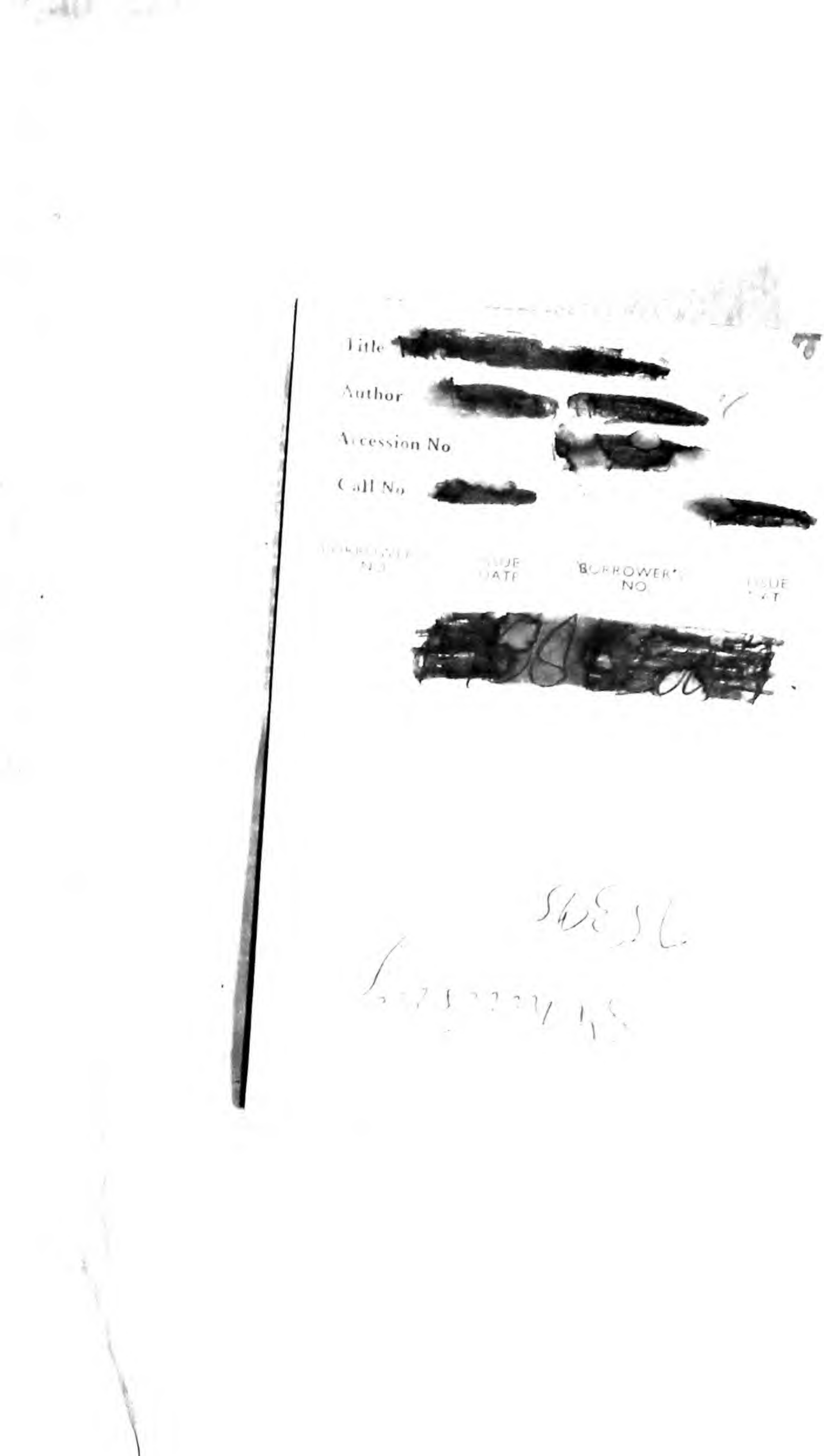
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CITATION : A. I. R. 1935 CALCUTTA

Printed by D. G. Ranade at the All India Reporter Press, Nagpur

And published by

V. V. CHITALEY, B. A., LL. B.,

AT THE ALL INDIA REPORTER OFFICE

NAGPUR, C. P.

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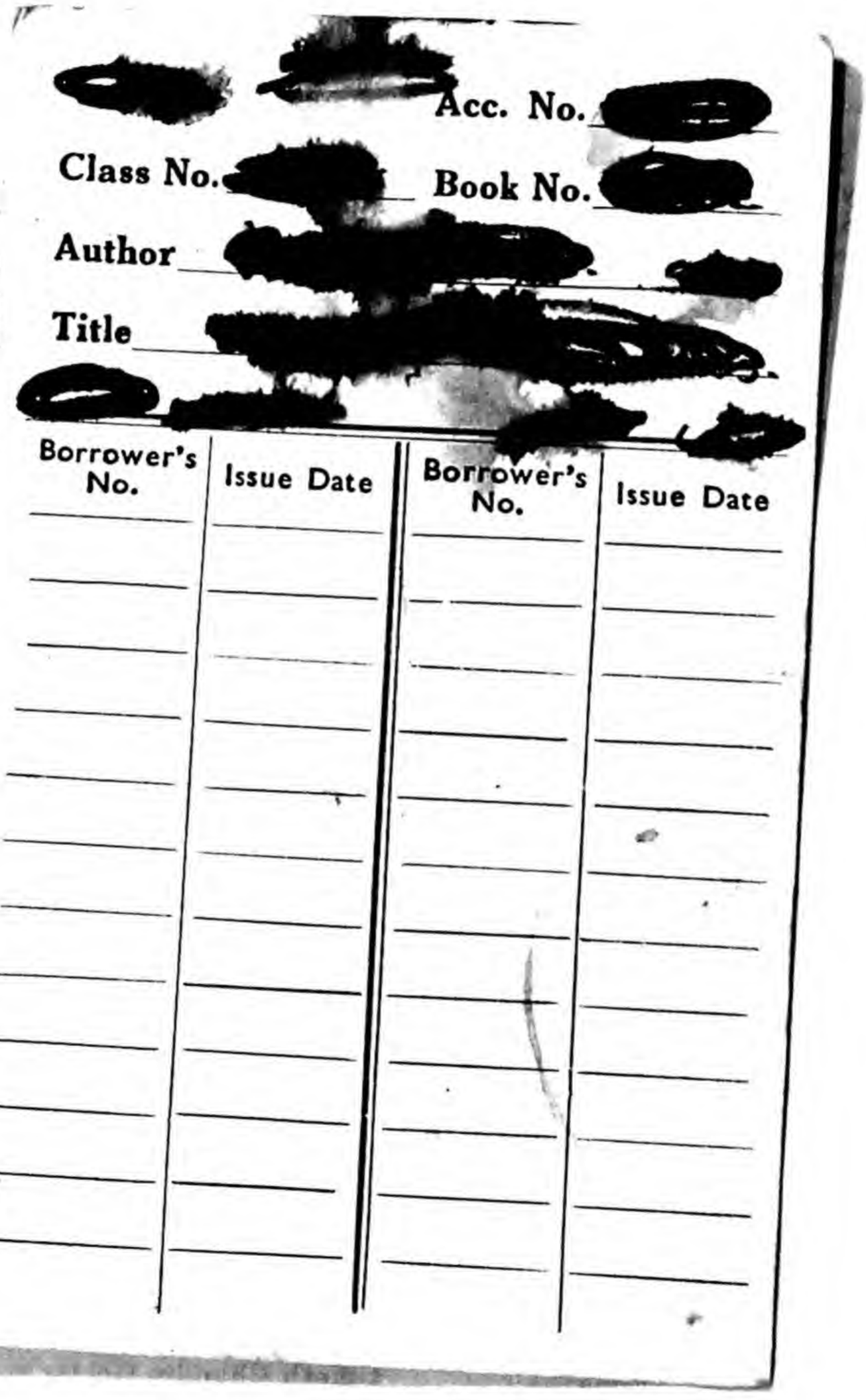
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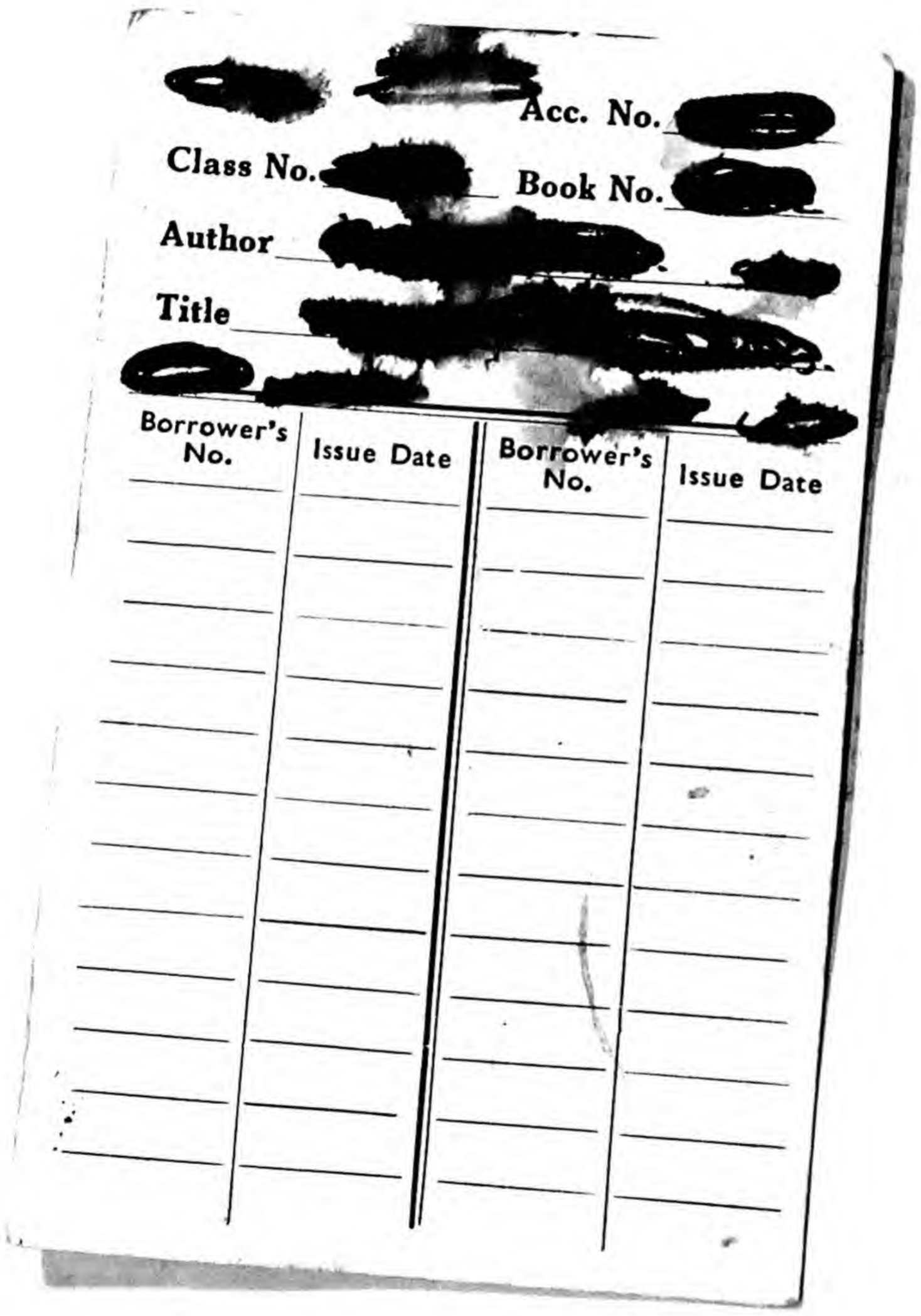
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*——*S.* 10—Claim by dependants of deceased Railway employee —No claim against Company but against contractor —Notice by Commissioner to Company —Notice held ought to have been given to contractor, not to Company 683*b*
*——*S.* 12—Labourer in Railway Company dying of accident —Dependants claiming compensation from contractor employing deceased—Company held directly liable to dependants as if employer 683*a*
**——*S.* 12 (2)—Claim for compensation —S. 12 (2) making contractor liable to indemnify Railway Company, principal— Contractor is entitled to notice—Hence can dispute claim 683*c*

Wrongful confinement
——Peon arresting under valid warrant in discharge of duty—Objection by such person that he is exempt under S. 135 (2), Criminal P. C. —Peon taking him to Court and release of person—Peon held not guilty under S. 342, I. P. C. 551


Acc. No.
Class No.
Book No.
Author
Title
Borrower's No.
Issue Date
Borrower's No.
Issue Date

COMPARATIVE TABLES

TABLE No. I

Showing seriatim the pages of OTHER REPORTS, JOURNALS AND PERIODICALS for the year 1935, with corresponding references of the ALL INDIA REPORTER.

N. B.—Column No. 1 denotes pages of OTHER JOURNALS.

Column No. 2 denotes corresponding references of the ALL INDIA REPORTER.

I. L. R. 62 Calcutta=All India Reporter

ILR	AIR			ILR	AIR			ILR	AIR			ILR	AIR			ILR	AIR		
1	1935	*C*	218	169	1935	*C*	242	305	1935	*C*	195	457	1935	*C*	503	749	1935	*C*	316
15	"	"	212	175	"	"	347	312	1934	"	853	469	"	"	731	800	1936	"	165
28	"	"	596	190	1936	"	44	324	1936	"	193	475	"	"	605	804	1935	"	344
52	1934	"	751	201	1934	"	815	331	1935	"	243	483	"	"	460	808	"	"	312
57	1935	"	508	204	1935	"	20	337	1934	"	847	488	"	"	459	861	1936	"	185
61	"	"	336	213	1934	"	754	346	1935	"	368	492	"	"	541	865	"	"	184
66	"	"	333	217	1935	"	206	374	1934	"	858	499	"	*PC*	49	886	1935	"	298
73	1934	"	739	223	"	"	231	384	1935	"	101	527	1934	*C*	7	900	"	"	407
75	1935	"	139	229	"	"	239	389	"	"	477	534	1933	"	833	911	"	"	534
82	"	"	456	238	"	"	513	399	"	"	122	572	1935	"	184	918	"	"	311
114	"	"	509	257	"	"	146	404	"	"	578	586	"	"	537	969	"	"	801
120	"	"	511	266	"	"	287	409	"	"	399	639	"	"	488	979	1936	"	17
125	1934	"	741	272	"	"	271	417	"	"	279	666	"	"	304	983	1935	*PC*	89
145	1935	"	402	275	1934	"	838	421	"	"	177	677	1936	"	42	1057	"	*C*	506
149	"	"	91	286	1935	"	502	427	1936	"	169	711	"	"	28	1093	"	"	466
154	"	"	29	289	1936	"	47	430	1935	"	545	715	1935	"	290	1119	"	"	491
158	"	"	484	298	1935	"	225	433	"	"	561	733	1936	"	116	1127	"	"	489

61 Calcutta Law Journal=All India Reporter

CLJ	AIR			CLJ	AIR			CLJ	AIR			CLJ	AIR			CLJ	AIR		
1	1935	*C*	800	91	1935	*C*	544	205	1935	*C*	736	310	1936	*C*	167	503	1936	*C*	37
5	"	"	500	93	"	"	559	209	"	"	739	319	1935	"	506	519	1935	"	801
9	"	"	706	96	"	*PC*	36	212	"	*PC*	14	322	*Too old*			526	1936	"	24
12	1936	"	169	102	"	"	53	216	"	"	47	328	1935	*C*	393	530	"	"	189
15	1935	"	709	111	"	*C*	298	221	"	"	62	336	"	*PC*	95	537	"	"	34
18	"	"	710	122	"	*PC*	44	230	"	"	67	351	1936	*C*	29	545	"	"	168
20	"	"	498	127	1936	*C*	173	239	"	"	79	360	"	"	17	548	"	"	30
24	"	"	418	134	1935	"	554	251	"	"	57	366	1935	"	607	560	1935	"	666
27	*Too old*			137	"	"	556	257	"	"	92	369	1936	"	22	570	1936	"	100
42	1935	*PC*	21	141	"	"	488	259	"	"	89	373	"	"	31	577	1935	"	611
53	"	"	8	143	1936	"	49	267	"	"	85	376	1935	"	419	586	1936	"	124
55	1934	"	81	147	1935	*PC*	59	274	"	"	104	473	1936	"	125	588	"	"	164
59	1935	"	16	154	"	"	73	285	"	"	97	477	1935	*PC*	108	590	"	"	130
75	1936	*C*	181	165	"	*C*	290	304	1936	*C*	15	491	"	"	125	593	"	"	116
				189	1936	"	176	307	1935	"	454								

62 Calcutta Law Journal=All India Reporter

CLJ	AIR			CLJ	AIR			CLJ	AIR			CLJ	AIR			CLJ	AIR		
1	1935	*PC*	122	210	1935	*C*	813	326	1932	*PC*	13	409	1936	*PC*	5	479	1935	*C*	726
28	"	*C*	659	240	"	"	491	359	1935	*C*	756	419	"	"	49	483	1936	"	178
43	1936	"	186	260	"	"	489	367	"	"	634	428	1935	*C*	572	490	1935	"	689
49	1935	"	702	273	"	"	729	372	1936	"	171	436	1936	*PC*	24	521	1936	*PC*	46
79	"	"	619	289	1936	"	170	383	1935	"	751	442	"	*C*	57	528	"	"	18
99	"	"	671	292	*Too old*			386	"	"	344	453	"	*PC*	20	538	"	*C*	64
111	"	"	783	298	1935	*C*	707	394	"	"	769	464	1935	*C*	817	541	"	"	70
116	"	"	636	303	"	"	732	397	1936	*PC*	1	477	"	"	770	545	"	"	127
136	1936	"	180	310	"	"	777												

39 Calcutta Weekly Notes=All India Reporter

CWN	AIR			CWN	AIR			CWN	AIR			CWN	AIR			CWN	AIR		
1	1934	*PC*	213	46	1935	*C*	284	67	1934	*C*	754	106	1935	*C*	225	129	1935	*C*	99
9	"	"	205	52	"	"	250	89	"	*PC*	217	110	"	"	243	131	"	"	338
15	"	"	227	54	1934	"	815	95	1935	*C*	456	114	"	"	271	139	"	"	255
20	"	*C*	838	56	1935	"	242	98	"	"	261	117	"	"	271	141	"	"	251
27	"	"	853	57	"	"	287	101	"	"	296	120	"	"	203	143	"	"	252
34	"	*PC*	235	61	"	"	231	104	"	"	174	123	"	"	263	145	1934	*PC*	238
41	"	"	182	64	"	"	258												

39 Calcutta Weekly Notes=All India Reporter—(*Concld.*)

CWN	AIR			CWN	AIR			CWN	AIR			CWN	AIR			CWN	AIR		
155	1935	*C*	35	289	1935	*C*	605	433	1935	*PC*	44	698	1935	*C*	281	1124	1935	*PC*	139
159	"	"	195	293	"	"	160	440	"	"	21	703	"	"	312	1130	"	"	146
164	"	"	267	303	"	"	413	451	"	*C*	498	709	"	*PC*	62	1146	"	*C*	573
165	"	"	268	317	"	"	550	454	"	"	462	739	"	*C*	344	1165	"	"	611
169	"	"	248	318	"	"	551	457	"	"	500	744	"	"	513	1167	"	"	558
186	"	"	502	334	"	"	561	474	"	"	495	770	"	"	419	1169	"	"	813
188	"	"	580	350	"	*PC*	35	480	"	"	239	834	"	*PC*	108	1185	"	*PC*	119
199	"	"	526	352	"	"	36	485	"	"	478	863	"	*C*	506	1191	"	"	165
209	1934	*PC*	246	357	"	*C*	537	488	"	"	311	865	"	*PC*	97	1199	"	*C*	777
224	1935	*C*	508	363	"	"	418	490	"	"	290	882	"	*C*	393	1206	"	"	664
226	"	"	20	366	"	"	391	510	"	"	356	919	"	"	491	1210	"	"	180
232	"	"	389	368	"	"	184	512	"	"	177	924	"	"	534	1217	"	*PC*	182
233	"	"	545	377	"	*PC*	12	518	1934	*PC*	230	929	"	*PC*	122	1223	"	"	180
235	"	"	477	380	"	*C*	399	526	1935	*C*	298	934	*Too old*			1241	"	*C*	658
237	"	"	788	384	"	"	460	547	"	*PC*	47	954	1935	*C*	407	1245	"	"	636
246	"	"	577	387	"	"	357	552	"	"	59	986	"	"	308	1249	"	*PC*	185
248	"	"	279	390	"	"	154	581	1936	*C*	49	990	"	"	489	1255	"	"	172
251	"	"	119	394	"	"	454	583	1935	"	306	994	"	*PC*	125	1270	1936	*C*	22
259	"	"	101	402	"	"	403	598	"	*PC*	73	1014	"	*C*	481				
262	"	"	591	405	"	*PC*	49	626	"	"	89	1046	"	"	610	1280	1935	"	677
265	"	*PC*	9	412	"	"	14	632	"	"	67	1057	"	*PC*	132	1281	"	*PC*	168
270	"	"	1	416	"	*C*	541	640	"	"	85	1082	"	*C*	473	1289	"	*C*	612
281	"	*C*	578	420	"	"	458	646	"	"	57	1089	"	*PC*	117	1292	"	"	644
283	"	"	547	422	"	"	459	651	*Too old*			1093	"	"	143	1295	"	"	619
285	"	"	122	424	"	"	503	657	1935	*PC*	79	1103	"	*C*	805	1303	"	"	678
288	"	"	176	432	"	"	488	682	"	"	95	1114	"	"	466	1309	"	"	687

TABLE No. II.

Showing seriatim the pages of the ALL INDIA REPORTER 1935 CALCUTTA, with corresponding references of the OTHER REPORTS, JOURNALS AND PERIODICALS.

N. B.—Column No. 1 denotes pages of the ALL INDIA REPORTER 1935 CALCUTTA.
Column No. 2 denotes corresponding references of OTHER JOURNALS.

A. I. R. 1935 Calcutta=Other Journals

A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals		
1	61	*Cal*	670	31	154	*I C*	110	93	60	*C L J*	34	116 (1)	36	*Cr L J*	495
	38	*C W N*	818		36	*Cr L J*	480		154	*I C*	712	116 (2)	38	*C W N*	1099
	154	*I C*	645	33	61	*Cal*	986	94	60	*C L J*	40		1935	*Cr C*	154
10	61	*Cal*	980		38	*C W N*	1054		154	*I C*	408		154	*I C*	417
	38	*C W N*	838		60	*C L J*	14	95	60	*C L J*	120		36	*Cr L J*	512
	59	*C L J*	523		154	*I C*	108		154	*I C*	414	117	38	*C W N*	1171
	154	*I C*	82	35	39	*C W N*	155	97	60	*C L J*	116		155	*I C*	811
13	59	*C L J*	452		154	*I C*	1056		154	*I C*	466	118	38	*C W N*	1053
	154	*I C*	98	38	60	*C L J*	19	99	39	*C W N*	129		154	*I C*	654
14	60	*C L J*	251		154	*I C*	105		60	*C L J*	461	119	39	*C W N*	251
	154	*I C*	90	39	61	*Cal*	711		154	*I C*	731	120	38	*C W N*	1128
15	38	*C W N*	996		154	*I C*	479	101	39	*C W N*	259		1935	*Cr C*	155
	155	*I C*	848	74	38	*C W N*	674		1935	*Cr C*	95		154	*I C*	609
17	61	*Cal*	694	SB	61	*Cal*	827		154	*I C*	1006		36	*Cr L J*	553
	156	*I C*	512		1935	*Cr C*	62		62	*Cal*	384	121	38	*C W N*	1061
20	60	*C L J*	404		153	*I C*	872		36	*Cr L J*	615		154	*I C*	452
	39	*C W N*	226		36	*Cr L J*	432	102	60	*C L J*	91	122	1935	*Cr C*	156
	62	*Cal*	204	80	61	*Cal*	937		38	*C W N*	1146		39	*C W N*	285
	156	*I C*	209		155	*I C*	321		155	*I C*	1109		155	*I C*	537
24	61	*Cal*	919	84	61	*Cal*	924	108 (1)	38	*C W N*	1065		62	*Cal*	399
	154	*I C*	101		154	*I C*	524		30	*C L J*	104		36	*Cr L J*	794
26	38	*C W N*	1015	89	60	*C L J*	36		154	*I C*	666	125	38	*C W N*	1118
	1935	*Cr C*	40		154	*I C*	347	108 (2)	38	*C W N*	1070		154	*I C*	458
	155	*I C*	261	90	60	*C L J*	44		1935	*Cr C*	102	127	38	*C W N*	1085
	36	*Cr L J*	678		154	*I C*	411		154	*I C*	668		154	*I C*	606
28	61	*Cal*	886	91	60	*C L J*	112		36	*Cr L J*	591	130	38	*C W N*	1124
	154	*I C*	71		62	*Cal*	149	109	61	*Cal*	571		60	*C L J*	102
29	60	*C L J*	88		154	*I C*	420		154	*I C*	829		154	*I C*	451
	62	*Cal*	154	92	38	*C W N*	1183	116 (1)	38	*C W N*	1072	131	38	*C W N*	1045
	154	*I C*	772		60	*C L J*	126		1935	*Cr C*	143		61	*Cal*	1056
31	60	*C L J*	45		154	*I C*	448		154	*I C*	197		154	*I C*	655
	1935	*Cr C*	196												

A. I. R. 1935 Calcutta=Other Journals—(*Contd.*)

A.I.R.	Other Journals		
134	38	*C W N*	1202
	155	*I C*	506
139	38	*C W N*	1178
	62	*Cal*	75
	154	*I C*	868
142	60	*C L J*	42
	154	*I C*	476
143	60	*C L J*	123
	154	*I C*	555
144	38	*C W N*	1095
	154	*I C*	760
146	38	*C W N*	1174
	154	*I C*	1072
	62	*Cal*	257
149	38	*C W N*	1093
	60	*C L J*	110
	154	*I C*	761
150	38	*C W N*	1122
	155	*I C*	77
151	38	*C W N*	1126
	154	*I C*	714
153 (1)		...	
153 (2)	38	*C W N*	1098
	154	*I C*	823
154	39	*C W N*	390
	156	*I C*	241
157 (1)	38	*C W N*	1063
	60	*C L J*	197
	154	*I C*	820
157 (2)	156	*I C*	386
158	61	*Cal*	1081
	155	*I C*	64
160	61	*Cal*	1023
	39	*C W N*	293
	155	*I C*	882
168	38	*C W N*	1031
	61	*Cal*	1005
	154	*I C*	781
174	60	*C L J*	248
	39	*C W N*	104
	154	*I C*	775
176	39	*C W N*	288
	159	*I C*	421
	37	*Cr L J*	103
177	39	*C W N*	512
	62	*Cal*	421
	156	*I C*	445
179	60	*C L J*	18
	38	*C W N*	1209
	155	*I C*	720
180	60	*C L J*	238
	155	*I C*	201
	39	*C W N*	1210
182	1935	*Cr C*	240
	159	*I C*	964
184	39	*C W N*	368
FB	1935	*Cr C*	241
	155	*I C*	687
	62	*Cal*	572
	36	*Cr L J*	808
190	60	*C L J*	253
193	60	*C L J*	220
195	60	*C L J*	232
	39	*C W N*	159
	62	*Cal*	305
	155	*I C*	987
198	61	*Cal*	1075
	155	*I C*	1017
201	60	*C L J*	213
	155	*I C*	75
202	60	*C L J*	225
202	155	*I C*	733
203	60	*C L J*	243
	39	*C W N*	120
	155	*I C*	926
206	38	*C W N*	1197
	62	*Cal*	217
	156	*I C*	489
209	60	*C L J*	295
	155	*I C*	72
210	60	*C L J*	288
	155	*I C*	154
212	62	*Cal*	15
	60	*C L J*	158
	38	*C W N*	1132
	155	*I C*	158
218	38	*C W N*	1190
	62	*Cal*	1
	155	*I C*	193
223	38	*C W N*	1083
	155	*I C*	65
224	38	*C W N*	1081
	155	*I C*	696
225	60	*C L J*	281
	39	*C W N*	106
	62	*Cal*	298
	155	*I C*	991
228	60	*C L J*	391
230	38	*C W N*	1144
	155	*I C*	723
231	60	*C L J*	179
	39	*C W N*	61
	62	*Cal*	223
	155	*I C*	297
	36	*Cr L J*	698
234	60	*C L J*	25
	155	*I C*	1027
239	60	*C L J*	173
	39	*C W N*	480
	62	*Cal*	229
	155	*I C*	915
242	62	*Cal*	169
	39	*C W N*	56
	1935	*Cr C*	305
	155	*I C*	710
	36	*Cr L J*	842
243	60	*C L J*	216
	39	*C W N*	110
	62	*Cal*	331
	155	*I C*	817
245	60	*C L J*	286
	155	*I C*	725
246	1935	*Cr C*	319
	159	*I C*	385
	37	*Cr L J*	77
248	60	*C L J*	227
	39	*C W N*	169
	155	*I C*	999
250	39	*C W N*	52
	155	*I C*	727
251	39	*C W N*	141
	60	*C L J*	474
	1935	*Cr C*	333
	155	*I C*	416
	36	*Cr L J*	736
252	39	*C W N*	143
	60	*C L J*	472
	1935	*Cr C*	334
	155	*I C*	444
	36	*Cr L J*	740
253	60	*C L J*	321
253	155	*I C*	719
255	39	*C W N*	139
	60	*C L J*	396
	155	*I C*	721
256	60	*C L J*	324
258	60	*C L J*	399
	39	*C W N*	64
261	60	*C L J*	384
	39	*C W N*	98
263	60	*C L J*	415
	39	*C W N*	123
267	39	*C W N*	164
	155	*I C*	702
268	39	*C W N*	165
	156	*I C*	522
271 (1)	39	*C W N*	117
	62	*Cal*	272
	155	*I C*	749
271 (2)	60	*C L J*	590
	39	*C W N*	114
	155	*I C*	1052
273	60	*C L J*	377
	155	*I C*	815
275	60	*C L J*	464
	155	*I C*	842
278	60	*C L J*	458
	155	*I C*	812
279	60	*C L J*	469
	39	*C W N*	248
	62	*Cal*	417
	156	*I C*	431
281	1935	*Cr C*	391
	39	*C W N*	698
	156	*I C*	238
	36	*Cr L J*	884
282	60	*C L J*	412
	155	*I C*	833
284	39	*C W N*	46
	155	*I C*	1071
287	39	*C W N*	57
	1935	*Cr C*	392
	62	*Cal*	266
	155	*I C*	1003
	36	*Cr L J*	857
290	39	*C W N*	490
FB	61	*C L J*	165
	155	*I C*	480
	62	*Cal*	715
296	39	*C W N*	101
	155	*I C*	1055
298	61	*C L J*	111
	39	*C W N*	526
	156	*I C*	727
	62	*Cal*	886
304	1935	*Cr C*	491
	62	*Cal*	666
306	39	*C W N*	583
	156	*I C*	604
308	1935	*Cr C*	459
	156	*I C*	396
	39	*C W N*	986
	36	*Cr L J*	921
311	39	*C W N*	488
	1935	*Cr C*	462
	62	*Cal*	918
	158	*I C*	843
	36	*Cr L J*	1470
312	1935	*Cr C*	463
	39	*C W N*	703
	156	*I C*	192
312	62	*Cal*	808
316	1935	*Cr C*	467
	156	*I C*	678
	36	*Cr L J*	982
	62	*Cal*	749
333	62	*Cal*	66
	158	*I C*	191
336 (1)	1935	*Cr C*	417
	155	*I C*	1120
	36	*Cr L J*	888
336 (2)	62	*Cal*	61
	156	*I C*	126
338	60	*C L J*	201
	39	*C W N*	131
	157	*I C*	356
344	39	*C W N*	739
	156	*I C*	394
	62	*Cal*	804
	62	*C L J*	386
345	1935	*Cr C*	484
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	39	*C W N*	510
	159	*I C*	299
357	60	*C L J*	566
	39	*C W N*	387
	159	*I C*	383
359	38	*C W N*	784
	156	*I C*	165
367	60	*C L J*	569
368	60	*C L J*	477
	62	*Cal*	346
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390	60	*C L J*	587
	156	*I C*	959
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396	60	*C L J*	572
	156	*I C*	405
398	156	*I C*	590
399	62	*Cal*	409
	39	*C W N*	380
	156	*I C*	515
402	62	*Cal*	145
	156	*I C*	417
403	39	*C W N*	403
	1935	*Cr C*	628
	156	*I C*	400
	36	*Cr L J*	919
405	156	*I C*	390
407	1935	*Cr C*	630
SB	156	*I C*	481
	39	*C W N*	954
	36	*Cr L J*	944
	62	*Cal*	900
413	60	*C L J*	556
	39	*C W N*	303

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418	39 *C W N*	363
	61 *C L J*	24
	156 *I C*	919
419	39 *C W N*	770
FB	1935*Cr C*	795
	61 *C L J*	376
	156 *I C*	1055
	36 *Cr L J*	1053
454	39 *C W N*	394
	61 *C L J*	307
	1935*Cr C*	789
	156 *I C*	924
456	39 *C W N*	95
	62 *Cal*	82
	156 *I C*	928
458	39 *C W N*	420
459	39 *C W N*	422
	62 *Cal*	488
	156 *I C*	963
460	39 *C W N*	384
	62 *Cal*	483
	157 *I C*	140
462	39 *C W N*	454
464	157 *I C*	353
466	1935*Cr C*	858
	39 *C W N*	1114
	158 *I C*	1095
	62 *Cal*	1093
	36 *Cr L J*	1513
473	1935*Cr C*	865
	39 *C W N*	1082
	157 *I C*	840
	36 *Cr L J*	1248
477	39 *C W N*	235
	62 *Cal*	389
	1935*Cr C*	869
	157 *I C*	653
	36 *Cr L J*	1211
478	39 *C W N*	485
	157 *I C*	971
481	39 *C W N*	1014
484	62 *Cal*	158
SB	1935*Cr C*	876
	157 *I C*	374
	36 *Cr L J*	1130
488	39 *C W N*	432
	61 *C L J*	141
	1935*Cr C*	880
	62 *Cal*	639
	157 *I C*	365
	36 *Cr L J*	1114
489	39 *C W N*	990
	1935*Cr C*	881
	36 *Cr L J*	1460
	158 *I C*	761
	62 *Cal*	1127
	62 *C L J*	260
491	39 *C W N*	919
	1935*Cr C*	883
	157 *I C*	670
	36 *Cr L J*	1238
	62 *Cal*	1119
	62 *C L J*	240
494	1935*Cr C*	886
	157 *I C*	674
495	39 *C W N*	474
	157 *I C*	846
498	39 *C W N*	451
	61 *C L J*	20
	157 *I C*	601
500	39 *C W N*	457
	61 *C L J*	5
	157 *I C*	688
502	39 *C W N*	186
	62 *Cal*	286
	157 *I C*	637
503	39 *C W N*	424
	62 *Cal*	457
	157 *I C*	862
506	61 *C L J*	319
	39 *C W N*	863
	157 *I C*	876
	62 *Cal*	1057
508	39 *C W N*	224
	62 *Cal*	1057
	157 *I C*	790
509	62 *Cal*	114
	157 *I C*	975
511	62 *Cal*	120
	157 *I C*	936
513	62 *Cal*	238
SB	39 *C W N*	744
	1935*Cr C*	889
	157 *I C*	387
	36 *Cr L J*	1115
526	39 *C W N*	199
	1935*Cr C*	902
	157 *I C*	829
	36 *Cr L J*	1220
534	39 *C W N*	924
	1935*Cr C*	910
	157 *I C*	837
	62 *Cal*	911
	36 *Cr L J*	1246
537	39 *C W N*	357
	62 *Cal*	586
	157 *I C*	937
541	39 *C W N*	416
	62 *Cal*	492
	159 *I C*	20
544	61 *C L J*	91
	157 *I C*	676
545	39 *C W N*	233
	62 *Cal*	430
	1935*Cr C*	937
	157 *I C*	1059
	36 *Cr L J*	1308
546	1935*Cr C*	938
	157 *I C*	1031
	36 *Cr L J*	1267
547	39 *C W N*	283
	1935*Cr C*	939
	157 *I C*	998
	36 *Cr L J*	1271
548	1935*Cr C*	940
	157 *I C*	1042
	36 *Cr L J*	1339
550	39 *C W N*	317
	1935*Cr C*	942
	157 *I C*	1030
551	39 *C W N*	318
	1935*Cr C*	943
	157 *I C*	1004
	36 *Cr L J*	1252
552	157 *I C*	1116
554	61 *C L J*	134
556	61 *C L J*	137
	157 *I C*	1026
558	39 *C W N*	1167
	158 *I C*	704
559	61 *C L J*	93
	157 *I C*	1038
561	39 *C W N*	334
SB	62 *Cal*	433
	1935*Cr C*	969
	157 *I C*	1070
	36 *Cr L J*	1275
571	1935*Cr C*	979
	158 *I C*	384
	36 *Cr L J*	1364
572	157 *I C*	1091
	62 *C L J*	428
573	39 *C W N*	1146
	158 *I C*	780
577	39 *C W N*	246
	157 *I C*	1115
578	62 *Cal*	404
	39 *C W N*	281
	1935*Cr C*	1002
	157 *I C*	1089
580	39 *C W N*	188
SB	1935*Cr C*	1004
	36 *Cr L J*	1322
	158 *I C*	176
591	39 *C W N*	262
	1935*Cr C*	1015
	158 *I C*	67
	36 *Cr L J*	1254
596	62 *Cal*	28
	158 *I C*	1074
605	62 *Cal*	475
	39 *C W N*	289
	1935*Cr C*	1022
	157 *I C*	1103
	36 *Cr L J*	1340
607	61 *C L J*	366
	159 *I C*	515
609	158 *I C*	380
610	39 *C W N*	1046
	157 *I C*	406
611	39 *C W N*	1165
	61 *C L J*	577
	158 *I C*	433
612	39 *C W N*	1289
	62 *C L J*	79
	158 *I C*	574
614	158 *I C*	556
619	39 *C W N*	1295
	62 *C L J*	79
	158 *I C*	436
621	1935*Cr C*	1044
	158 *I C*	385
	40 *C W N*	29
	36 *Cr L J*	1366
623	158 *I C*	544
625	159 *I C*	767
631	158 *I C*	567
634	158 *I C*	594
	40 *C W N*	14
	62 *C L J*	367
636	1935*Cr C*	1043
	39 *C W N*	1245
	158 *I C*	204
	62 *C L J*	116
	36 *Cr L J*	1370
638	159 *I C*	235
	40 *C W N*	156
640	158 *I C*	590
641	158 *I C*	656
644	39 *C W N*	1292
644	158 *I C*	398
645	158 *I C*	585
646	158 *I C*	445
	40 *C W N*	81
648	158 *I C*	512
650	158 *I C*	1017
658	39 *C W N*	1241
	159 *I C*	511
659	62 *C L J*	28
	159 *I C*	1001
664	39 *C W N*	1206
	159 *I C*	637
666	61 *C L J*	560
	159 *I C*	159
671	62 *C L J*	99
	40 *C W N*	45
	159 *I C*	133
675	1935*Cr C*	1117
	159 *I C*	36
	37 *Cr L J*	1
677	39 *C W N*	1280
	1935*Cr C*	1069
	159 *I C*	140
	37 *Cr L J*	28
678	1935*Cr C*	1070
	39 *C W N*	1303
	36 *Cr L J*	1462
	158 *I C*	791
680	1935*Cr C*	1072
	158 *I C*	840
	36 *Cr L J*	1466
681	1935*Cr C*	1073
	40 *C W N*	64
	159 *I C*	31
	37 *Cr L J*	69
683	1935*Cr C*	1075
	159 *I C*	423
	40 *C W N*	254
684	1935*Cr C*	1076
	159 *I C*	180
	37 *Cr L J*	65
687	1935*Cr C*	1079
	39 *C W N*	1309
	159 *I C*	149
	37 *Cr L J*	30
689	158 *I C*	925
	40 *C W N*	208
	62 *C L J*	490
702	62 *C L J*	49
	40 *C W N*	115
	159 *I C*	1101
706	61 *C L J*	9
	159 *I C*	611
707	159 *I C*	443
	62 *C L J*	298
	40 *C W N*	309
709	61 *C L J*	15
	158 *I C*	702
710	61 *C L J*	18
711	159 *I C*	756
	40 *C W N*	345
713	159 *I C*	370
716	159 *I C*	437
721	159 *I C*	618
	40 *C W N*	132
723	159 *I C*	376
725	159 *I C*	462
726	159 *I C*	542
	62 *C L J*	479
728	159 *I C*	420

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	62 *C L J*	273		159 *I C*	523	766	160 *I C*	199	800	61 *C L J*	1
	40 *C W N*	112		37 *Cr L J*	115	769	159 *I C*	662		159 *I C*	957
731	62 *Cal*	469	742	1935 *Cr C*	1143		62 *C L J*	394	801	61 *C L J*	519
	1935 *Cr C*	1144		159 *I C*	664		40 *C W N*	307		62 *Cal*	969
	159 *I C*	660		37 *Cr L J*	153	770	160 *I C*	84		40 *C W N*	22
	37 *Cr L J*	139	743	159 *I C*	1074		62 *C L J*	477		160 *I C*	96
732	40 *C W N*	153	744	160 *I C*	121	771	40 *C W N*	121	805	39 *C W N*	1103
	62 *C L J*	303	746	159 *I C*	1078		159 *I C*	685		159 *I C*	893
	159 *I C*	1070	748	160 *I C*	212	773	40 *C W N*	124	809	159 *I C*	886
733	159 *I C*	1116	751	40 *C W N*	145	777	39 *C W N*	1199	811	159 *I C*	907
736	61 *C L J*	205		159 *I C*	696		62 *C L J*	310	813	39 *C W N*	1169
	1935 *Cr C*	1188		62 *C L J*	383	779	160 *I C*	250		62 *C L J*	210
	159 *I C*	527	752	159 *I C*	8	783	62 *C L J*	111		159 *I C*	1017
	37 *Cr L J*	133	756	40 *C W N*	102		159 *I C*	613			
738	40 *C W N*	26		160 *I C*	219	786	159 *I C*	1089	816	160 *I C*	86
	159 *I C*	575		62 *C L J*	359	788	39 *C W N*	237	817	40 *C W N*	245
739	61 *C L J*	209	760	159 *I C*	752		160 *I C*	124		160 *I C*	388
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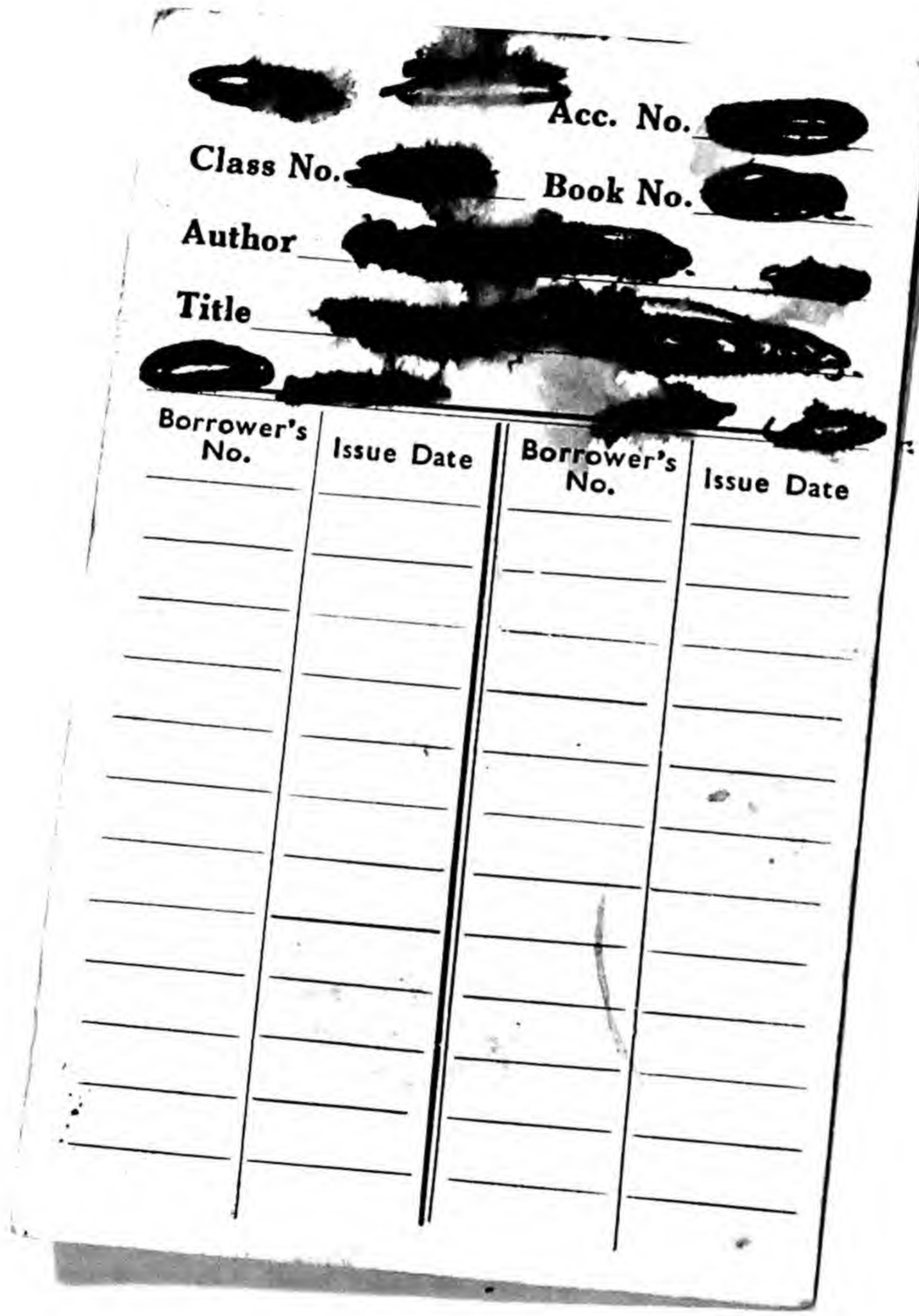
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THE
ALL INDIA REPORTER
1935
CALCUTTA HIGH COURT

A. I. R. 1935 Calcutta 1

COSTELLO AND PANCKRIDGE, JJ.

Durgaprasad—Defendant—Appellant.

v.

Kantichandra Mukerji—Plaintiff—Respondent.

Appeal Nos. 4 and 5 of 1934, Decided on 5th March 1934, from Original Suit No. 2151 of 1931.

(a) Civil P. C. (1908), S. 10—Application in subsequent suit for declaration that attachment made in previous suit is illegal and for injunction does not change identity of suits.

Where an application is filed in a subsequent suit for a declaration that an attachment made in a prior suit is illegal and for injunction to stay the suit, the asking for a declaration and for an injunction cannot be said to be claiming reliefs of such a character as to spoil what would otherwise be the identity of the two suits: 1917 *Cal* 248 and 1923 *Cal* 716, *Dist.* [P 6 C 2]

(b) Civil P. C. (1908), S. 10—If first and second suits are parallel, second should be stopped—Test to see whether two suits are parallel stated.

If it is satisfactorily demonstrated that the second suit is 'parallel' to the first suit, then the best course for every body concerned would be to put a stay upon or to arrest altogether the second suit at the earliest possible moment. In endeavouring to arrive at a correct decision, as to whether a subsequent suit is 'parallel' to a previous suit, one must have regard to the position of affairs at the time when each of the suits was, respectively, instituted and further to what would be the position of affairs when both the suits have been tried and finally determined. The real criterion to apply is this: Supposing the first suit was determined; would the positition then be that when the second suit was instituted the matters raised in the second suit were res judicata by reason of the decision of the prior suit? [P 7 C 2; P 8 C 1]

(c) Civil P. C. (1908), S. 10—Order refusing stay is judgment and is appealable.

An order refusing to stay a suit to which the provisions of S. 10 apply, is a judgment within Cl. 15, Letters Patent, and is appealable: 1933 *Bom* 85, *Rel on.* [P 9 C 1]

(d) Civil P. C. (1908), S. 10—Court has power to stay suit at any stage.

In a proper case the Court has power to stay a suit, generally, at any stage at which it seems expedient to do so. [P 10 C 1]

P. R. Das and *H. C. Majumdar*—for Appellant.

S. R. Das—for Respondent.

Costello, J.—These two appeals arise out of a judgment delivered by Buckland, J., on 19th December 1933. As a result of that judgment, two orders were made. The suit in which these orders were made was Suit No. 2151 of 1933, and it was a suit brought by Kantichandra Mukerji, the Official Receiver, as the receiver appointed in Suit No. 1395 of 1933. The defendants were six persons, namely, Durgaprasad, Gangadhar and Satnarayan—all three residing at Kucha Chelan at Delhi, and described as traders and landholders, and Satnarayan Dalmia, Deokinandan Dalmia and Sedmull Dalmia—all residing at and carrying on business at No. 133, Cotton Street, in Calcutta and they were described as landholders.

In order to appreciate how this suit came into existence, it is necessary to say something about the relationship of these six persons and the history of the litigation which had taken place between them. The first three defendants carried on business, in Delhi, as a firm, described as Parasram Harnandroy, and the other three defendants carried on business in Calcutta, as a firm under the name and style of Hargobindroy Mathuradas and all these six persons carried on business in partnership, under the name and style of Harnandroy Badridas. In

the month of March 1933, a suit was instituted, in the Court of the Subordinate Judge of Delhi, being Suit No. 52 of 1933, in which the plaintiff was Durgaprasad and that suit was for dissolution of the partnership carried on in the name of Harnandroy Badridas. As a counterblast to that, a suit was instituted in this Court, being Suit No. 747 of 1933, on 4th April 1933, by the partners of the Calcutta firm, who have been described in the proceedings as the Dalmias. This suit was brought by Satnarayan—one of the Dalmias against the partners in the Calcutta firm and by the partners in the Delhi firm for dissolution of the larger partnership. We are not really concerned with those two suits, because in June 1933, there was a compromise arrived at, whereby that litigation was terminated. Both the suits were compromised by an agreement, made on 1st June 1933, and there was some subsequent arrangement on 5th June 1933. The compromise was recorded in the Delhi suit, that is to say, in Suit No. 52 of 1933, and as a part of the settlement, the Calcutta suit was withdrawn. It is of some importance to see what were the terms of that compromise. So far as they are material they appear in sub-paragraphs of para. 4 of the petition, which was put forward before the Court at Delhi, upon which the compromise was recorded and sub-paras. (a) and (b) are in these terms :

(a) That R. B. L. Sedmull will produce all the account books, papers and records of the period of partnership for the purposes of said accounting which may afterwards be delivered to such person as may be directed to receive by Seth Satnarayan of the first party. His decision will be binding on all the parties,

and

(b) That accounts of the partnership shall be taken and R. B. L. Sedmull will render all the accounts, etc., etc.

Those two matters were consequential upon the main term of the compromise, which was that the partnership business hitherto carried on at No. 69, Cotton Street, under the management of the second party, should stand dissolved, as from 24th March 1933, and the parties agreed to divide the assets and the liabilities of the partnership on the terms set out in the same sub-paragraph. On 29th June 1933, another suit was started, in Calcutta, in which Satnarayan was the plaintiff and the defendants were Sedmull and Deokinandan. That suit was, in a sense, of a domestic character, because it was merely for dissolution of the partnership existing between those persons. The importance of it is that in that suit there was an application for the appointment of a receiver and an order was made, by consent, in which a receiver was appointed of the joint properties of the parties, and what those properties consisted of was set forth in the document called Sch. "B." It is argued before us, in this appeal, that those properties did not include the interest which these persons had in the larger firm which in the proceedings before Buckland, J., was described as firm C. On 11th September the Official Receiver, of this Court, was appointed receiver in that suit, and it is by reason of that fact that the present proceedings have arisen. Previously, on 14th July 1933, three attorneys of this Court had been appointed receivers and they purported to have taken possession of the properties of the partnership, including such interests as the partners had in the firm C. In that state of affairs, a suit was started in the Court of the Subordinate Judge at Delhi, which is Suit No. 72 of 1933. That suit was brought by Durgaprasad against the other five persons, who had been his partners in the larger firm, and the reliefs claimed by him were as follows :

(a) That it be declared that partnership between the plaintiff and defendants 4 and 5 with defendants 1 to 3 known as Harnandroy Badridas 69, Cotton Street, has been validly dissolved;

(b) It be declared that the parties are bound by the arrangement, dated 1st June 1933 and 5th June 1933 ;

(That arrangement, of course, was the compromise, to which I have already referred, by which the two suits, No. 52 of 1933, and No. 747 of 1933, were settled).

(c) That accounts of the partnership business, assets and profit be taken ;

(d) Receiver of the partnership affairs, business, assets and properties be appointed ;

(e) Such amounts, shares and properties securities, as may be found due to the plaintiff, defendants 4 and 5 be awarded to them against defendants 1 to 3 or such of them as may be found liable :

and then there was a general prayer for costs and for such further or other reliefs as the Court might think fit to award. That suit was instituted on 10th August 1933. It should be observed that it comes in between the date when the three attorneys were appointed receivers,

in what has been called the domestic suit—suit No. 1395 of 1933—and the date when the Official Receiver was appointed receiver in that suit. It is clear to my mind, that broadly speaking, in this new Delhi suit No. 72 of 1933, the plaintiff was seeking three things : (1) enforcement of the effect of the compromise, (2) dissolution of the larger partnership known as Harnandroy Badridas and (3) the taking of accounts which would necessarily be consequential upon the dissolution of the partnership; and, on the face of it one would have thought that as all the six partners were on the record in that suit and parties to the suit which was of a partnership character, the determination of that suit would once and for all settle the differences that obviously existed between these different groups of partners and possibly between them individually. But it so happened that the Subordinate Judge of Delhi made certain interim orders which however were only of the kind one would have expected to be made in a suit of that nature.

Following on the orders however there was some correspondence between the Subordinate Judge of Delhi and the Official Receiver of this Court. It is not necessary, I think, that I should refer to it in any great detail but, in effect, it was to give intimation that the Delhi Court had attached some of the properties, of the defendants in the Delhi suit, which were in the hands of the Official Receiver of this Court, in his capacity as receiver, appointed in suit No. 1395 of 1933. The first letter was dated 24th October 1933, and in reply to that the Official Receiver of this Court, on 3rd/4th November 1933, acknowledged receipt of a copy of the order of attachment before judgment, issued by the Additional Subordinate Judge of Delhi. The next event of any importance was that, on 3rd November 1933, the Delhi Court appointed a gentleman named Lala Hemchand as interim receiver in the Delhi suit—suit No. 72 of 1933, and Mr. Hemchand, having been appointed, proceeded to make a demand on the Official Receiver of this Court, requiring in effect, that all assets and the books of account, which were in the hands of the Official Receiver, should be made over to this interim receiver, who had been appointed in the Delhi suit. I have no doubt, that it would be right to say, that the communications from the Additional Subordinate Judge of Delhi to the Official Receiver of this Court were not couched in the most tactful language. It is perhaps not altogether surprising therefore that the Official Receiver seemed to consider that his dignity was affected, and that he was being interfered with, if not harassed, in his capacity as receiver in suit No. 1395 of 1933. According to the statement made by learned counsel before us, the Official Receiver took counsel's opinion and indeed, he says so in his own petition before this Court, and, as a result, he launched the suit out of which this matter arises, that is, as already mentioned, suit No. 2151 of 1933.

It is to be observed that the Official Receiver made himself plaintiff in that suit and all the members of the two smaller partnerships and of the larger partnership defendants in the suit. This suit was filed on 13th November 1933. On the same day, the Official Receiver had obtained leave, from this Court, to file that suit. It was, of course, necessary before filing the suit, in his capacity as receiver, that, he should get the leave of the Court, which had appointed him receiver. Further, on the same date—the 13th November—the Official Receiver, as plaintiff in the suit obtained an interim injunction, as the result of a petition, presented by him, for the purpose. In that petition, he asked for an injunction, against the first three defendants, and their servants and agents, restraining them from proceeding further with suit No. 72 of 1933, that is to say, the Delhi suit, or from enforcing the orders dated 3rd November 1933, in any manner whatsoever. The main order of 3rd November, was the one which I have already mentioned, namely the order appointing Lala Hemchand interim receiver in suit No. 72. The petition also prayed for the appointment of a receiver of the books of account of the firm of Harnandroy Badridas, and such further or other orders as might be necessary. On 13th November, an interim order was, in fact, made granting the interim injunction and appointing the plaintiff himself as interim receiver and a Rule was issued, returnable on 27th November, calling upon some of the defendants, that is to say, the first three

defendants, to show cause why the order should not be made as prayed for. Before I deal with the subsequent history of that order it is necessary, I think, that I should refer to the plaint in the suit. The concise statement is in these terms:

"This is a suit for accounts of the dissolved partnership firm carried on under the name of Harnandroy Badridas; for winding up of the said business; for a declaration that the attachment made under the orders of the Delhi Court it illegal and is not binding on the plaintiff; for an injunction restraining the defendant Durgaprasad from proceeding with the said suit No. 72 of 1933, or from enforcing the said orders, dated 3rd November 1933, in any manner whatsoever; for appointment of receiver; and for other necessary directions and inquiries."

In the plaint the reliefs claimed were tabulated thus:

"(2) That accounts be taken and the said partnership, that is to say, the partnership of Harnandroy Badridas be wound up by and under the directions of this Court; (3) A declaration that the attachment made under the said orders is illegal and is not binding on the plaintiff; (4) An injunction restraining the defendant Durgaprassed from proceeding with the said suit No. 72 of 1933, or from enforcing the said orders, dated 3rd November 1933, in any manner whatsoever; (5) That receiver be appointed; (6) That all directions be given, inquiries ordered and accounts taken as may be necessary, etc., etc."

It is obvious that the Official Receiver was really functioning, as the plaintiff in this suit, in the place of defendants 4, 5 and 6, that is to say, the Dalmias, they having been restrained, by an order of the Delhi Court, from taking any action in this Court, or in any other Court, in their own names. It seems a little difficult to understand what precisely the status of the Official Receiver in this matter was. No doubt, in his capacity as the receiver appointed in suit No. 1395 of 1933, it was his business to take the accounts and settle the partnership matter, as between the Dalmias. I dare say it is arguable that, in his capacity as receiver in that suit No. 1395 of 1933, he might, in one sense, take possession of or, at any rate, have some sort of interest in the Dalmias' share in the partnership in Harnandroy Badridas. Speaking for myself however, I cannot understand how it was possible for him, standing outside that partnership, as it were, to bring a suit in the nature of a partnership action and make all the six persons forming that partnership defendants. One can only suppose that one of two things happened: either as his petition of 13th November seems to indicate, he did so, in order to vindicate his own dignity and position, as an officer of this Court, and in order to counteract the interim order, made by the Subordinate Judge; or else, he was acting in his supposed interest of the three Dalmias, they not being able to take any action themselves. We are however fortunately, as I think, not concerned with that aspect of the matter because a learned Judge of this Court did think fit to give Kantichandra Mukerji leave to institute the proceedings; but in dealing with this matter, one must, I think, go a little below the surface and examine the real nature and intent of this suit No. 2151 of 1933. I have stated that, on 13th November a rule was issued. It was returnable on 27th November, and the plaintiff had obtained the injunction he wanted, as a temporary measure, restraining Durgaprasad, Gangadhar and Satnarayan, that is to say, the Delhi partners from proceeding with suit No. 72. Before the rule was, in fact, further discussed, that is to say, on 29th November, a notice was given on behalf of Durgaprasad, who seems to be the leading spirit, on behalf of the Delhi firm, which notice was returnable on 4th December. By that notice, the plaintiff and the other five defendants were given notice that an application would be made for an order that all proceedings in the suit should be stayed until the disposal of suit No. 72 of 1933, in the Court of the Subordinate Judge at Delhi, in which Durgaprasad was the plaintiff and Satnarayan and others were the defendants. So that on 29th November the position was this: The Official Receiver, as plaintiff in suit No. 2151 of 1933, had obtained an interim injunction which might have had the effect of holding up, if not putting an end to, the proceedings in Suit No. 72 of 1933. That injunction was granted against the plaintiff, preventing him from proceeding with the suit, and it is for that reason that the plaintiff in that suit was asking that the Official Receiver's suit in this Court should be stayed pending the disposal of Delhi suit. Both these matters came on for determination on 4th December, and, eventually, judgment was given, as I said, at the outset, on 19th December, by Buckland, J. The effect of that judgment was that the

application, on the part of the plaintiff, for an injunction was granted and the application, on the part of Durgaprasad, for stay of Suit No. 2151 was refused.

If the matter rests there the position will be that the plaintiff in the Delhi suit, i. e., Durgaprasad will be in the position of being restrained from going on with that suit, until after the suit in this Court has been decided. It therefore comes to this. Is that a situation which we ought to confirm ? Two orders have been made, as the outcome of the judgment, and therefore there are two appeals—in effect, in the nature of cross appeals—and they have been argued before us on that kind of basis. It appears that either one of the orders must be dependent upon the other; as for example if this suit were stayed then it would seem not to be right that an injunction should be granted preventing any further progress with the Delhi suit. That would merely create a perpetual deadlock.

Mr. P. R. Das, who appeared before us on behalf of the principal defendant in this suit, argued that the matter ought to be dealt with upon the basis of three points, which may be labelled comity of Courts, convenience of the parties, and the common sense of the situation. I have no doubt that a great deal can be said in support of each of those aspects of the matter. But Mr. Das really rested his case on the provisions of S. 10, Civil P. C. That section reads as follows:

"No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other Court in British India having jurisdiction to grant the relief claimed, or in any Court beyond the limits of British India established or continued by the Governor-General in Council and having like jurisdiction, or before His Majesty in Council."

It has been argued before us that the matter in issue in the suit out of which the present proceedings arise, that is to say, in Suit No. 2151 of 1933, is directly and substantially in issue in a previously instituted suit, that is to say, Suit No. 72 of 1933, in the Court of the Subordinate Judge at Delhi, and that these two suits are between the same parties. It is by reason of this last element in the situation that I thought it apt to say that, in my opinion one ought to dive a little below the surface and ascertain what this Suit No. 2151 of 1933 really is. I cannot have any doubt that although the Official Receiver is ostensibly the plaintiff, we ought to deal with the matter upon the footing that the real plaintiffs are the Dalmias. The present suit is concerned with the business of and the partnership disputes and differences between the six partners and undoubtedly the Delhi Suit No. 72 of 1933 is between those same six partners. Therefore we may take it that, to all intents and purposes, the parties are the same, and indeed it has not been seriously argued, or argued at all, nor even suggested, that that is not the position, as regards the parties. What has been argued, as against the applicability of S. 10, is that the matters in issue are not the same. Mr. P. R. Das for the principal defendant—if I may so describe Mr. Durgaprasad—relies upon the section, because he says it is clear that the matters in issue are identical, and the Calcutta suit is nothing more or less than a unwarranted counterblast to the Delhi suit; or to put it in another way: this is, in effect, nothing but a cross suit in the sense that in the Delhi suit the plaintiff is asking for certain reliefs and in the Calcutta suit the same reliefs are sought for, though perhaps under a slightly different phraseology. I have set out the reliefs claimed in these two suits respectively, for the purpose of making a comparison, in connexion with the question whether S. 10 can rightly be said to apply, or not. If it does then it would seem that the Calcutta suit should not be allowed to go on, and in that case, the injunction asked for by the plaintiff should not have been granted, but on the contrary the application of Durgaprasad should have been granted.

Buckland, J., in his judgment, seems to have taken the view that it might well be that the matter in issue in the Calcutta suit was substantially the same as that in the Delhi suit but that the application of Duragaprasad was premature. The learned Judge says in this connexion:

A further point made by learned counsel on behalf of Deokinandan is that, in this Court at least, no written statements have been filed, and that in the Delhi Court one or, it may be, two written statements have been filed, and that

until the pleadings are closed in the suit, in each Court, it is not possible to say that any matter in issue is also directly and substantially in issue in a previously instituted suit, in other Court, or even what is in issue. This contention, also, in my judgment, is well-founded and for these reasons the application made on behalf of the defendants must fail.

The learned Judge had previously said this:

> Section 10 is not, as I read it, intended to permit of an application being made, at an early stage, to stay all proceedings in another Court, as it is now sought to have done.

In that view of the matter, the learned Judge dismissed the application of Durgaprasad and in consequence, and no doubt, inevitably, he then made absolute the rule which had been obtained by the plaintiff. It does therefore seem from the passages which I have cited from the judgment, that the learned Judge, to put the matter no higher, was by no means certain that these two suits would not, at any rate, ultimately, be found to be, for all practical purposes, identical as regards the matters in issue between the parties. Putting into juxtaposition the reliefs claimed, it seems to me that the matters in issue can be concisely stated thus: In each of the suits what was being sought was an enforcement of the effect of the compromise arrived at on 3rd June 1933, with a view to terminating the partnership known as Harnandroy Badridas, and the taking of accounts and the squaring up of affairs as between all the former partners—the six persons who had composed that firm. Upon that view of the matter, prima facie, at any rate, it does appear that there is sufficient resemblance between these two suits to attract the operation of S. 10.

Mr. Chatterjee, who appeared on behalf of the plaintiff—the Official Receiver—argued however and argued with considerable cogency, that amongst the reliefs claimed in this suit there were certain matters which could not and would not be decided in the Delhi suit. They were those contained in prayers (3) and (4) of the plaint in the present suit, viz:

> A declaration that the attachment made under the said orders is illegal and is not binding on the plaintiff.

and

> an injunction restraining the defendant Durgaprasad from proceeding with the said suit No. 72 of 1933, or from enforcing the said orders dated 3rd November 1933, in any manner whatsoever.

It is to be observed that, as regards the attachment the legality of which was impugned in the plaint in this suit, that was made merely by an interim order and was in the nature of an interlocutory proceeding in the Delhi suit. In any event, it was only in a sense ancillary to that suit, a mere incident, though perhaps an important one, but an incident in the progress of that suit from its initiation to its final determination. As regards the injunction which is asked for in this suit, it is obvious that in any case, where there is a subsequent suit which is said to cover the grounds already traversed by a previous suit, it is easy enough to put in such a prayer, and thus endeavour to provide a method of escaping from the operation of S. 10. It might be no more than a subtle device to include an application for injunction, as one of the reliefs claimed, in order to put a blemish upon an otherwise immaculate resemblance. In my opinion, the asking for a declaration and for an injunction cannot be said to be claiming reliefs of such a character as to spoil what would otherwise be the identity of the two suits. Looking at the matter therefore from a common sense and on a reasonably broad basis, upon a careful consideration of the reliefs claimed in these two suits respectively, one is bound in my judgment to come to the conclusion that suit No. 2151 is a suit in which the matters in issue are also directly and substantially in issue in a previously instituted suit, namely, suit No. 72 of 1933, in the Court of the Subordinate Judge of Delhi.

I ought perhaps to make one or two further observations with regard to the contention put forward by Mr. Chatterjee to the effect that the reliefs claimed in Cls. (3) and (4) of the prayer distinguish this present suit No. 2151, i. e., the Calcutta suit, from the Delhi suit. Mr. Chatterjee relied on certain authorities in support of his contentions, the first of which was the case of 1917 Cal. 248 (1). That case is useful in that it emphasises the proposition that the object of S. 10 is to prevent Courts of concurrent jurisdiction from simultaneously

1. Bepin Behari Majumdar v. Jogendra Chandra Ghosh, 1917 Cal 248=36 I C 641.

trying two parallel suits, in respect of the same matter in issue ; but it is really of no avail in support of Mr. Chatterjee's argument, because there the second suit was concerned with a claim for rent for a period subsequent to that included in the previously instituted suit for rent. So I should have thought that it would have been very difficult for any one even to argue that the matter in issue in the second suit was substantially the same as that in the first suit ; for it is clear that the decision in the first suit would not necessarily conclude the matter in issue in the second suit.

Another case, on which Mr. Chatterjee relied, was the case of 27 C.W.N. 772 (2). There two suits involving claims for certain cesses against the petitioners were decided against them and were pending in appeal, when another suit was brought against the petitioners. They thereupon applied for stay of the suit, under S. 10, Civil P. C., inasmuch as it concerned cesses alleged to be due for a subsequent period. The present Chief Justice held that though for this purpose, that is to say, for the purpose of S. 10, suits include appeals, S. 10 did not apply to the case before him, because it was a suit for a different debt altogether, and for a debt which was not in existence when the last of the previous suits was brought. Mr. Chatterjee relied upon a passage in the judgment which appears at p. 774 and runs as follows :

" But it must be observed that a judgment for the recovery of subsequent cesses does not differ merely as being for a different form of relief. It is the same kind of relief for an entirely separate subject-matter, namely, a debt which was not in existence at all at the time of the previous suit.

Mr. Chatterjee sought to found, on that passage, his argument to the effect that the claim comprised in the prayer for declaration and the prayer for injunction was not in existence at the time when the Delhi suit was instituted. I have already dealt, in effect, with that aspect of the matter. I have pointed out that that kind of claims could always, and quite reasonably, if not necessarily, be added to the reliefs claimed in a subsequent suit where, otherwise, the matters in issue would have been identical with those in the prior suit.

Finally, Mr. Chatterjee referred us to the case of 11 All. 148 (3). That again, in my opinion, does not afford much support to Mr. Chatterjee's argument. On the contrary, it is mainly noteworthy for the fact that Mahmood, J., pointed out at p. 155 that:

The policy of the law is to confine the plaintiff to one litigation, thus obviating the possibility of contradictory verdicts by two or more Courts in respect of the same relief.

In my opinion, in endeavouring to arrive at a correct decision, as to whether a subsequent suit is "parallel," to use the words of the authorities, to a previous suit, one must have regard to the position of affairs at the time when each of the suits was, respectively, instituted and further to what would be the position of affairs when both the suits have been tried and finally determined. It is to be noted that the provisions in S. 19 have been put in front of those contained in S. 11. The real criterion to apply is this. Supposing the first suit was determined; would the position then be that when the second suit was instituted the matters raised in the second suit were res judicata by reason of the decision of the prior suit? In that way, the provisions of S. 10, logically and naturally, precede S. 11. Applying that test, it seems to me that if the Delhi suit were tried out and judgment given in that suit, the matters substantially in issue in the Calcutta suit would indeed then be res judicata. To put the matter in another way, all the matters really at issue between the half a dozen partners would have been finally determined by the decision in the Delhi suit. That aspect of the matter has been touched upon by the learned Judge in his judgment (p. 32 of the paper-book) where he says:

The learned Advocate-General has elaborated the point by submitting that the section (that is to say, S. 10) is intended, merely, to prevent the trial by one Court of an issue in another pending suit, of earlier date, in another Court. For the purposes of his argument, he has made reference to S. 11, the familiar section relating to res judicata. The universal practice, where the issue of res judicata is raised, is for the Court, at the hearing of the suit, in which that issue is raised, to try it at the hearing. Why should a different practice prevail where it is contended that S. 10 applies?

2. Jamini Nath Mallik v. Midnapur Zamindary Co., 1923 Cal 716=75 I C 231=27 C W N 772.

3. Balkishan v. Kishan Lal, (1889) 11 All 148 =1889 A W N 42.

So that the learned Judge, inferentially, seems to say that although if the Delhi suit had been determined and then the Calcutta suit was started the matter in the second suit might be res judicata, that is a question which ought not to be decided until a later stage of the suit. In that connection, one must bear in mind that S. 10 itself does say that no Court shall proceed with the trial of a suit. Therefore, it is, no doubt, arguable that nothing need be done, or indeed ought to be done, till the stage has been reached at which the "trial" in the strict sense of the word has commenced or is about to commence. I have already indicated that Buckland, J., thought that the moment was not ripe for the application made by Durgaprasad; but, in my opinion, the real position is this: It is mandatory upon the Court not to proceed with the trial of any suit in which the matter raised is also raised in a previously instituted suit. That is not to say, however, that it is not also discretionary with the Court to stop the proceedings at an earlier stage. Indeed one would have thought—I say this, of course, with the greatest possible respect to the learned Judge whose judgment we are now considering—that as a matter of common sense and convenience, generally speaking, if it is satisfactorily demonstrated that the secood suit is "parallel" to the first suit, then the best course for everybody concerned would be to put a stay upon or to arrest altogether the second suit at the earliest possible moment. At any rate, there seems to be no bar, in law, to that course being adopted, and actually such a course was adopted by Imam, J., in the case of 1917 Cal 637 (4). In that case a man who carried on business at Karachi employed a man as his agent in Calcutta, and on 16th February 1915, the Karachi employer instituted a suit in the Court of Judicial Commissioner of Sind, at Karachi, against his Calcutta agent, for an account and for the recovery of whatever sum might be found due on the taking of such account. On 10th March 1915, the agent retaliated, if I may use the expression, by instituting, in the High Court of Calcutta, a suit which is the case now cited. The Calcutta agent instituted that suit against his Karachi employer for recovery of a certain sum of money, or in the alternative, for an account. Thereupon, the employer applied to the High Court of Calcutta to have the suit which had been instituted in that Court stayed pending the determination of the suit which he himself had instituted at Karachi. In giving judgment Imam, J., said :

" Both the suits admittedly relate to the same contracts between the parties and the only question that requires to be considered is whether the Karachi Court has jurisdiction to grant the relief claimed. In the suit at Karachi the plaint sets out allegations that clearly give jurisdiction to that Court to try the case. Those allegations may be wholly untrue, but it is not for this Court to pronounce on them for the purpose of this application—jurisdiction does not depend upon actual facts but upon the allegations made concerning them. This suit therefore cannot be proceeded with. The suit will be stayed till the determination of the suit at Karachi."

It would seem therefore that Imam, J., stayed the Calcutta suit at a very early stage in its career. I see no reason why that course should not be adopted in connection with the matter now before us. Holding, as I do, that the matter in issue in suit No. 2151 of 1933 is also directly and substantially in issue in the suit previously instituted in the Court of the Subordinate Judge at Delhi, I arrive at the conclusion that suit No. 2151 of 1933 ought to be stayed and so the application made by Durgaprasad, dated 29th November 1933, ought to be granted. The moment one has come to that conclusion, it obviously inevitably follows that the application made by the plaintiff Kantichandra Mukherji ought to be refused, and therefore the Rule which he obtained on 13th November 1933 ought to be discharged. If the Calcutta suit is stayed, it follows that there is no necessity for the plaintiff, or anyone else, to be appointed receiver in that suit, and therefore it is a consequential matter that the order appointing him interim receiver should be vacated also. Both the matters of injunction and receiver are comprehended in the Rule. Therefore I think it is sufficient to say that the Rule should be discharged. In my judgment, for the reasons I have given, both these appeals should be allowed. As regards costs, I think the appellant should get, from the plaintiff respondent one set of hearing costs, assessed on the basis of an appeal

4. Padamsee Narainjee v. Lakhamsee Raisee, 1917 Cal 637=33 I C 288=43 Cal 144.

from a decree. He will get his general costs in both the appeals. The appellant will also get his costs, one set, in the original Court.

Panckridge, J.—I agree but I desire to add certain observations. At the outset of the appeal, counsel for the respondent indicated that he proposed to argue that no appeal lay from the order refusing to stay the Calcutta suit. At a later stage, he stated that he did not propose to press this contention. I have merely referred to it because there is a direct authority on the point, the Bombay High Court having, recently, held that an order refusing to stay a suit to which, it is said, the provisions of S. 10 apply, is a judgment within Cl. 15 of the Letters Patent and is appealable. To my mind the reasoning of Sir John Beaumont, C.J., and Blackwell, J., as appearing in the judgment in the case of 1933 Bom 85 (5), is conclusive. I think it right to state my opinion on this point in case the matter is raised in a future appeal.

With regard to the orders appealed against, as has been pointed out, the learned Judge in the Court of first instance did not come to a conclusion whether the matter in issue in the Calcutta suit was also directly and substantially in issue in the previously instituted suit. He expressed the opinion that it was not possible to come to any decision on the matter until at least the pleadings in the two suits were closed. This proposition may be true of certain classes of suits, but it should, I think, be borne in mind that suits for dissolution of partnerships and the taking of partnership accounts are in many respects different from ordinary suits, and authorities having reference to suits other than partnership suits are sometimes of no great value when a partnership suit has to be considered. Looking at the two plaints I find no difficulty in coming to a conclusion that the matter in issue in the Calcutta suit is directly and substantially in issue in the Delhi suit. The matter in issue in both suits appears to me the rights and liabilities of the partners inter se upon the dissolution of the partnership.

I do not agree that the suit is one for the enforcement of the agreement of 1st June 1933, or of the modification of that agreement as arrived at on 5th June 1933. My reason for saying so is that those agreements contemplated the taking of the accounts without the intervention of the Court, while both the plaints ask that accounts should be taken by the Court. I think if the plaints are properly analysed the result is that the allegations as to what happened in June 1933, are only relevant as showing how it has come about that the parties have had to seek the intervention of the Court. I do not consider that what I may call the identity of the second suit with the former suit is in any way affected by the fact that a declaratlon is prayed as to the illegality of certain interlocutory orders that have been made in the Delhi suit. The respondent has taken no steps to have these orders set aside by the Judge who made them; nor has he invoked the powers of the tribunal, whatever it may be, to whose appellate jurisdiction the Judge is subordinate. In these circumstances, I do not think that the fact that a declaration is prayed for as to the illegality of those orders can change a suit for partnership accounts into a suit for something else. I need add nothing to what has fallen from my Lord on the subject of the prayer for an injunction. As has been pointed out, if such a prayer can be held to make the second suit different from the former suit for the purpose of S. 10, it is open to any plaintiff who has already been made a defendant in another suit to embark on a parallel course of litigation merely by inserting in his plaint a prayer for injunction to restrain the defendant from proceeding with the prior suit instituted by him.

This being so, I have to consider whether the learned Judge was right in holding that even if the matter in issue in both the suits was the same, the application to stay the suit was premature. As has been pointed out, a general order for stay has frequently been made long before the stage of the actual trial has been reached. Indeed in the case to which the learned Judge refers—1922 Bom 276 (6)—the order had been made as an interlocutory order and before the suit was ripe for hearing, and

5. Jivanlal Narsi v. Pirojshaw Vakharia & Co., 1933 Bom 85=143 I C 806=57 Bom 364.

6. Sennaji Kapurchand v. Pannaji Devichan, 1922 Bom 276=64 I C 580=46 Bom 431.

it was not suggested that that order was without jurisdiction, for the case was merely concerned with what powers, if any, remained with the Court after it had made the order for stay. I have no doubt that in a proper case the Court has power to stay a suit, generally, at any stage at which it seems expedient to do so. In the present case, I can see no reason at all for permitting this suit to continue if, as I hold, it falls within S. 10. Indeed, there are very many reasons why, if it is going to be stayed, it should be stayed at the earliest opportunity.

With regard to the respondent's claim for an interim injunction I notice that the learned Judge attached considerable weight to the fact that it appeared to him that the Official Receiver had been interfered with in the discharge of his duties. I wish to express no opinion as to the facts, but assuming the views of the learned Judge to be correct, I do not think it would justify an injunction restraining the plaintiff in the Delhi suit, generally, though I can imagine cases where this Court would restrain the plaintiff from taking any particular step, and would punish him for contempt if he would take it; but I can see no reason why he should be absolutely restrained from proceeding with the suit either because he has interfered with the Official Receiver or because it is thought likely that he may do so in the future.

It has been urged by the respondent that it will be more convenient to have the suit tried here rather than in Delhi. Having regard to the various authorities to which reference has been made, I think it must be conceded that the Court has jurisdiction to restrain a defendant from litigating in another Court on the grounds of convenience. I am not satisfied however that the allegations of the respondent are correct or the balace of convenience is so clearly in favour of the proceedings being conducted in Calcutta that the defendant should be restrained from continuing the Delhi proceedings. I notice in the affidavit of the Official Receiver that the point he has made is not so much the inconvenience to which the Dalmias will be put, in their capacity as partners in the firm of Harnandroy Badridas, but the inconvenience to which both he and the Dalmias would be put in taking accounts in what is called the domestic litigation. I do not think that this is a consideration which ought to have much weight with us in deciding the matter. As I have said I agree with the order as formulated by my Lord.

K.S. *Appeals allowed.*

A. I. R. 1935 Calcutta 10

NASIM ALI, J.

Mahedar Rahaman Mia — Plaintiff— Appellant.

v.

Kanti Chandra Basu — Defendant — Respondent.

Appeal No. 1360 of 1933, Decided on 17th May 1934, from appellate decree of Addl. Sub-Judge, Malda, D/- 15th May 1933.

(a) Bengal Self-Government Act (3 of 1885), S. 138-A—Dispute relating to qualification of voters is dispute relating to election.

Disputes relating to the qualification of voters is a dispute retating to elections under the Act. [P 12 C 1]

(b) Bengal Self-Government Act (3 of 1885), S. 138-A—Election Rules — R. 26 (b) —Magistrate's decision under R. 26 (b) is judicial decision and not simply an executive order.

The decision which the Magistrate gives under R. 26 (b) is a judicial decision and not simply an executive order passed by the returning officer in connexion with the preparation of a register of voters. [P 12 C 1]

(c) Jurisdiction — Special tribunal for determining certain questions — Civil Court cannot take cognizance of such matters — Civil P. C. (1908), S. 9.

Where the legislature has set up special tribunal for the purpose of determining certain questions as to rights which are the creatures of the Act, then the jurisdiction of that tribunal is exclusive and the civil Court cannot take cognizance of such matters. [P 12 C 2]

C. C. Biswas, Debi Prosad Dutta and *Gopendra Krishna Banerjee*—for Appellant.

Jogesh Chandra Roy and *Nagendra Nath Bose*—for Respondent.

Judgment.—This is an appeal by the plaintiff in a suit for a declaration that the election of the defendant to the Malda Local Board was illegal and void and for a perpetual injunction restraining him from exercising the functions of a member of the same Board. Various objections were taken by the plaintiff to the election of the defendant. In view of the concurrent findings of the

Courts below the learned advocate appearing for the appellant has pressed in this appeal only one objection, namely, that the defendant not being a qualified voter was not entitled to stand as a candidate in the election. The defendant's answer to this objection was that the civil Court had no jurisdiction to try that question. The Courts below have accepted the defendant's plea on this point and have agreed in dismissing the suit. Hence the present appeal by the plaintiff.

The only point for determination therefore in this appeal is whether the civil Court has jurisdiction to try the question whether the defendant was a qualified voter or not. S. 9, Civil P. C., lays down that

"the Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred."

The point for determination therefore is whether the trial of this question by the civil Court is barred either expressly or impliedly. The case for the defendant is that the jurisdiction of the civil Court is barred by the rules which have been framed by the Local Government under S. 138-A, Local Self-Government Act (3 of 1885). R. 1-A of the Statutory Rules framed under the aforesaid Act is in these terms :

"All disputes arising under these rules other than objections under Rr. 15 and 42 shall be decided by the Magistrate and his decision shall be final."

Rule 26-B lays down that:

"Every application made under R. 24 or R. 25 shall be duly considered by the Magistrate of the district, or such other officer as may be appointed by him in this behalf on the date fixed under R. 26-A and the decision of the Magistrate or of the officer so appointed, as the case may be, shall be final."

It was urged by the learned advocate for the appellant on the authority of the decision in the case of 1931 Cal. 36 (1) that the word "final" in the rules quoted above means final so far as the executive authorities are concerned and consequently the question can be tried again by the civil Court. That was however a case which arose out of an election under the Bengal Municipal Act in which there is an express proviso to S. 15 of the said Act retaining jurisdiction of the civil Courts to try suits relating to election. The learned advocate for the defendant-respondent, on the other hand contended that the word "final" in Rr. 1-A and 26-B means "not liable to be challenged in a civil suit." The observations of Mitter, J., in the case of 1928 Cal. 750 (2) support this contention of the respondent. It was however contended by the learned advocate for the appellant that the observations of the Mitter, J., in that case were mere obiter dicta inasmuch as the learned Judge having found that the objection taken by the plaintiff in that case, (namely, whether Tarak was a qualified voter) fell within R. 42, it was not necessary for the learned Judge to come to a decision as to the meaning of the word "final" in that rule. Even if it be assumed that the observations of Mitter, J., in that case are obiter dicta, I am not prepared to say that the opinion expressed by the learned Judge in that case is wrong. S. 138-A, Bengal Self-Government Act,as originally enacted was in these terms:

" It shall be lawful for the Lieutenant-Governor to make rules consistent with this Act for any District Board or Local Board for the purposes of determining the mode and time of appointment or election of members of Boards and Committees, the term of office and the registrations of voters and candidates, and generally for regulating all elections under this Act."

By Bengal Act 1 of 1914 the following words were added to Cl. A, S. 138 :

" And determining the authority who shall decide disputes relating to such elections."

The result of this amendment of Section 138 (a) was that the Local Government obtained powers from the legislature to determine by rules the authority who shall decide disputes relating to elections under the Local-Self-Government Act of 1885. In exercise of that power the Local Government has framed certain rules. The question is whether by any of these rules the Local Government has determined the authority who is to decide disputes relating to elections held under the Act. Under R. 22 of these statutory rules the Magistrate is to have a register of persons, qualified to vote, prepared and such a register is to be prepared from the assessment list from enquiries made by persons especially deputed for the purpose and in such manner as may appear expedient.

1. Rathis Chandra v. Amulya Charan, 1931 Cal 36=129 I C 422=58 Cal 87.

2. Sibesh Chandra v. Bibhu Bhusan, 1928 Cal 750=116 I C 372=56 Cal 52.

Under R. 23 the list of voters is to be published. Under R. 24 any person whose name is omitted from the register is to apply to the Magistrate in writing to have his name inserted in the register stating the grounds of his application. Under R. 25 any person whose name is in the register and who considers that any name appearing in the register ought to be omitted may apply in writing to the Magistrate stating definitely the grounds of his application to have such name omitted. R. 26 lays down that the application need not be stamped and may be submitted either by post or through an agent. R. 26 (a) indicates how the notice of that application is to be served and a date fixed for the hearing of that application. Then comes R. 26 (b) under which the Magistrate or some other officer as may be appointed by him in this behalf on the date fixed under R. 26 (a) is to hear the application and to pass his decision. It seems to me that by these rules the Local Government has determined the authority who is to decide disputes relating to the qualification of voters and there can be no doubt that such a dispute is a dispute relating to elections under the Act.

It is true that though the Local Government has obtained powers from the legislature to determine the authority who is to decide all disputes relating to elections, it has not yet exercised that power to its fullest extent. The Local Government has not yet determined the authority by which disputes other than those arising under the rules framed (as for example, corrupt practices) are to be decided. In fact the civil Court still continues to have jurisdiction to decide such disputes. This is clear from the fact that the Local Government has given authority to the Magistrate to decide only those disputes which arise under the election rules. It appears to me also that the decision which the Magistrate gives under R. 26 (b) is a judicial decision and not simply an executive order passed by the returning officer in connexion with the preparation of a register of voters. The decision under R. 26 (b) is really a decision as to whether the person is or is not a qualified voter. A particular procedure has also been laid down for getting the decision under R. 26 (b). On all these grounds I am of opinion that the Local Government by virtue of the power delegated by the legislature has set up a special Tribunal for deciding whether a certain person is qualified to vote or not.

It is well established on authorities that where the legislature has set up special Tribunal for the purpose of determining certain questions as to rights which are the creatures of the Act then the jurisdiction of that Tribunal is exclusive and the civil Court cannot take cognizance of such matters. If the plaintiff had really any grievance he should have resorted to the Tribunal which has been set up for redressing that grievance and if he did not avail himself of that opportunity, he cannot now complain that the law has deprived him of his right to have his grievances redressed by the civil Court.

On these grounds I agree with the Courts below that the jurisdiction of the civil Court to try the question as to whether the defendant is a qualified voter or not is barred by the rules framed by the Local Government under S. 138 (a), Local Self Government Act.

It was however contended by the learned advocate for the appellant that the actual decision in 1928 Cal 750 (2) goes to show that the question as to whether a person is a qualified voter or not is a question which can be tried by the civil Court. In that case however the learned Judges held that the question as to whether a certain person was a qualified voter or not was a question which came under R. 42 and consequently by virtue of the provisions of R. 1-A the decision of the Magistrate on that question was not final. It appears however that at the time when the election which was in dispute in that case was held, the specific rules quoted above determining the authority who is to decide disputes relating to the qualification of voters were not framed by the Local Government. Under the existing rules the dispute relating to the qualification of voters no longer falls within R. 42. Consequently the actual decision in the case referred to above does not help the appellant so far as the present appeal is concerned. No sufficient ground has therefore been made out for interfering with the judgment and decree of the Courts below.

The appeal is accordingly dismissed with costs.

K.S. *Appeal dismissed.*

A. I. R. 1935 Calcutta 13

JACK AND KHUNDKAR, JJ.

Prafulla Nath Tagore—Decree-holder—Appellant.

v.

A. M. Paruk—Judgment-debtor—Respondent.

Appeal No. 528 of 1933, Decided on 30th April 1934, against order of First Court Sub-Judge, Bakarganj, D/- 30th November 1933.

Civil P. C. (1908), S. 151—Attachment, withdrawal of — Institution of title suits alleging fraud and misrepresentation is no justification for withdrawal of attachment.

There is no reason why a decree-holder should merely because the judgment-debtor has filed a title suit alleging fraud, be deprived of the security for payment of the decretal amount which he has acquired by attachment of the judgment-debtor's property. Attachment should not be withdrawn unless the judgment-debtor is prepared to give security for payment of the decretal amount. [P 13 C 1]

Brojolal Chakerbutty, Hiralal Chuckerbutty and *Shyamadas Bhattacharji* —for Appellant.

Clough and *Bhabesh Narayan Bose* for *Ambicka Pada Chowdhury*— for Respondent.

Jack, J.—This is an appeal against the dismissal of an execution case and an order withdrawing the attachment of the judgment-debtor No. 70's share in the attached properties. Certain rent decrees were passed against this judgment-debtor and others and against these decrees nine title suits were instituted on the ground that the rent decrees were null and void having been obtained by fraud and misrepresentation. The trial Court issued an order for injunction restraining execution of the rent decrees pending the hearing of the title suits. Against that order there was an appeal to the District Judge of Backerganj who modified the order to the extent that he ordered that execution might proceed against the tenures in arrears only without prejudice to the rights of the plaintiff which might be determined in the title suits and that all other proceedings should be stayed pending the disposal of the title suits. Thereafter the Subordinate Judge in the execution case passed the order which is complained of, namely, that as the title suits were not yet ripe for hearing and it was not known when they would be disposed of, the execution case before him which was already pending for a long time need not be kept pending and might be conveniently disposed of. He therefore dismissed the execution case and withdrew the attachment of the judgment-debtor No. 72's share in the properties.

As pointed out in the disposal of the previous rule which was issued by this Court against that order, it does not appear that the learned Subordinate Judge was justified in dismissing the execution case entirely. There does not seem to be any reason why the decree-holder should merely, because the judgment-debtor has filed a title suit alleging fraud be deprived of the security for payment of the decretal amount which he has acquired by attachment of the judgment-debtor's property. The attachment even though of a property which is out side the tenures in arrears is not illegal and he is entitled to attach the property and there is no reason why he should relinquish the advantage he has so gained merely because of the institution of a title suit, unless the judgment-debtor is prepared to give security for payment of the decretal amount. Under the order of the District Judge it appears that the decree-holder is entitled to proceed against the tenures in arrears; and though the order states "without prejudice to the rights of the plaintiff" it does not appear to me that it excludes the share of the plaintiff from the execution proceedings against the tenures in arrears though this is the interpretation which has been put upon it by the Subordinate Judge. In any case I think the learned Judge was not entitled to dismiss the execution case and withdraw the attachment complained of unless the judgment-debtor gave security for the alleged amount of his share in the decretal debt. I would therefore order that the execution case be dismissed and the attachment withdrawn on the judgment-debtor giving security for his share of the debt and not otherwise; unless therefore the judgment-debtor gives security or his share of the debt within a month from this date the order of the learned Subordinate Judge dismissing the execution

case and withdrawing the attachment will be reversed and the execution case and the attachmeut will be restored. There will be no order as to costs.

Khundkar, J.—I agree.

.S. *Appeal allowed.*

A. I. R. 1935 Calcutta 14

BARTLEY, J.

Srt. Charusilla Dasi — Plaintiff—Appellant.

v.

Sukhdev Haluai and *others* — Defendants—Respondents.

Appeal No. 199 of 1933, Decided on 13th September 1934, from appellate decree of Addl. Sub-Judge, Birbhum, D/- 8th September 1932.

Civil P. C. (1908), S. 47—Objection in execution proceedings by representative of debtor—S. 47 applies and no separate suit lies, even if such representative claims property on his own behalf.

All objections raised in execution proceedings by parties to the suit or their representatives come under S. 47 and that section bars a seperate suit. And this principle holds good, even when the representative of the debtor, impleaded in the case, claims the property on his own behalf, though under a different right : 17 *Cal* 711 (*F B*) and 115 *I C* 353, *Rel. on.* [P 14 C 2, P 15 C 1]

Amarendra Nath Bose, Dhirendranath Guha Thakurta and *Bholanath Roy*—for Appellant.

Gopendra Krishna Banerji—for Respondents.

Judgment. — The facts material in this appeal are as follows : Plaintiff, here the appellant, obtained a decree for khas possession of certain lands in 1918. Miscellaneous litigations followed, with the result that a final application for execution of the decree against defendant 1 as the son and legal representative of the deceased judgment-debtor was made in 1927. Defendant opposed this application on the ground that by a compromise entered into after the passing of the original decree, the suit lands had been settled with him and others of his family. The matter was heard and the Court decided that the decree was incapable of execution. There was no appeal against that order. In 1929, plaintiff brought the present suit to have the order set aside and to recover khas possession on the basis of her decree. She alleged that the order was founded on false evidence and asked that it should be set aside. The Court of first instance held that the order deciding that the decree was incapable of execution was made not under S. 47, Civil P. C., but under O. 21, R. 58 and was therefore no bar to the subsequent suit. The learned Subordinate Judge held that it was made either under S. 47 or under O. 21, R. 2, and he accordingly found that no suit lies to set it aside. In the result he dismissed the present suit. For the appellant, it is now contended that the order was not made either under S. 47 or under O. 21, R. 2 and therefore the suit is not barred. Respondents' contention is that the order was made under S. 47 and is a complete bar to a subsequent suit. I am definitely of opinion that the view taken by the learned Subordinate Judge was correct.

The board rule is that all objections raised in execution proceedings by parties to the suit or their representatives come under S. 47 and that section bars a separats suit. Claims by third parties can be agitated by two ways, either under O. 21, R. 58 or by means of a separate suit. In the present case, original objection was made by the defendant when he was brought on the record as heir and legal representative of the deceased judgment-debtor. It was therefore an objection by a party to the suit. It was argued that the section could not apply because, although he was the legal representative of the judgment-debtor, the defendant claimed the property in virtue of a new settlement with himself and not in his capacity of heir to the debtor. The point however is without substance. It was held in 17 Cal. 711 (1), that an objection taken by a person who has become the representative of the judgment-debtor in the execution of a decree to the effect that that property attached in execution thereof was his own property, and not held by him as such representative, is a matter cognizable only under S. 244 of the Code. This view was followed and affirmed in 115 I C 353 (2), in which case the correct principle was held to be that when the representative of the debtor, impleaded in the case, claims

1. Panchanon Bandopadhya v. Rabia Bibi, (1890) 17 Cal 711 (F B).
2. Naidabashi v. Rajendra Chandra, (1928) 115 I C 353.

the property on his own behalf though under a different right S. 47 applies. It follows from this that in the present case, no seperate suit lies to set aside the order passed in 1928 (1927) ? to the effect that the decree was incapable of execution. In the result, the decision of the lower appellate Court is affirmed and this appeal dismissed with costs. Leave to appeal is refused.

K.S. *Appeal dismissed.*

A. I. R. 1935 Calcutta 15

BUCKLAND, AG. C. J.

Protiva Sundari Debi—Plaintiff.

v.

Sarada Charan Goho and *others*—Defendants.

Civil Suit No. 2186 of 1931, Decided on 20th March 1934.

(a) Mortgage—Property not mortgaged included in sale proclamation and sold—Mere abstention of mortgagor to rectify does not disentitle him from recovering such property.

Where property not included in mortgage is included in the sale proclamation, and sold, the mere abstention of the mortgagor to have the sale proclamation rectified does not necessarily bind him so as to disentitle him from recovering the same. Some thing more is necessary to enable the mortgagee to entitle him to bring to sale in execution of his mortgage decree such property also: *Willmott* v. *Barber*, 15 *Ch D* 96, *Ref.* [P 16 C 1, 2]

(b) Receiver—Receiver is not a necessary party where no attempt is made to interfere with his right to property entrusted to his care and he has no possession.

The receiver of the property of a party to a litigation, is not a necessary party, if no attempt is made thereby to interfere with the right of the receiver to the property entrusted to his care, where the subject-matter of suit is not in the possession of the receiver: 6 *I C* 214, *Dist.* [P 16 C 2]

(c) Civil P. C. (1908), S. 47—Suit for setting aside Court sale in respect of properties not included in mortgage—Suit may be treated as application under S. 47.

A suit for setting aside a Court sale in respect of property not included in the mortgage may be treated as an application under S. 47, made on the day on which the plaint is presented: 22 *Cal* 483, *Foll.* [P 17 C 1]

W. W. K. Page and *A. K. Roy (Jr.)*—for Plaintiff.

Advocate-General and *N. Chatterjee*—for Defendants.

Judgment.—The plaintiff in this case asks for a declaration that the sale held by the Registrar of this Court on 25th September 1931 in Suit No. 1120 of 1927 is not binding. The facts are not in dispute. The plaintiff's husband and one Himangshu Sekhar Gupta were the joint owners of a moiety of a printing press known as the 'Gupta Press' situate at No. 221, Cornwallis Street, and the copyright in a publication known as the 'Gupta Press Panjika' as well as other publications.

"The owner of the other moiety was the defendant Sushila Bala Debi. In the year 1918 Sushila Bala Debi brought a suit against the plaintiff's husband for partition and accounts, and on 28th June 1918 Mr. Nripendra Nath Bose was appointed receiver. The terms on which he was appointed are set out in para. 3 of the plaint, and he was appointed to take possession of the 'Gupta Press' with its goodwill, lease hold rights, machinery, stock-in-trade, printing machineries copyright and materials of and in the Gupta Press Panjika or Year Book, corrugated iron roof room on the first floor of premises No. 221, Cornwallis Street, to be sold as a going concern by the receiver, and the copy right in other publications, with liberty to the parties to bid and set off half the amount of the bid less Rs. 4,000."

On 20th December 1923 the receiver was directed to print the publication known as the 'Gupta Press Panjika' for the year 1924-25 and to raise Rs. 5,000 at 12 per cent on the security of the Gupta Press concern for, I presume, the purposes of financing the publication, which he did by a mortgage dated 8th August 1924, whereby he borrowed Rs. 5,000 from the defendant Sarada Charan Goho on the security of what I may very shortly state was the press and its goodwill. The defendant Goho brought a suit in this Court on his mortgage and obtained a final decree which directed the mortgaged properties to be sold, and it is alleged that at the sale in execution of the decree not only was the mortgaged property sold but other property not included in the mortgage was also sold. So far as the plaintiff charges that that was done fraudulently, such charge has now been withdrawn and the case has been limited to the claim to have the sale set aside so far as it affects property which was sold and which was not the subject of the mortgage and therefore should not have been sold. What was mortgaged was

"all beneficial interest and goodwill in the said business carried on under the name and style of Gupta Press at 221 Cornwallis Street, Calcutta, and secondly, all and singular the several chattels and things belonging to the said Gupta Press concern and specifically described in the schedule hereto."

Turning to the schedule, one finds there five items which are sufficiently specific not to admit of much error. There is no mention of any publication or of the Gupta Press Panjika to which I understand a certain value is attached. To the plaint is attached a schedule in two parts, the first part of which admittedly includes the property covered by the mortgage, and the second part of which includes items admittedly not within the schedule to the mortgage but which, it is argued on behalf of the defendant are within the general words in Cl. 1 of the deed which I have quoted, and, if not comprised therein, admittedly are not within the security. Various other defences, more or less technical, have been taken and they are comprised in the following issues:

1. Is the receiver a necessary party to this suit? 2. Did defendant in execution of his decree cause to be sold property not covered by the mortgage in his favour? 3. Is the plaintiff entitled to restrain the defendant from publishing Gupta Press Panjika or other publications mentioned in para. 2, Sch. A? 4. Are S. 47 and O. 21, R. 78, bars to the maintainability of this suit? 5. Was sale proclamation and notice settled on notice to the plaintiff? If so, what is the effect thereof? 6. To what relief, if any, is the plaintiff entitled? On issue 5 no argument has been addressed to me by the learned Advocate-General, though he exhibited the affidavit of service of notice to the parties to the mortgage suit to settle the sale proclamation and the minutes of the Registrar when he settled the sale proclamation. But Mr. Page on behalf of the plaintiff has referred me to the observations of Fry, J., in 15 Ch. D. 96 (1) (at p. 104), upon which he relies for the purpose of showing that there was no acquiescence on the part of the plaintiff. As I have said, the learned Advocate-General, though he submitted the issue and put in the relative documents, did not argue the point, and no question of estoppel being raised it does not appear to me that the plaintiff is necessarily bound if the notification of sale actually and in fact included property which is not the subject of the security. It would, I conceive require something considerably more than mere abstention on the part of the plaintiff to enable the defendant to say that he was entitled to bring to sale in execution of his mortgage decree property which belonged to the mortgagor though it was not subject to his mortgage.

Taking the other issues in order, it has been argued on the authority of 6 I. C. 214 (2) that the receiver was a necessary party to this suit. But that was a case in which the property, the subject-matter of the suit, was actually at the time in the possession of the receiver. That is not the case here, and the learned Judges observed:

"It is obvious that, the receiver of the property of a party to litigation, is not a necessary party if no attempt is made thereby to interfere with the right of the receiver to the property entrusted to his care."

There is no question in this suit of interfering with the right of the receiver. The defendant Goho has no interest in the rights of the receiver. The receiver was the representative of the parties in the suit in which he was appointed. It may be that if this suit should succeed the property recovered should be handed back to the receiver, but that is not a matter in which the defendant Goho is interested. In my judgment this is not a case in which the receiver is a necessary party. I will pass over issue 2 because that involves a question of construction to which I shall presently return. Issue 3 is only a question of relief. With reference to issue 4 Mr. Page on behalf of the plaintiff has conceded that this suit is not maintainable and that he cannot resist the arguments advanced, but he has invited me on the authority of 22 Cal. 483 (3), which is one of the authorities cited on behalf of the defendant to adopt the course then followed by the learned Judges and to treat this suit as though it were an application under S. 47, Civil P. C. As in that case, the suit has been instituted in the Court which has jurisdiction to execute the decree and by which the order for sale was

1. Willmott v. Barker, (1880) 15 Ch D 96=28 W R 911=43 L T 95.

2. Jotindra Nath v. Sarfaraj Mia, (1910) 6 I C 214.

3. Biru Mahala v. Shyamabhurn, (1895) 22 Cal 483.

made and under whose direction the sale was held. This, as pointed out there, is merely a defect in form, and I see no reason why the same course should not now be adopted; and if it is adopted the only logical course is to treat the suit from the beginning as though it were an application made on the day on which the plaint was presented. In that case no question of limitation will arise. This is admitted. A question of limitation would only arise if the suit were treated as though it were an application under S. 47 made now or on some date subsequent to that on which the plaint was presented, but I see no reason for that and I direct that this suit shall be treated as an application under S. 47, Civil P. C. made on the day on which the plaint was presented.

The only question which remains to be decided is whether what was sold is covered by the mortgage. What was sold was the beneficial interest in the business. That means the legal interest in the business. That does not carry anything specific. Then there was sold the goodwill in the business. Now goodwill is something intangible and immaterial which must have some relation to something else. It was the goodwill of the business, but it is not specified as the goodwill in any publication or anything of that nature. So far as any question of any thing other than a chattel is concerned, that disposes of the matter. The second part of the clause specifically restricts the security to the chattels and things belonging to the Gupta Press concern which are described in the schedule. Admittedly nothing in Sch. 2 to the plaint is to be found in the schedule to the mortgage deed. Nothing in Sch. 2 to the plaint, in my view, is comprised within the first part of the clause which I am now considering. That being so, it follows that that which is to be found in Sch. 2 to the plaint is not within the security and therefore was sold by the defendant in execution of his mortgage decree though it was property not covered by the mortgage in his favour. In these circumstances the plaintiff is entitled to relief. The defendant will restore to the receiver appointed in Suit No. 674 of 1918 the properties specified in Sch. 2 to the plaint. The plaintiff will be entitled to her costs as though this were an application made under S. 47, Civil P. C. As regards any costs which have been incurred and which would not have been incurred if an application had been filed in the first instance, both sides will bear their own costs.

K.S. *Order accordingly.*

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SUHRAWARDY AND COSTELLO, JJ.

Gireeshchandra Bhattacharjya — Appellant.

v.

Rabeendranath Das—Respondent.

Appeal No. 1854 of 1928, Decided on 23rd June 1930, from appellate decree of Third Addl. Sub-Judge, Sylhet, D/- 10th April 1925.

Pre-emption—Hindus of Sylhet have right of pre-emption—No evidence is necessary for proving such custom as it has received judicial recognition—Custom.

A custom becomes a law when it receives judicial recognition. Once the Court has decided, as a fact, that a custom does exist then that custom obtains the force of law. As a matter of law in the District of Sylhet, Hindus have the same right of pre-emption under the provisions of Mahomedan law as Mahomedans themselve have in that district and the plaintiff need not prove the existence of such custom by adducing evidence for that purpose.

[P 18 C 1, 2; P 19 C 2; P 20 C 1]

Bhagirath Chandra Das—for Appellant.

Chandrashekhar Sen — for Respondent.

Costello, J.—This is an appeal from a decision of the third Additional Subordinate Judge, Sylhet, reversing a decision of the Munsif, First Court, Habiganj. The suit was one for pre-emption and for certain other reliefs. The learned Munsif dismissed the suit on the ground that the necessary formalities had not been complied with and that there had been delay on the part of the plaintiff. The lower appellate Court came to the conclusion that all the necessary formalities had been complied with and there had been no unreasonable delay and he agreed with the finding of the learned Munsif that there is a custom of pre-emption among the Hindus in the District of Sylhet. The only point seriously argued before us was upon the question whether or not the lower appellate Court was right in holding that such a custom does exist among the Hindus in that district. The other questions raised are all questions of fact

and are concluded by the findings of the lower appellate Court. It was argued before us on behalf of the appellants that there was no evidence before the lower appellate Court on which the learned Subordinate Judge could properly find that the custom of pre-emption does exist amongst the Hindus of the District of Sylhet and he further urged that the matter is still an open question and must be decided in every case which comes before the Court solely upon the evidence given in that particular case.

We are not disposed to hold, even upon that view of the matter, that the learned Subordinate Judge was wrong in coming to the conclusion at which he arrived, because he did in fact have before him two documents which were marked as Exs. 7 and 8—one of which was a judgment of this Court and the other a judgment of a Munsif. Both of them decided that, in fact, the custom of pre-emption must be taken to exist amongst the Hindus of the District of Sylhet. We desire however to deal with this matter on a much broader basis. If the contention of the learned advocate for the appellants is correct, it would follow that, even at this time of day, it would be necessary for the plaintiff, in every case where the customary right of pre-emption is asserted, to prove his case upon this point to the satisfaction of the Court before whom the matter is being tried. If that were so, it is difficult to see at what point the matter would be so concluded that this question would pass out of the region of controversy. As against the contention put forward on behalf of the appellants, it urged on behalf on the respondent that this question of the existence of the right of pre-emption amongst the Hindus of Sylhet is no longer one to be decided on the evidence given in the particular case, because the existence of such a custom has already been judicially recognized in such a way as to put the question outside the region of evidence and to put it into the category of a rule of law.

It is a well known principle that a custom becomes a law when it receives judicial recognition. No doubt, before a custom can have the force of law it must come up to a certain standard of general reception. A custom of that kind when judicially recognized has the force of law. I may recall that Professor Holland in his well known treatise on jurisprudence goes a step further than that even, for he is of opinion that a custom may be law even before it receives judicial recognition and all that the Court does is to decide the fact that such a custom exists. Without pausing to consider this view of the matter however it is sufficient for us to say that once the Court has decided, as a fact, that a custom does exist then that custom obtains the force of law. The actual point we now have to decide was considered by this Court and a judicial decision given with regard to it in the case of 35 Cal. 575 (1), where it was held that when existence of the custom, under which Hindus have the same right of pre-emption under the Mahomedan law as Mahomedans in any district, is generally known and judicially recognized it is not necessary to assert or prove it. This case went on appeal to the Judicial Committee of the Privy Council and there Mr. Ameer Ali made some observations which in effect recognize the principle just enunciated: 39 Cal. 915 (2). As long ago as the year 1864 similar observations were made by Bayley and Macpherson, JJ. in the case of 1 W. R. 234 (3). There the learned Judges in the course of their judgment said:

> "In the first place we observe as to the question of custom, that the fixed rule of law, as laid down by the High Court, is that where the custom of the right of pre-emption under Mahomedan law has been adopted by Hindus in any particular district, it shall be there recognized as a legal custom."

That means that once it has been established to the satisfaction of the Court as a matter of fact that the right of pre-emption under Mahomedan law has been adopted by the Hindus of any particular district the custom shall thenceforth have the force of law and Courts before whom the matter arises must take judicial notice of its existence. What we really have to determine in this case is whether or not the existence of the right of pre-emption has been so 'judicially noticed' as a custom existing

1. Jadu Lal v. Sahu Janki Koer, (1908) 35 Cal 575.
2. Jadu Lal v. Janki Koer, (1912) 39 Cal 915= 15 I C 659=39 I A 101 (P C).
3. Inder Narain v. Mahomed Naziroodeen, (1864) 1 W R 234.

amongst the Hindus in the district of Sylhet that the custom has at any rate by this time obtained the force of law. The question has already been agitated before this Court on a number of occasions, but conflicting decisions have been given. As long ago as the year 1864, the matter came before a Bench of this Court consisting of Steer and Jackson, JJ., in the case of 1 W. R. 250 (4). The head-note of that case runs as follows:

"The plaintiff relies upon the custom of pre-emption prevailing between Mahomedans and Hindus in Sylhet. Held that, unless he can show that the custom is undoubted and invariable, he is not entitled to a decree."

The case had been referred back by this Court to the civil Court of Sylhet in order that the Judge there might inquire whether as between Mahomedans and Hindus the custom of pre-emption prevailed in that district. The Judge before whom the matter came decided that no such custom prevailed, and, accordingly, he dismissed the suit. This Court decided that where the plaintiff relied upon a custom he was not entitled to a decree unless he could show that the custom was undoubted and invariable and that as he did not show such a custom he was not entitled to succeed. It would appear from this decision that the custom of pre-emption amongst the Hindus of Sylhet was not then definitely established in operation and the decision would appear on the face of it definitely to negative the existence of the custom. But I think we must take it that that decision was founded solely upon the evidence adduced in the course of the case and upon the way in which the plaintiff's case was presented, because a few years later — in 1871 — there was a decision of this Court exactly to the contrary. I refer to the case of 15 W. R. 223 (5), in which Jackson, J., said:

"I am of opinion that the Subordinate Judge (of Sylhet) has laid down the law correctly. It is admitted that among the residents of the district of Sylhet there is a custom sanctioning a right of pre-emption even among Hindus."

It seems clear from that decision that at any rate in the year 1871, the matter had reached the stage where the existence of the custom in question was admitted and recognized. All the reported cases however to which we have been referred have apparently omitted to take account of an unreported decision of this Court, which was the judgment put in evidence in the course of the present case as Ex. 7, to which I have already referred. That unreported judgment is one given by Trevor and Campbell, JJ. in S. A. No. 984 of 1866 (6), on appeal from a decision given by the Judge of Sylhet (dated 23rd January 1866) affirming a decree of the Munsif of Fenchuganj, dated 20th July 1865, in which Ramaprashad Sarma and others were appellants and Abdul Hakeem was the respondent. The judgment was as follows:

"In this case the question is whether the custom of pre-emption exists in the district of Sylhet. The Judge after a careful analysis of twenty-four cases finds as a fact that it does and the vakil of appellant is wholly unable to state any intelligible ground of special appeal. The appeal is dismissed with costs."

We are of opinion that this ancient decision of this Court accorded full judicial recognition to the existence of the right of pre-emption amongst the Hindus in the district of Sylhet; and nothing has been put before us in the course of the argument in this appeal which leads us to any other conclusion than that we ought to hold quite definitely that that custom has by now received such judicial recognition as enables us to say that it has obtained the force of law. The same question came before my learned brother and myself a short time ago and it seems to have been assumed in the course of the argument then put before us that the custom did in fact exist and was not a matter susceptible of argument. We are of opinion that it is desirable that the matter should be finally set at rest and that it should be understood once and for all that the custom in question has been recognized by this Court in such a way as to put the matter beyond controversy and that the stage has been reached where it is no longer necessary for the plaintiff to prove the existence of the custom by adducing evidence for that purpose. That matter has in fact in our opinion reached the stage contemplated by the dictum in the case of 35

4. Jameelah Khatoon v. Pagul Ram, (1864) 1 W R 250.
5. Akshoy Ram Shahajee v. Ram Kant Roy, (1871) 15 W R 223.
6. Ramprasad Sarma v. Abdul Hakim, Second Appeal No. 984 of 1866, decided on 2nd August 1866.

Cal. 575 (1) to which I have already alluded.

We, accordingly, hold as a matter of law that, in the district of Sylhet, Hindus have the same right of pre-emption under the provisions of Mahomedan law as Mahomedans themselves have in that district, and we express the view that hereafter the local Courts should take judiclal notice of that state of affairs. It follows that the decision of the learned Additional Subordinate Judge of Sylhet is correct and that this appeal must be dismissed. The appellants must pay the respondent the costs incurred by him in this Court.

Suhrawardy, J.—I agree. I wish to say a few words with reference to a decision to which I was a party and in which I may be taken as expressing a view different from what my learned brother has taken in the present case. In S. A. No. 1817 of 1926 (7), the Bench of which I was a member held that in a case where pre-emption was pleaded as a customary law in any part of Bengal and Assam it was for the party so pleading to prove that it was a part of the lex loci of the particular district. The question then too was raised with reference to some land in Moulvibazar within the district of Sylhet. The case on that occasion was not presented before us in the way in which it has now been done. Besides, the question of pre-emption was not of much importance in that case—the fact being that the plaintiff and the contesting defendant were cosharers with the vendor and had therefore equal right to claim pre-emption.

The decree in that case would be justified in any view of the matter. In the recent case, S. A. No. 1605 of 1928 (8), my learned brother and I took it as undisputed that in the district of Sylhet the law of pre-emption prevails amongst the Hindus also. It is desirable in the interests of all parties concerned that this question should be finally settled. It is most inconvenient that this question should be raised and decided upon evidence in every particular case which may lead to conflicting decisions in different cases. I therefore agree with my learned brother in holding that the authorities are in favour of the view that the Mahomedan law of pre-emption prevails in the district of Sylhet as a customary law even among the Hindus and that it should be so judicially recognized.

K.S. *Appeal dismissed.*

7. Giridhar Bhattacharjya v. Nayanchandra Deb, Second Appeal No. 1817 of 1926, decided on 28th May 1929 by Suhrawardy and Jack, JJ.
8. Ramjay Sarma v. Gopalkrishna Deb, Second Appeal No. 1605 of 1928, decided on 30th May 1930.

✻ A. I. R. 1935 Calcutta 20

MITTER AND EDGLEY, JJ.

Santi Kumar Pal and *another*—Plaintiffs—Appellants.

v.

Mukunda Lal Mondal and *others*—Respondents.

Appeal No. 71 of 1930, Decided on 30th July 1934.

✻ (a) Hindu Law—Widow — Surrender by widow in favour of next reversioner—Surrender to be effective there must be complete self-effacement of widow—Mere device to divide estate between reversioner and widow will not pass good title to reversioner.

Where a Hindu widow transfers for consideration by way of sale, the entire property of the husband to the next reversionary heir or to one of the reversionary heirs, the other reversionary not objecting and a major portion of the consideration passes to the widow, the transaction cannot be supported as having the same effect as a surrender. The idea of surrender by a widow in favour of the next reversioner is based on religious considerations. In order that the reversionary heir may acquire good title by surrender there must be self-effacement of the widow; in other words there must be something in the nature of civil death of widow, the extinction of her right in her deceased husband's estate, a circumstance which would happen if she were dead. It is in this view that the theory of surrender is supported under the Hindu law. The surrender must be bona fide surrender and not a device to divide the estate between the widow and the reversioner: 1921 *P C* 107; 1918 *P C* 196, *Foll.*; 40 *Cal* 721 (*F B*), *Expl.*

[P 22 C 2 ; P 23 C 1]

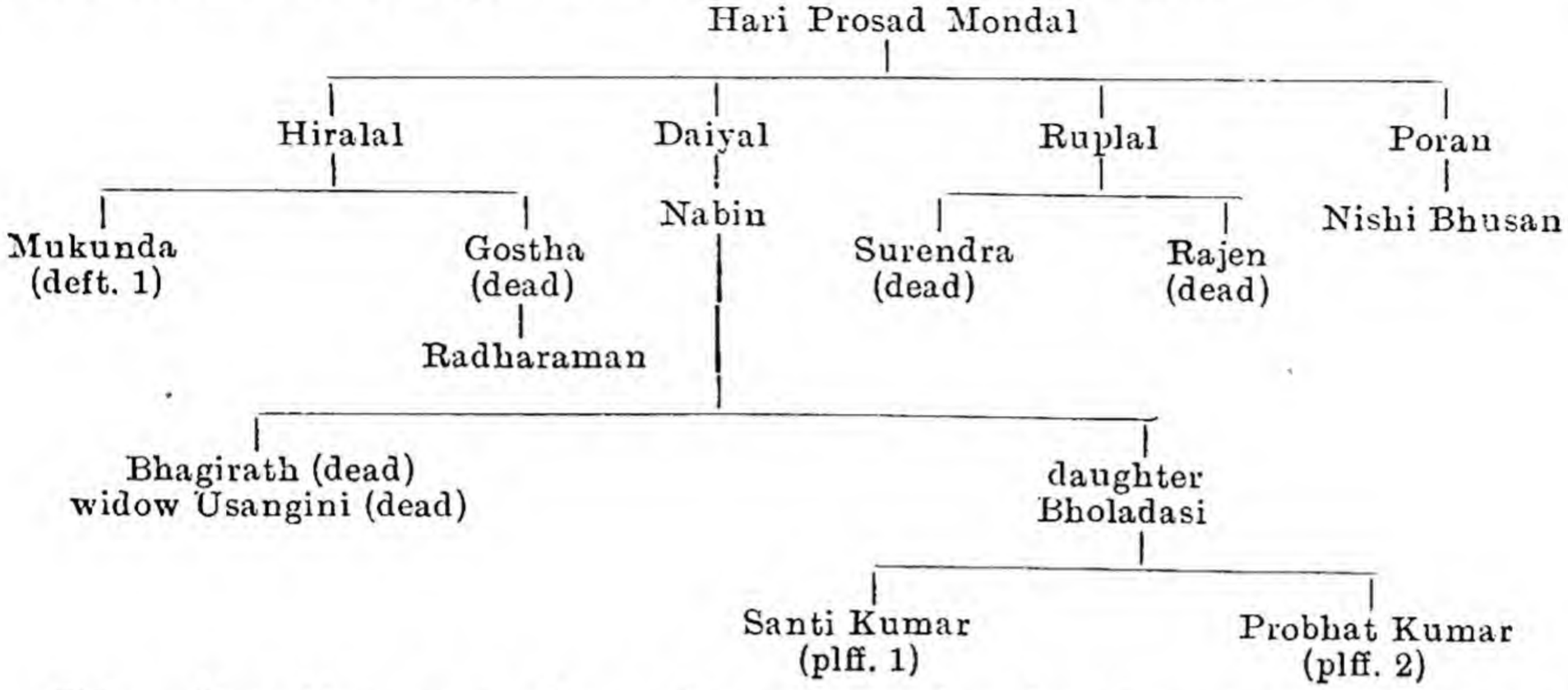
(b) Hindu Law — Alienation by widow in favour of reversioner for consideration—Part of consideration utilised for legal necessity—Alienation can be set aside by next reversioners, not unconditionally but on terms.

Where a widow transfers the estate of her deceased husband to the next reversioner for consideration and only a part of the consideration is utilized for legal necessity, the transaction can be set aside at the instance of the other reversioners not unconditionally but on terms, they being required to pay to the extent, of the consideration used for legal necessity: 29 *All* 331 *Foll.* [P 24 C 1]

Brojolal Chakravarty and *Karunamoy Ghose*—for Appellants.

Mukerji and *Hari Prasanna Mukerji*—for Respondents.

Mitter, J.—This is an appeal from a decree of the Officiating Subordinate Judge of Birbhum, dated 28th August 1929 by which he dismissed the suit of the plaintiffs to set aside an alienation by the widow of the last male owner Bhagirath. The plaintiffs claimed to be reversionary heirs of Bhagirath. The relationship of the plaintiffs with the last male owner Bhagirath is shown in the genealogical tree to be found in the judgment of the Subordinate Judge and which is printed at p. 67 of the first part of the paper-book. For the sake of convenience it is reproduced here with a slight variation and the genealogical tree as given at p. 57 is admitted by both parties. There is some dispute about the variation regarding Poran and Nishe Bhusan.



The alienation was by a document dated 18th Magh 1329 B. S. corresponding to 1st February 1923. The document is to be found at p. 11 of the paper book (Part II). This document purports on the face of it to be a deed of surrender in favour of defendant 1 Mukundalal Mondal who was said to be the sole reversionary heir to Bhagirath's estate at the time of the alienation. There has been some dispute as to whether Mukunda defendant 1 was the sole reversionary heir or there was another reversionary heir Nishi, the son of Poran, alive at the time of the alienation. Bhagirath died on 9th December 1921 leaving surviving him his widow Ushangini; and Ushangini died on the 25th Bashakh 1334 B. S. corresponding to 8th May 1927. The present plaintiffs are the sisters's sons of Bhagirath and the suit was commenced by them to set aside the alienation on 20th April 1928, a short time after the death of Ushangini. The transaction has been sought to be supported by defendant 1 on the ground that this was a surrender by Ushangini in favour of the sole reversionary heir. There was some question raised in the Court below that even if the deed could not be supported on the ground of surrender it could be supported on the ground that there was legal necessity for the transaction treating it as a deed of sale in favour of the sole reversionary heir or in favour of one of the reversionary heirs, the other reversionary heir Nishe Bhusan not objecting to the same. The Subordinate Judge has also considered this contention and has dismissed the plaintiff's suit. Hence the present appeal.

It has been contended by Mr. Brojolal Chakravarty that on a mere perusal of the document of 1st February 1923 it would appear clear that although on the face of it it purports to be a deed of surrender of a Hindu widow's estate in favour of the next reversionary heir it was in reality a transaction by way of sale, the widow taking the major portion of the consideration money of Rs. 900 odd in cash and paying Rs. 400 out of the consideration money to meet the debt of her deceased husband. In other words it was said that although it was described as a deed of surrender it was really a device between the limited owner and these reversionary heirs to divide the estate as between themselves to the detriment of the ultimate reversionary heir. It must be stated that Dr. Mukerji who has appeared for the respondents has conceded that he cannot support this document on the basis of its being a deed of surrender or relin-

quishment as it is understood under the Hindu law so as to be binding on the ultimate reversioner. He has however tried to support the judgment of the Subordinate Judge by contending that where a Hindu widow transfers even for consideration by way of sale, the entire property of her husband to the next reversionary heir or to one of the reversionary heirs the other reversionary not objecting it really has the same effect as a surrender; and he relies on a certain passage in the judgment of their Lordships of the Judicial Committee of the Privy Council in the case of 1918 P. C. 196 (1), in support of his contention. This case when carefully examined does not lend support to the contention of the learned advocate for the respondents. After stating the two heads under which alienation by the limited owners might fall their Lordships of the Judicial Committee of the Privy Council said in the passage which has been referred to at p. 81 of the report that, if the alienation be total, and the reversionary heirs be the nearest, it falls within the first division; that is within the division of its being surrender. But that passage has to be read along with what precedes in the same page. Dealing with the second head their Lordships remarked thus:

"Turning now to the second head namely, the power of alienation, which may be alienation to any one, whether heir or not, there is again authority of long standing. As a leading case may be taken, 8 M I A 529 (2) in a passage which need not be quoted at length. The purposes for which alienation is legitimate may be summarized as religious or charitable purposes, and those which are supposed to conduce to the spiritual welfare of the husband, or necessity. Now, necessity must be proved, and the mere recital in the deed of alienation is not sufficient proof: 10 I. C. 967 (3). An equitable modification has also been admitted in the case where the alienee has in good faith made proper inquiry and been led to believe that there was a case of true necessity. Thus far if the alience stands alone. But it may be fortified by the consent of reversionary heirs. The remaining question is what is the effect of such consent?"

This is the passage that precedes the passage on which Dr. Mukerji has relied for contending that if the alienation be in favour of such reversioner and be total it falls within the first head—surrender. It is to be remarked that after reviewing the previous authorities on the subject their Lordships summarized the conclusion thus:

"The result of the consideration of the decided cases may be summarized thus: (1) An alienation by a widow of her deceased husband's estate by her may be validated if it can be shown to be a surrender of her whole interest in the whole estate in favour of the nearest reversioner or reversioners at the time of the alienation. In such circumstances the question of necessity does not fall to be considered. *But the surrender must be bona fide surrender and not a device to divide the estate with the reversioner* (2) When the alienation of the whole or part of the estate is to be supported on the ground of necessity, then if such necessity is not proved aliunde and the alienee does not prove inquiry on his part and honest belief in the necessity, the consent of such reversioners as might fairly be expected to be interested to dispute the transaction will be held to afford a presumptive proof which, if not rebutted by contrary proof, will validate the transaction as a right and proper one. These propositions are substantially the same as those laid down by Jenkins, C. J., and Mookerjee, J., in 40 Cal. 721 (4). It follows that their Lordships cannot agree with a good deal of what was said in 31 Mad. 366 (5)."

It would appear from the sentence underlined (italicized) that in order to be effective as a deed of surrender it must be clearly shown that the surrender is a bona fide one and not merely an arrangement by the limited owner to divide the estate with the reversioner. Looking to the deed, it seems to us that this is precisely the case with reference to the transaction of 1st February 1923, namely that it seems to us that it is a device to divide the estate between Ushangini on the one hand and Mukundalal Mandal, defendant 1 on the other hand. Dr. Mukerji has next relied on a decision of the Full Bench of this Court in the case of 40 Cal. 721 (4). The Full Bench enunciated a number of propositions as laying down the doctrine of surrender and alienation by limited owners under the Hindu law. Those propositions are very lucidly summarized in the judgment of Asutosh Mukerjee, J., at pp. 781 and 782 of the report. The appellant seeks to bring his case within the purview of the fourth proposition laid down by the Full Bench. That proposition runs as follows:

1. Rangasami Gounden v. Nachiappa Gounden, 1918 P C 196=50 I C 498=46 I A 72=42 Mad 523 (P C).
2. Collector of Muslipatam v. Cavaly Vencata Narrainappah, (1859-61) 8 M I A 529=2 W R 61 (P C).
3. Banga Chandra Dhur Biswas v. Jagat Kishore, (1911) 10 I C 967.
4. Debi Prosad v. Gopal Bhagat, (1913) 40 Cal 721=19 I C 273 (F B).
5. Rangappa Naik v. Kamti Naik, (1908) 31 Mad 366=18 M L J 309.

"When a Hindu widow has alienated her entire interest in the estate inherited by her from her husband, with the consent of the whole body of persons entitled to succeed as immediate reversionary heirs, the transferee acquires a good title as against the actual reversionary heirs at the time of her death."

This proposition cannot be held to apply to cases where the transfer is to the sole reversionary heir or the entire body of reversionary heirs for the time being as the case may be, for this proposition contemplates a case where transfer is made to a stranger with the consent of the whole body of persons entitled to succeed as immediate reversionary heirs. If the contention of Dr. Mukerjee be accepted we would be laying down a very dangerous doctrine, and if the proposition is true the result would be that it would be possible for the immediate reversionary heir or heirs for the time being to come to an arrangement with the widow and purchase the property of the reversionary estate for consideration. The idea of surrender is based on different and religious considerations. In order that the reversionary heir may acquire good title by surrender as the authorities lay down, there must be self-effacement of the widow, in other words there must be something in the nature of civil death of the widow, the extinction of her right in her deceased husband's estate, a circumstance which would happen if she were dead. It is in this view that the theory of surrender is supported under the Hindu law.

The true limitations of that doctrine have also been laid down by their Lordships of the Judicial Committee in their decision in the subsequent case of 1921 P. C. 107 (6). That was a case of compromise after there was a dispute with reference to a will which had been executed by the last full owner. By that will the full owner, who died leaving behind him an infant son and a widow and four daughters, provided that on the death of the son without issue the daughters should succeed to the immovable property. The son died a few months later and the daughters took possession under the will. The son's next reversioner having sued the widow and the daughters to set aside the will the parties entered into a compromise on certain terms. The terms were that rights under the will were given up; that the widow took absolutely the moveable property to which in any case she would have succeeded being governed by the Mithila School; that the widow surrendered all rights of succession to the immovable property and the plaintiff who by the surrender became entitled as next reversioner transferred half of it to the daughters; and that the plaintiff and the daughters each gave a small portion of the land to the widow for her life. The plaintiff having died the persons who then became the next reversioners brought the present suit for a declaration that the compromise and the transfers in pursuance of it were inoperative. In this state of facts their Lordships of the Judicial Committee held that the compromise was a bona fide surrender of the whole estate and not a device to divide it with the next reversioner, the giving of small portions to the widow for maintenance being unobjectionable. The present case does not fall even within the limits of the rule of surrender as laid down in the case just cited. It is idle to say that there was any attempt to secure to her the maintenance that was required and it appears that the larger portion of the actual sale proceeds went to the widow. We are therefore of opinion that the transaction cannot be supported as a surrender.

The next matter for consideration is whether this transaction could be supported on the ground that it is alienation based on legal necessity. It appears from the recitals of the deed as also from the evidence that the sum of Rs. 400 which was the debt of the lady's husband and which Ushangini was liable to pay was not paid; and a sum of Rs. 400 out of Rs. 1500 really went to pay off the mortgage which was executed in favour of the creditor by Nabin and others, a debt which Bhagirath was liable to pay nnder the Hindu law. The Subordinate Judge also finds that a sum of Rs. 400 was paid for the purpose of meeting that debt. This finding of the Subordinate Judge has been taken exception to by the appellants and our attention has been drawn to the mortgage bond for the purpose of showing that

6. Sureshwar Misser v. Maheshrani Misrain, 1921 P C 107=57 I C 325=47 I A 233=48 Cal 100 (PC).

the mortgage bond had previously been paid. Necessarily the recital in the deed that Rs. 400 went to pay off the mortgage bond executed by Nabin is an untrue statement. Our attention has been drawn to the two entries on the back of the mortgage bond and it is contended that the entry in the middle showing a payment of Rs. 397 by purchase was an interpolation. We have examined the two endorsements and, having regard to the evidence given on behalf of the respondents that the two transactions were entered into at one and the same time and were written in the handwriting of Shib Kristo, it is very difficult to say that the entry showing a payment of Rs. 397 was a forgery. Shib Kristo could have given the best evidence on the question and it is somewhat surprising that he has not been examined at all although he is the first person who should have been examined on this question. We are satisfied that the entry in the document was not a forgery and we agree with the Subordinate Judge that the portion of the consideration money went to pay off the debt of Ushangini's husband's father. Consequently there was legal necessity for Rs. 400.

In these circumstances the true rule to follow is to set aside the transaction not unconditionally but on terms. The true rule to follow in a case of this kind has been laid down by their Lordships of the Judicial Committee in the case of 29 All. 331 (7). Following that rule the proper direction to make in this case, having regard to the view we have taken is to set aside the transaction evidenced by the deed of 1st February 1923. But this must be done on terms that the appellants do pay to the respondents a sum of Rs. 400 within two months of the arrival of the record in the lower Court. On this money being paid by the appellants to the respondents the possession of the property will be delivered to the plaintiffs. Plaintiff's suit is decreed in these terms. The appeal is allowed on the lines indicated in our judgment.

Each party must bear its own costs both in this Court as also in the Court below. If the sum of Rs. 400 be not paid within the time allowed the appeal will stand dismissed with costs.

Edgley, J.—I agree.

G.B. *Appeal partly allowed.*

7. Deputy Commissioner of Kheri v. Khanjan Singh, (1907) 29 All 331 = 34 I A 72 = 10 O C 117 (PC).

A. I. R. 1935 Calcutta 24

NASIM ALI, J.

Kamalakanta Debnath and *others* — Plaintiffs—Appellants.

v.

Tamijaddin and *others*—Defendants—Respondents.

Second Appeal No. 1743 of 1931, Decided on 2nd May 1934, from appellate decree of Second Addl. Sub-Judge, Tippera, D/- 11th December 1930.

(a) Civil P. C. (1908), O. 41, Rr. 4 and 33—Appeal by one defendant alone — If decree proceeds on ground common to all defendants, decree may be varied in favour of non-appealing defendants also.

Reading Rr. 4 and 33, O. 41 together, there can be no doubt that one of the defendants can file an appeal without impleading the other defendants as respondents, if the decree appealed from proceeds on a ground common to all of them and that the appellate Court may therefore exercise the power of varying the decree in favour of the non-appealing defendants, although they have not been made parties to the appeal : 18 *C L J* 621, *Rel on.* ; 1919 *Cal* 127, *Dist.* ; 1926 *Cal* 1042 ; 1929 *All* 243, *Ref.* [P 25 C 2]

(b) Civil P. C. (1908), O. 41, R. 33—Decree in favour of party not heard can be passed—But not against party who is no party to appeal.

Order 41, R. 33, authorizes the appellate Court to pass a decree in favour of a party who has not been heard. It does not authorize the Court to pass a decree against a person who is not a party to the appeal, or in other words powers under R. 33 cannot be exercised to the prejudice of a person who is not given a hearing. [P 26 C 1]

Nripendrachandra Das — for Appellants.

Upendrakumar Ray—for Respondents.

Judgment.—This is an appeal by the plaintiffs in a suit for declaration of title and for khas possession of certain lands. Plaintiffs' case is that the lands in suit appertained to the jote of Panchananda Debnath and that they purchased the same at an auction sale in execution of a decree against his heirs. Plaintiffs further alleged that they got symbolical possession through Court on 20th September 1921, but were prevented from taking actual possession by the defendants. Defendants 1 to 5 filed a joint written statement contending inter alia that the land in suit was not the exclusive property of Panchananda Debnath, but that he had only eight annas share therein. The trial Court held that the

land in suit was the exclusive property of Panchananda Debnath and, in that view, decreed the plaintiffs' suit in full. On appeal by defendant 4, in which the other defendants were not made parties, the lower appellate Court held that Panchananda Debnath had only eight annas share in the land in suit and, in that view, declared the plaintiffs' title in respect of eight annas share of the land in suit and ordered delivery of joint possession of the said eight annas share with all the defendants. Plaintiffs have preferred the present appeal against this decision of the lower appellate Court.

The first point urged in support of the appeal is that the lower appellate Court erred in law in varying the decree of the trial Court in favour of the other defendants also, who did not appeal and who were not even made respondents in the appeal before the lower appellate Court. O. 41, R. 4, Civil P. C., provides that, where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal from the whole decree, and, thereupon, the appellate Court may reverse or vary the decree in favour of all the plaintiffs or the defendants, as the case may be. From this provision of law it is clear that anyone of the defendants can appeal from the whole decree, if the decree appealed from proceeds on any ground common to all the defendants, and thereupon the appellate Court can vary the decree in favour of all the defendants. It is not however clear from R. 4 quoted above whether the other defendants or plaintiffs, who have not appealed should be made respondents in the appeal. If however R. 4 be read along with R. 33, O. 41, the position appears to be that on an appeal by one of the defendants the appellate Court can pass such decree as the case may require and this power may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal. It further appears from R. 33 that the exercise of this power by the appellate Court is not confined only to the cases of respondents, who are parties to the appeal, but the power can be exercised in favour of persons who are parties to the suit. The learned advocate for the appellants contends that the word "parties" in R. 33 means parties to the appeal. I am however unable to accept this contention, inasmuch as the rule speaks of respondents or parties and, if parties mean parties to the appeal then the word "respondents" would be redundant. It seems to me therefore that a decree may be varied in favour of a defendant, who has not appealed and has not been made a party to the appeal but who was a party to the suit. Reading therefore Rr. 4 and 33, O. 41 together there can be no doubt that one of the defendants can file an appeal without impleading the other defendants as respondents, if the decree appealed from proceeds on a ground common to all of them and that the appeliate Court may thereupon exercise the power of varying the decree in favour of the non-appealing defendants, although they have not been made parties to the appeal. This point was considered by this Court in the case of 18 C L J 621 (1) at p. 623. Mookerjee, J., in that case observed as follows :

"Rule 4, O. 41 of the Code, in so far as it is applicable to the case before us, provides that where there is more defendant than one in a suit and the decree appealed from proceeds on any ground common to all the defendants, any one of the defendants may appeal from the whole decree, and thereupon the appellate Court may reverse or vary the decree in favour of all the defendants. In the case before us, there are more defendants than one in the suit. The decree of the Court of first instance proceeds on a ground common to all the defendants. The Court of first instance held in the first place that the lambardar defendant was not competent to grant a lease of the land to the other defendants ; and in the second place, that if the lambardar had authority to grant such a lease, that authority had been validly terminated. These were grounds which affected all the defendants in an equal degree. It was consequently open to the first defendant to prefer an appeal against the whole decree and to obtain thereupon a reversal of that decree in favour and for the benefit of all the defendants. This course was open to the Court below, notwithstanding the fact that the other defendants had not been joined as parties respondents to the appeal."

The learned advocate for the appellants placed much reliance upon the decision in the case of 1919 Cal. 127 (2). This case however was considered in a later case by this Court in the case of

1. Dasarath Patel v. Brojo Mohan, (1913) 18 C L J 621=22 I C 90.
2. Jogesh Chandra v. Sarada Kumar, 1919 Cal 127=49 Cal 834.

1926 Cal. 1042 (3). Suhrawardy, J., with reference to 1919 Cal. 127 (2), observed as follows :

"The first case is not decided on the construction of O. 41, R. 33 and is based upon its own particular facts."

The learned Judge, while discussing the meaning of the words "respondents" or "parties" in R. 33, O. 41, made the following observations :

"By the use of the expression "respondents or parties" in the section I understand that the appellate Court may pass an order in favour of the respondents who have not appealed and it may similarly decide any question in favour of a party, by which I understand a party to the suit and who is not a respondent in the appeal."

Again in the case of 1929 All. 243 (4), the learned Judges of the Allahabad High Court observed as follows :

"Rule 33 states that the appellate Court shall have power to pass any decree which ought to have been passed, and this is wide enough to allow a decree against a party to the suit who is not a party to the appeal."

This view apparently does not lead to any injustice or cause any prejudice to any party. O. 41, R. 33, authorizes the appellate Court to pass a decree in favour of a party who has not been heard. It does not authorize the Court to pass a a decree against a person who is not a party to the appeal, or in other words powers under R. 33 cannot be exercised to the prejudice of a person who is not given a hearing. A person, who has been heard in appeal, cannot object to a decree being passed in favour of a person merely because that person is not a party to the appeal and has not been heard. The decree passed by the lower appellate Court cannot therefore in my opinion be successfully challenged on the ground stated above, as it is admitted in this case that the decree of the trial Court proceeded on a ground common to all the defendants.

The next point urged, in support of the appeal, is that the lower appellate Court should not have passed a decree for joint possession with defendants other than defendants 1 and 4. There is no substance in this contention, because the plaintiffs have succeeded in proving their title only to an undivided eight annas share of the property. They are to get joint possession with all the defendants, who according to their own case are in actual possession of the lands. The last point urged by the learned advocate in support of the appeal is that the lower appellate Court, in arriving at the find, ing on the question of plaintiffs' title did not give proper effect to the presumption arising out of the Record-of-Rights. It however appears from the judgment of the learned Subordinate Judge that he raised this presumption in favour of the plaintiffs. But, in view of the evidence in the case, he was of opinion that that presumption was rebutted. There is therefore no substance in this contention. The result therefore is that this appeal is dismissed with costs.

K.S. *Appeal dismissed.*

3. Bhut Nath Deb v. Sashimukhi Brahmani, 1926 Cal 1042=96 I C 474.
4. Madan Lal v. Gajendrapal Singh, 1929 All 243=116 I C 436=51 All 575.

A. I. R. 1935 Calcutta 26

GUHA AND MCNAIR, JJ.

Kunjalal Ghose—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 124 of 1934, Decided on 19th June 1934.

Evidence Act (1872), S. 32 (3)—Charge under Penal Code, Ss. 420 and 120-B—Insurance Company induced to accept proposal by securing false medical report—Statement by doctor though may be inadmissible under S. 32 (3) would be admissible under S. 10.

Where a person is charged under Ss. 420 and 120-B for committing fraud on the Insurance Company by inducing the said company to accept the proposal for insurance on the life of one *M* by securing a false medical report about the said *M*, the confessional statement of the doctor that his report was made out according to the instructions of the accused though may not be admissible, in evidence under S. 32 (3), would be admissible under S. 10 of the Act, seeing that other evidence in the case disclosed reasonable grounds for believing that there was a conspiracy, and that the doctor was a conspirator. [P 27 C 2]

S. C. Taluqdar and *Ajit K. Dutt*—for Petitioner.

Order.—The petitioner was convicted by the Deputy Magistrate at Chandpur in the District of Tippera, under Section 420/120-B and S. 418, Penal Code, and sentenced to rigorous imprisonment for 18 months and to a fine of Rs. 500 in default to further rigorous imprisonment for six months, under S. 420/120-B. There was a sentence of rigorous imprisonment for 18 months also, under Section 418 ; but the sentence so passed was to run concurrently with the other sentence passed under S. 420/120-B, Penal Code. The aforesaid conviction and sentence by the learned Magistrate

were affirmed on appeal by the learned Sessions Judge of Dacca, to whose Court the appeal was transferred for hearing and disposal.

The charge against the petitioner was fraud committed on the Sun Life Assurance Company of Canada, by inducing the said company to accept the proposal for insurance on the life of one Monoranjan Mazumdar, for the sum of Rs. 15,000, securing a false medical report from Dr. Birendra Chandra Mazumdar of Dacca, about the said Monoranjan Mazumdar and by suppressing and misrepresenting facts about him and his family history, to the said company with the knowledge that the accused was thereby likely to cause wrongful loss to the said company whose interest in the transaction to which the cheating relates, the accused as an agent of the company was bound to protect.

In view of the terms of the rule issued by this Court the nature of the evidence on the record had to be considered by us, for the purpose of determining whether the findings arrived at by the Court below were sustainable, and the conviction of the petitioner could be upheld.

One of the points raised before us related to the admissibility of a confessional statement made by Dr. Birendra Chandra Mazumdar, and it is necessary, in this connexion, to refer briefly to the materials on the record, bearing upon the question of admissibility of the statement, which proved the guilt of the petitioner in the matter of his securing a false medical report : a report which was made out by the doctor, according to the instructions of the petitioner. It appears from the evidence that Mr. Mitchell (District Manager of the Sun Life Assurance Company), Babu Subarna Bose (Circle Inspector of Police), and Dr. Birendra Chandra Mazumdar went, during the investigation of the case, to Dr. Mazumdar's chamber at Dacca ; a note book of the doctor was seized there while there Dr. Mazumdar told Mr. Mitchell that the petitioner had supplied necessary materials for his medical report. After this, Dr. Birendra Chandra Mazumdar was arrested and produced before the Sub-divisional Officer of Dacca. It was contended before us, on the authority of a decision of the Bombay High Court in the case of 25 Bom. L. R. 248 (1), that the confessional statement of the doctor that his report was made out according to the instructions of the petitioner was not admissible inasmuch as its maker had already rendered himself liable to criminal prosecution, at the time when it was made. Conceding in favour of the petitioner that the confession of the doctor, who died very soon after the statement was made by him, is not admissible in evidence under Section 32 (3), Evidence Act, there can be no doubt that the statement was admissible under S. 10 of the Act, seeing that other evidence in the case disclosed reasonable grounds for believing that there was a conspiracy, and that the doctor was a conspirator. General evidence of the existence of a conspiracy of which the doctor was a member, having been given, affording reasonable ground to believe that two or more persons had conspired to commit an offence, evidence as to overt acts of things said or done by any conspirator in reference to a common design, was admissible under the law ; and the confessional statement of Dr. Birendra Chandra Mazumdar was therefore admissible under the law, as evidence of the guilt of the petitioner. On that evidence, taking the same along with other evidence in the case, the Courts below have come to the definite conclusion that a false medical certificate was secured by the petitioner ; the doctor granting the certificate, having done so, under instructions from the petitioner.

The questions requiring consideration next are whether the petitioner suppressed facts and made false representations to the insurance company as an agent, in order to have the insurance effected ; whether the insured Monoranjan Mazumdar was a person known to the petitioner to be unfit to be insured. The evidence on this part of the case has been discussed by the Courts below, at length, and in detail. The argument advanced before us in support of this rule was that the report submitted by the petitioner as a canvasser and an agent was a bona fide one, on the belief that the life of the insured was that of a healthy man ; and that inasmuch as the family history of the insured was not required to be given, the fact that

1. Emperor v. Keshav, (1913) 25 Bom L R 248.

some of his relations died of tuberculosis was of no consequence. On this part of the case comment was made on the report furnished by the petitioner to the insurance company, and on the evidence of the witness Sures Chandra Chanda examined on the side of the prosecution. The evidence of this witness, who spoke to his having found the petitioner in the joint family dwelling house of the insured Monoranjan Mazumdar, on five or six occasions talking like a friend has to be taken as a whole, and that evidence along with the report submitted by the petitioner led to the conclusion arrived at by the Courts below that the petitioner was on intimate terms with Monoranjan's family. The recommendation contained in the report was stated to be based on personal inquiry made by the petitioner; and it was further specifically mentioned in the report that the life of Monoranjan was an average life, that the petitioner never heard of Monoranjan's ever being ill. Monoranjan was recommended unqualifiedly by the petitioner for insurance at ordinary rates. On the materials on the record, which have been discussed in detail, by the Courts below, the conclusion was arrived at that the petitioner deliberately misused his knowledge regarding Monoranjan's family history, and his own state of health. The finding on evidence in the case, further was that the petitioner conspired with Monoranjan and Dr. Birendra Chandra Mazumdar, in making misrepresentations to the Sun Life Assurance Company.

On the definite findings arrived at on evidence in the case, which we see no reason to differ from, the conviction of the petitioner must be upheld. The sentence passed on the petitioner is not, in our judgment, severe, regard being had to the nature of the offence committed by him.

The conviction of the petitioner and the sentence passed on him are affirmed. The rule is discharged. The petitioner must surrender to his bail bond, and serve out the remainder of the sentence passed on him.

R.K. *Rule discharged.*

A. I. R. 1935 Calcutta 28

M. C. GHOSE AND MCNAIR, JJ.

Mokam Haldar—Plaintiff—Appellant.

v.

Naimaddi Shaikh— Defendant—Respondent.

Second Appeal No. 657 of 1932, Decided on 11th April 1934, against decree of Addl. Sub-Judge, Khulna, D/- 23rd July 1931.

(a) Civil P. C. (1908), O. 26, R. 10—Trial Court accepting Commissioner's report and decreeing suit—Appellate Court accepting facts of Commissioner but disagreeing with his conclusion and setting aside decree—It is entitled to do so—Appeal, Appellate Court.

The trial Court accepted the view of the Commissioner and decreed the suit. The appellate Court accepted the map prepared by the Commissioner and the facts stated by him but disagreed with his conclusion and set aside the decree:

Held: he was entitled to do so. [P 29 C 1]

(b) Land Tenure—Patta — Construction—Land demised stated to be three bighas in Patta—Held lessee is not entitled to 26½ bighas on strength of this patta.

Where the area of the land demised was stated as measuring by guess three bighas:

Held: the lessee was not entitled on the strength of this patta to 26½ bighas of the land on the ground that such area is comprised within the boundaries of his patta: 41 *Cal* 493 (*P C*) *Dist.* [P 29 C 1,2]

Risheendranath Sarkar and *Farhat Ali*—for Appellant.

Atulchandra Gupta and *Nirodebandhu Ray*—for Respondent.

M. C. Ghose, J.—This is an appeal by the plaintiff in a suit for declaration of title to certain lands and recovery of possession. The lands in suit comprised three cadastral survey plots Nos. 1049, 1116 and 1117. These plots together make up an area of 26½ bighas. The plaintiff claimed these lands on the strength of a patta obtained from the patnidar, Annadaprasad Mukherji, in 1326. In that patta the area of the land demised to the plaintiff was stated as measuring by guess three bighas. A local investigation was made by a commissioner and he submitted a map and a report. The commissioner reported that in his view the land in dispute was comprised within the boundaries of the plaintiff's patta. The trial Court accepted that view and decreed the suit. In appeal by the defendants the learned Subordinate Judge did not accept the conclusion of the commissioner that the lands in suit are identical with the lands demised to the plaintiff by the patta of 1326. On going through the report of

the commissioner, the learned Subordinate Judge came to the conclusion that the boundaries on the north and west coincided with the boundaries in the plaintiff's patta, but that the boundaries on the south and the east were not identical. In this view, the learned Subordinate Judge held that the plaintiff would be entitled to an area of land measuring three bighas beginning with the boundaries on the north and west.

In appeal, it is urged that the procedure adopted by the learned Subordinate Judge was wrong, that he had no authority to set aside the finding of the commissioner and to adopt only a part of his report. The learned advocate has quoted the case in 1917 Cal 573 (1), decided in 1916 by Sir Lancelot Sanderson and Sir Asutosh Mookerjee. In that case the first Court accepted the commissioner's report and decreed the suit. The Court of appeal found the report to be unsatisfactory and unreliable and dismissed the suit. The High Court, in the circumstances of that case, considered that the case should go back to the first Court for a fresh local investigation. We are of opinion that in this case the learned Subordinate Judge did not exceed the proper limits in criticising the work of the commissioner. He accepted the map prepared by the Commissioner as correct. He accepted facts stated by the commissioner. He only disagreed with the conclusion of the commissioner. This, in our opinion, he was entitled to do.

It has been strenuously urged that the learned Subordinate Judge misdirected himself in holding the view that the plaintiff was entitled to only three bighas of land as stated in his patta. It is urged that the plaintiff obtained settlement by his patta of 1326 of jungli lands and that the area was put by guess and not by measurement and that, in the circumstances, the plaintiff was entitled to all the lands, which were found within the boundaries as stated in his patta. In support of this view, the case of 41 Cal 493 (2) decided by their Lordships of the Judicial Committee in 1913, has been quoted. In that case, the landlord sued for rent on the basis of a patta when the rent was calculated on the basis of an area of 400 bighas of land. The defendants pleaded that the area was less than 400 bighas and claimed a proportionate abatement of rent. It was found that the defendants in a previous suit had got reduction on the basis of inferior quality of coal but not on any representation or complaint that there were not 400 bighas of land within the boundaries specified in the schedule to the kabuliyat. In that case, the first Court found that the area in the possession of the defendants was 346 bighas. In appeal, the High Court found that the area found in the defendant's possession was 275 bighas. Their Lordships of the Judicial Committee held that the defendants were bound to pay rent for the whole of the land within the boundaries, although it had been arrived at on the basis of 400 bighas in area. In the present case, the area obtained by the plaintiff by his patta was three bighas of land at a rent of Re. 1 per bigha. In our view, the learned Subordinate Judge was not wrong in holding that, on the strength of this patta, the plaintiff was not entitled to dispossess the defendants from 26½ bighas of land. In our opinion, the decree of the Court of appeal below is correct. This appeal is dismissed with costs.

McNair, J.—I agree.

K.S. *Appeal dismissed.*

1. Tirthabasi Singha v. Bepin Krishna, 1917 Cal 573=34 I C 30.
2. Durga Prasad Singh v. Rajendra Narayan, (1913) 41 Cal 493=21 I C 750=40 I A 223 (P C).

A. I. R. 1935 Calcutta 29

NASIM ALI AND KHUNDKAR, JJ.

Sarala Dassi—Petitioner.

v.

President, Calcutta Improvement Tribunal—Opposite Party.

Civil Rule No. 704 of 1934, Decided on 27th July 1934, from order of Court of Calcutta Improvement Tribunal, D/- 7th May 1934.

(a) Land Acquisition Act (1894), S. 32—Compensation money can be invested in purchase of lands presumably of same value and income as lands acquired—Interest of person for whom money is held in trust must be considered.

The President has jurisdiction under S. 32 to reinvest the money in the purchase of other lands and in this matter he acts as a Judge and has got to exercise his function in a judicial manner. He is to exercise his discretion in making the investments in the interest of persons for whom the money is held in trust. If lands are to be purchased he should invest money in

purchasing the lands presumably of the same value and income as the lands acquired.

[P 30 C 1, 2]

(b) Interpretation of Statutes — Judge should apply law to all cases which appear to be comprehended within the express sense of law or within the consequences thereof.

It is the duty of a law-giver to foresee only the most natural and ordinary events, and to form his dispositions in such a manner as that, without entering into the detail of singular cases, he may establish rules common to them all. And it is the duty of the Judges to apply the laws not only to what appears to be regulated by their express dispositions, but to all the cases to which a just application of them may be made, and which appear to be comprehended either within the express sense of the law or within the consequences that may be gathered from it: 9 *W. R.* 402. *Foll.* [P 30 C 2; P 31 C 1]

Satindra Nath Mukherjee and *Satish Chandra Mukherjee*—for Petitioners.

Order.—The facts which give rise to this Rule are as follows: Premises No. 115-1-1 Cornwallis Street and 7 Paul Lane in which the petitioner had a Hindu widow's estate were acquired by the Calcutta Improvement Trust. Under S. 32 (b), Land Acquisition Act, the compensation money, namely Rupees 42,515-11-5, was invested in G. P. Notes in 1914. Since then the G. P. Notes are being held in deposit by the Calcutta Improvement Tribunal and the petitioner had been receiving the interest periodically accruing thereon. On 2nd March 1934 a notice was issued by the President, Calcutta Improvement Trust, upon the petitioner calling upon her to show cause why the said G. P. Notes should not be applied in whole or in part in the purchase of lands under the provisions of S. 32, Land Acquisition Act. The petitioner thereupon appeared before the learned President and prayed that the G. P. Notes in question might continue to remain in deposit as before on certain grounds. The learned President by his order dated 7th May 1934 rejected her prayer. This Rule is directed against the said order of the President. It appears from the order of the learned President that he is of opinion that under the provisions of S. 32, Land Acquisition Act, as suitable properties are now available, he is bound to change the investment and apply the compensation money in the purchase of lands. It cannot be disputed that the learned President has jurisdiction under S. 32 to reinvest the money in the purchase of other lands and that in this matter he acts as a Judge and has got to exercise his function in a judicial manner. The statute does not say that the money is to be reinvested in the purchase of land within any particular time. Where the public officers are empowered to do certain things for a third person, the law requires that it shall be done when the interest of that person calls for the exercise of that power.

In the case of Civil Revn. No. 1445 of 1930 (1), it has been pointed out that under S. 32 of the Act the President is to exercise his discretion in making the investments in the interest of persons for whom the money is held in trust. It was further pointed out in that case that the President should invest money in purchasing the lands presumably of the same value and income as the lands acquired. The President while exercising his judicial function should therefore consider whether the reinvestment is expedient in view of the allegations of the petitioner. In a matter like this the primary consideration for the Court is the interest of the person for whose benefit the legislature has given him the power. The learned President appears to have made the order in question on the supposition that he is bound to reinvest since suitable lands are now available. It is not exactly clear what is exactly meant by the words "suitable lands." It is not possible for us to find out from his order whether the lands which are available now would bring the same income as the lands acquired. Again it is not clear from the materials before us how the learned President has come to the conclusion that suitable properties are now available. It is true that the Land Acquisition Act does not lay down any procedure which is to be followed in matters like this. But as observed by Domat it is a well known passage which is quoted with approval by Sir Barnes Peacock, C. J. in his judgment in the case of 9 W. R. 402 (2) at p. 406:

"Since laws are general rules, they cannot regulate the time to come so as to make express provision against all inconveniences, which are infinite in number, and so that either dispositions shall express all the cases that may possibly happen. It is the duty of a law-giver to foresee

1. Nawab Bahadur of Murshidabad v. Kumar Arun Chandra Singa, Civil Revn. No. 1445 of 1930.
2. Hurro Chunder Roy Chowdhury v. Shoorodhone Debei, (1868) 9 W R 402=Beng L R Sup Vol 985.

only the most natural and ordinary events, and to form his dispositions in such a manner as that, without entering into the detail of singular cases, he may establish rules common to them all and next, it is the duty of the Judges to apply the laws not only to what appears to be regulated by their express dispositions, but to all the cases to which a just application of them may be made, and which appear to be comprehended either within the express sense of the law or within the consequences that may be gathered from it."

The learned President in our opinion therefore should hear the petitioner before he decides whether it is desirable or advantageous that the money which has remained invested in G. P. Notes since 1914 without any objection from anybody should now be reinvested in view of the facts stated in the petition of the petitioner before him. The matter does not appear to have been properly dealt with by the learned President. We accordingly make the Rule absolute, set aside the order of the learned President and direct that the petition filed by the petitioner be reheard according to law in the light of the observations made above.

K.S. *Rule made absolute.*

A. I. R. 1935 Calcutta 31

GUHA AND NASIM ALI, JJ.

Kasimuddin and *others*—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 733 of 1933, Decided on 25th January 1934, from order of Asst. Sess. Judge, Dinajpur.

(a) Criminal P. C. (1898), S. 301—Jury adding to their verdict finding of fact—This by itself does not make verdict bad in law—It is enough if it is complete and exhaustive.

There is no particular form in which the jury are to deliver their verdict. Consequently there is no legal bar in the way of the jury to return their verdict in any way they think fit, provided it is complete and exhaustive as to facts in issue which go to make up the charges. The procedure with regard to the delivery of the verdict by the jury is not bad in law, merely because the jury add to their verdict their finding of the facts on which the verdict is based. [P 31 C 2; P 32 C 1]

(b) Criminal P. C. (1898), S. 298—Summing up of evidence—Heads of charge should be recorded—Mere omissions or misdirections are not sufficient to have verdict set aside.

The law only requires the heads of the charge to be recorded. The evident object of the legislature is to have a written record of the summing up of the evidence and the laying down of the law by the Judge to the jury in order to enable the Court of appeal to decide whether the Judge has properly marshalled the facts under distinct and separate heads, while charging the jury for heir substantial help and guidance in arriving at the conclusions on the facts in issue. In order to justify the appellate Court to set aside the verdict of the jury, the finding that there are certain omissions or non-directions is not enough. The Court of appeal must be satisfied on a perusal of the charge and the material evidence in the case that the omissions are so important that it may be reasonably said that they have led to an erroneous verdict [P 32 C 1]

(c) Criminal P. C. (1898), S. 298—Evidence so weak as to make guilt of accused doubtful—Omission to direct jury to give benefit of doubt to accused may be misdirection prejudicing accused.

Where the Judge thinks that the evidence is so weak that there are very great doubts as to the guilt of the accused, the omission to direct the jury to give the accused the benefit of doubt may be a misdirection which may be said to have prejudiced the accused. [P 32 C 2]

Nares Chandra Sen Gupta and *Bamaprasanna Sen Gupta*—for Appellants.

Khondkar and *Arabindhu Lahiri*—for the Crown.

Judgment.—The three appellants before us have been convicted by the Assistant Sessions Judge of Dinajpur of the offences under Ss. 366 and 147, I. P. C., on the unanimous verdict of the jury and sentenced to undergo rigorous imprisonment for five years under S. 366 and two years under S. 147, the sentences to run concurrently. The case for the prosecution is that on 25th April 1933 the appellants entered the hut of a young widow Khadija, caught hold of her person, dragged her out of the hut, began to carry her away forcibly whereupon she began to scream, that on hearing her cries P. Ws. 2, 3, 4 and 5 came out and rescued her, after she was taken about two rashis from her house. The defence of the appellants is that they knew nothing of this occurrence, that the girl was married to the appellant Kasimuddin on 24th April 1933 and that on 26th April 1933, the prosecution witnesses assaulted Kasimuddin and drove him away.

By S. 418 (1), Criminal P. C., an appeal to this Court against the conviction on a trial with the aid of a jury lies on a matter of law only. The first error of law on which the appellants rely is that the procedure with regard to the delivery of the verdict by the jury is bad in law inasmuch as the jury were not justified in law in adding to their verdict their finding of the facts on which the verdict is based. This contention is not supported either by any provision of law or by any precedent. The statute law in this country has not laid down any

particular form in which the jury are to deliver their verdict. Consequently there is no legal bar in the way of the jury to return their verdict in any way they think fit provided it is complete and exhaustive as to facts in issue which go to make up the charges. There is therefore no substance in this contention.

The second error of law which is urged in support of the appeal is that the heads of the re-charge on which the jury brought in their verdict of guilty under S. 147, I. P. C., were not recorded by the Judge as required by the proviso to sub-S. 5, S. 367 of the Code. It is clear however from the record that the fresh charge was the same as recorded in pp. 4 and 5 of the original charge. We are therefore unable to give effect to this contention. The third ground urged in support of the appeal is that on account of defective summing up of the evidence in the case the jury have been misled and an erroneous verdict has been returned by them. It may be pointed out here that the law only requires the heads of the charge to be recorded. The evident object of the legislature is to have a written record of the summing up of the evidence and the laying down of the law by the Judge to the jury in order to enable the Court of appeal to decide whether the Judge has properly marshalled the facts under distinct and separate heads while charging the jury for their substantial help and guidance in arriving at the conclusions on the facts in issue. In order to justify the appellate Court to set aside the verdict of the jury the finding that there are certain omissions or non-directions is not enough. The Court of appeal must be satisfied on a perusal of the charge and the material evidence in the case that the omissions are so important that it may be reasonably said that they have led to an erroneous verdict.

The learned advocate appearing on behalf of the appellants has drawn our attention to the omissions of the Judge: (a) to charge the jury with regard to the question of the benefit of the doubt; (b) to draw the attention of the jury to the absence of any explanation in the prosecution evidence as regards the injuries on Kasimuddin and Quasimuddin; (c) to point out to the jury that the explanation about these injuries in the prosecution evidence before the Sessions Court was not given in the early stages of the case ; (d) to place before the jury the terms and conditions in the marriage contract which make the story of abduction improbable and (e) to state to the jury that the taking of the copy of the entries of marriage-register relating to the marriage by the complainant's party shortly after the registration of the marriage makes the defence case about marriage highly probable. We have examined the heads of the charge as recorded by the Judge in this case as well as the material portions of the evidence in the case bearing upon the omissions or nondirections stated above to satisfy ourselves whether there are really any omissions at all and if so whether the omissions are so important as to have misled the jury to an erroneous verdict. We are however not satisfied that sufficient grounds have been made out for our interference with the verdict. The Judge fully explained to the jury the meaning of the words "reasonable doubt" and told the jury that the burden of proving the guilt of the accused beyond reasonable doubt was entirely on the prosecution. In this connexion the following observations of the Madras High Court in the case of 4 Cr L J 502 (1) are pertinent :

"In this case the charge to the jury taken as a whole is very full and fair, but it is urged that the omission of the Sessions Judge to instruct the jury that if they entertain reasonable doubt as to the guilt of any one of the accused, the jury should give him the benefit of doubt and acquit him, amounts to a mis-direction in law. A direction in these terms is certainly a usual and most proper direction and it ought as a matter of practice to be given in every case; but we are not prepared to hold that the omission to give it must in every case constitute a misdirection of such a character as to render a conviction invalid."

Where however the Judge thinks that the evidence is so weak that there are very great doubts as to the guilt of the accused the omission to direct the jury to give the accused the benefit of doubt may be a misdirection which may be said to have prejudiced the accused. The Judge's opinion on the evidence in this case and the summing up of the evidence and the law as recorded in the charge in this case do not show that the appellants have been in any way prejudiced. As regards the non-directions relating

1. Para Thandan v. Para Senna Moonji, (1906) 4 Cr L J 502.

to the explanation of the injuries on Kaimuddin and Quasimuddin, it appears that the evidence before the Sessions Court discloses the explanation and that the Judge pointed out to the jury that the prosecution witnesses in their statements before Mr. Rahaman did not mention any lathies. The omission to place before the jury the terms and conditions of the marriage contract could not have misled the jury in their finding on the material issues inasmuch as the jury disbelieved the defence case about marriage in spite of the oral evidence in support of the marriage and the registration of the marriage by the Kazi. Lastly the non-direction with regard to the taking of the copy of the entries of the Marriage Register kept by the Marriage Registrar is not in our opinion such an important omission as to have led to an erroneous verdict on the question of marriage inasmuch as its bearing therefrom is very remote in view of the events that have happened in this case.

The result therefore is that all the grounds urged in support of this appeal fail, and we are not satisfied that there are sufficient grounds in law to set aside the verdict of the jury. The sentences passed on the appellants however appear to us to be severe in view of the facts and circumstances of the case. In our opinion the ends of justice in this case will be adequately met if the appellants be sentenced to one year's rigorous imprisonment under S. 366, and to one year's rigorous imprisonment under S. 147, the sentences being directed to run concurrently. We accordingly affirm the conviction of the appellants under Ss. 366 and 147, I.P.C., but set aside the sentences passed on them and in lieu thereof we sentence each of them to undergo rigorous imprisonment for one year under S. 366 and for one year under S. 147, the sentences to run concurrently. Subject to the modification in the sentences as indicated above the appeal is dismissed. The appellants must surrender to their bail and serve out the remaining terms of their imprisonment.

K.S. *Conviction affirmed, Sentence modified.*

A. I. R. 1935 Calcutta 33

JACK AND KHUNDKAR, JJ.

Nabakumar Singh Dudhuria—Appellant.

v.

Fateh Singh Nahar—Respondent.

Appeal No. 128 of 1934, Decided on 5th June 1934, from original order of Dist. Judge, Murshidabad. D/- 27th January 1934.

(a) Practice—Principles of equity as applied in Courts of England should be applied in absence of law laying down different procedure—Equity.

The principles of equity, as applied to the practice of the Courts of England, should be observed in the Court of this country in cases in which there is no law extant which lays down a different procedure: 23 *Bom* 653; 11 *Bom* 551 (*P C*) and 1932 *P C* 158, *Ref.* [P 34 C 1]

(b) Lunatic—Joint managers — Office of survivor terminates on death of co-manager —Rule of English law applies.

Until the legislature see fit to introduce into the Lunacy Act a provision similar to S. 38, Guardians and Wards Act, by which on death of one of joint guardians, principle of survivorship is applied, the rule of English law should be followed and where there is no provision for survivorship in the order of appointment of the joint managers, the office of the survivor should terminate on the death of his co-manager. [P 34 C 2]

Panchanan Ghosh, Durgadas Ray, Sourendranarayan Ghosh and *Paresh-nath Mukherji (Junior)*—for Appellant.

Atulchandra Gupta and *Bhageerath-chandra Das*—for Respondent.

Judgment.—This appeal has arisen out of an application for managership of the estate of lunatic Jnanchand Golecha. The estate was under the joint managership of Fateh Singh Nahar and Raja Bijay Singh Dudhuria of Azimganj by an order of the District Judge of Murshidabad under Act 35 of 1858. Raja Bijay Singh, having died on 18th May 1933, it is claimed that by his death the managership of Fateh Singh Nahar was terminated and the petitioner Nabakumar Singh Dudhuria applied to be appointed sole manager. The learned District Judge found that the original managership of Fateh Singh was not terminated by the death of Rajah Bijay Singh and that consequently there was no vacancy in the managership and, therefore, dismissed the petition of Nabakumar Singh. The question, therefore, to be decided in this appeal is whether the management of Fateh Singh terminated on the death of Raja Bijay Singh.

There is no provision in the Lunacy (District Courts) Act (35 of 1858) nor in the present Act on this point and it has been laid down in a number of cases that the principles of equity, as applied to the practice of the Courts of England, should be observed in the Courts of this country in cases, in which there is no law extant which lays down a different procedure: 23 Bom. 653 (1). The cases of 11 Bom 551 (2) and 1932 P. C. 158 (3) may also be referred to. We have been referred to three English cases, (1735) Cast Talb 142 (4), where a husband and wife had joint custody of a lunatic's estate, the Lord Chancellor laid down that, on the death of the wife, the husband's right to the custody of the estate was terminated, it being a joint grant and a mere authority without any interest. The learned District Judge distinguishes this case on the ground that it was the wife who was related to the lunatic; however, the principle on which the decision was based was that the original grant was joint and a mere authority without interest and not because the remaining manager was not related to the lunatic. The same rule was laid down by Lord Chancellor Eldon in the case of (1882) Jacob 589 (5). The Master of the Rolls, Lord Gifford, in the case of (1826) 1 Russ 528 (6), held that, where joint guardians of a minor were appointed, the office did not, upon the death of one of them, survive to the others. It was probably owing to this rule that in the Guardians and Wards Act, S. 38, was enacted, laying down that the principle of survivorship applied in the case of death of one of the joint guardians until another was appointed by the Court. The cases of joint executors or joint trustees are distinguishable, because in these cases there is a vesting of property in the surviving executor or trustee: vide S. 312, Succession Act and S. 76, Trusts Act. According to Pope (Law and Practice of Lunacy, p. 102):

> Previous to the Lunacy Regulation Act of 1853, in cases where two or more persons were appointed committees, and one of them died, the grant being joint, and a mere authority without any interest, the right to the custody of the lunatic absolutely determined and it became necessary to obtain an appointment of new committes. The only reported exception to this rule was a case where the property was very small: 2 De G M & G 280 (7).

By S. 66, Lunacy Regulation Act of 1853, the grant of authority might be extended to surviving or continuing committees in certain cases. This was repealed by the Lunacy Act of 1890, and R. 71 of the Rules on Lunacy (1890) under that Act provided that, where the Masters certify that several persons ought to be appointed committees of the estate or person and that it is expedient that one or more of such persons should continue to act after the death or discharge of the others or other of them, the order appointing the committees may direct that the custody of the estate or person shall continue to the surviving or continuing committees or committee. Pope on the authority of Elmer noted that this procedure had only been adopted in very special cases prior to 1890. This would go to show that it was not generally considered advisable, and there is probably reason for this. Joint managers are appointed permanently for the reason that it is advisable to have more than one manager possibly so that the second manager may act as a check on the conduct of affairs, and since, at the time of his appointment, it was not considered advisable that the first manager should have the sole conduct of the affairs of the lunatic, presumably on the death of the second manager he ought not to be allowed to continue as sole manager for the same reason. In these circumstances, until the legislature see fit to introduce into the Lunacy Act a provision similar to S. 38, Guardians and Wards Act, I am of opinion that the rule of English law should be followed and, where there is no provision for survivorship in the order of appointment of the joint managers, the office of the survivor should terminate on the death of his co-manager.

1. Pransukhram Dinanath v. Bai Fulkor, (1899) 23 Bom 653=1 Bom L R 88.
2. Waghela Rajsanji v. Masuldin, (1887) 11 Bom 551 (P C).
3. Muhammad Raza v. Abbas Bandi Bibi, 1932 P C 158=137 I C 321=59 I A 236=7 Luck 257 (P C).
4. Ex parte Lyne, (1735) Cast Talb 142.
5. Ex parte Clarke, (1882) Jacob 589=37 E R 973.
6. Bradshaw v. Bradshaw, (1826) 1 Russ 528=38 E R 203.
7. In re Noble, (1852) 2 De G Me G 280=21 L J Ch 748.

The order of the learned District Judge is accordingly set aside and the case will go back to him for hearing of the petitioner's application on the other points raised on the footing that the office of manager of the lunatic's estate is vacant except for the ad interim appointment of joint managers made by the Judge, which will meanwhile continue. The petitioner will get his costs in this Court; hearing fee one gold mohur. Costs in the District Judge's Court will abide the final result.

K.S. *Appeal allowed.*

A. I. R. 1935 Calcutta 35

MUKERJEE AND PATTERSON, JJ.

Lea Badin—Plaintiff—Appellant.

v.

Upendra Mohan Roy Choudhury and *others*—Defendants—Respondents.

Appeal No. 85 of 1934, Decided on 17th September 1934.

(a) Letters Patent (Calcutta), Cl. 15—Order refusing application for appointment of receiver is judgment.

As an order refusing an application for the appointment of a receiver based on a provision in the indenture of hypothecation, that on a breach of any one of the covenants contained therein the plaintiff's assignor would be entitled to have a receiver appointed, the order has determined a right which is one of the matters in the controversy itself, and so is a judgment within the meaning of Cl. 15: *Case law reviewed.* [P 37 C 1]

(b) Letters Patent Appeal—Civil P. C. and rules under it apply to Letters Patent appeal also.

The Code and the Rules made under it apply to an appeal from a Judge of the High Court : 1916 *Cal* 361 *ref.* [P 37 C 1, 2]

Arun Sen—for Appellant.

J. C. Hazra and *S. N. Rudra*—for Respondents.

Judgment.—The order from which this appeal has been preferred was made by Cunliffe., J. discharging an interim receiver appointed exparte on the plaintiff's application pending her suit laid on the basis of an indenture of hypothecation. The order amounts to one rejecting an application to appoint a receiver. A preliminary objection has been taken to the competency of the appeal.

Under Cl. 15, Letters Patent, there in unqualified right of appeal from the judgment of a single Judge on the Original Side. As regards the meaning of the word judgment as used in the clause, Courts in this country have taken different views. So far as this Court is concerned the leading case on the point is that of 17 W. R. 364 (1), in which Couch C. J. said,

"We think 'judgment' in Cl. 15 means a decision which affects the merits of the question between the parties by determining some right or liability. It may be final, or preliminary or interlocutory, the difference between them being that a final judgment determines the whole cause or suit, and a preliminary or interlocutory judgment determines only a part of it, leaving other matters to be determined."

In more decisions than one of this Court this definition of 'judgment' given by Couch, C. J. has been described as classical; and yet in a long course of decisions this Court has repeatedly expressed the view that the definition is not absolutely exhaustive 5 C. W. N. 781 (2), 1922 Cal. 172 (3), 1916 Cal. 361 (4), 1918 Cal. 850 (5) and 1918 Cal 858 (6). Treating this definition as not of an inflexing character and yet not expressly purporting to extend it, the Court has in numerous cases emphasized the necessity of scrutinizing the nature of the decision in each particular case in order to find out whether the decision amounts to a 'judgment' within the meaning of the clause. It may be observed that Couch, C. J. himself in in the case of 21 W. R. 303 (7), held that an appeal lies under the clause from an order refusing to grant leave to the plaintiff to sue under Cl. 12, Letters Patent, giving as his reason:

"It is not a mere formal order or an order merely regulating the procedure in the suit, but one that has the effect of giving a jurisdiction to the Court which it otherwise would not have. And it may fairly be said to determine some right between them, viz. to sue in a particular Court and to compel the defendants who are not within its jurisdiction to come in and defend the suit, or if they do not, to make them liable to have a decree passed against them in their absence."

This reason, it must be admitted, would hardly bring the case within the definition given in 17 W. R. 364 (1), because it is perfectly clear that the

1. Justices of the Peace of Calcutta v. Orient Gas Co., (1872) 17 W R 364=8 Beng L R 433.
2. Mt. Brij Commaree v. Ramrick Dass, (1901) 5 C W N 781.
3. Gour Mohon v. Nayan Manjuri, 1922 Cal 172=69 I C 915.
4. Mathura Sundari v. Haran Chandra, 1916 Cal 361=34 I C 634=43 Cal 857.
5. Budhulal v. Chattu Gope, 1918 Cal 850=39 I C 465=18 Cr L J 497=44 Cal 804.
6. Ramendra Nath v. Braijendra Nath, 1918 Cal 858=41 I C 944=45 Cal 111.
7. Hadjee Ismail v. Hadjee Mahomed, (1874) 21 W R 303=13 Beng L R 91.

"right or liability" contemplated by the definition in that case must mean some right or liability which was the subject-matter of the controversy in the suit or proceeding. And we must respectfully dissent from those decisions which have held or have proceeded on the supposition that the expression "right or liability" in that case was not meant to be restricted to the controversy in the suit or the proceeding itself (e. g. 1919 Cal. 667 (8)). In 6 Cal 594 (9) an order refusing to transmit for execution an order of His Majesty in Council was held to be open to appeal under the clause. This decision was affirmed by the Judicial Committee on the ground that it came within the meaning of the word "judgment" in that clause because the transmission of the record was not a merely ministerial proceeding, and the Judge who had made the order had in fact exercised a judicial discretion and had come to a decision of great importance which, if it remained, would entirely conclude any rights of the decree-holder for an execution in the suit: 9 Cal 482 (10). It is not impossible to bring this reasoning within the definition in 17 W. R. 364 (1), but in some cases an attempt has been made to treat it as the foundation for a doctrine that where a question of jurisdiction is involved there is a right of appeal, e. g. 1918 Cal 858 (6). This view however is one with which we do not agree. Garth, C. J. in the case of 4 Cal. 531 (11) laid down a definition in these words:

"I think the word 'judgment' means a judgment or decree which decides the case one way or the other in its entirety, and that it does not mean a decision or order of an interlocutory character which merely decides some isolated point not affecting the merits or the result of the entire suit.."

It would seem that orders excluded by this definition from the category of judgments would also be excluded by the definition of 17 W. R. 364 (1), but that this definition would bring within its scope orders which would put in peril the finality of a decision in favour of a party as "affecting the merits or the result of the entire suit", a view which has been doubted in the decision of this Court in the case of 1929 Cal. 214 (12). In the last mentioned case the correctness of the decision in the case of 1922 Cal. 335 (13) in which it was held that an order setting aside an abatement is a judgment within the meaning of the clause, was also doubted. An examination of the decisions bearing upon the question reveals a position, which has been admitted in many of the more recent decisions, that judicial opinion in this Court has not been either uniform or consistent as regards the meaning of the word 'judgment' as used in the clause, and that the decisions are not easy to be reconciled.

The result could not have been otherwise when the Court purporting to take its stand upon the definition given in 17 W. R. 364 (1) has, in each particular case, sought to bring the relevant order within its scope, not unoften by using logic which, it has to be said within the utmost respect, is not sound. This conflict of authority has been pointed out in several cases amongst which reference may be made to the cases of 1916 Cal. 361 (4), 1918 Cal. 850 (5) and 1929 Cal. 214 (12). In Madras, White, C. J., in the Full Bench decision in 35 Mad. 1 (14) said:

"The test seems to me to be not what is the form of the adjudication, but what is its effect in the suit or proceeding in which it is made."

He laid down three tests for determining whether an order is a judgment within the meaning of the corresponding clause of the Madras Letters Patent. They are the following: (1) If its effect is to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned; or (2) if the non-compliance therewith will have the effect of putting an end to such suit or proceeding; or (3) if it is passed in an independent proceeding which is ancillary to the suit (not instituted as a step towards judgment, but with a view to rendering the judgment effective when obtained), e. g., an order on an applica-

8. Chandi v. Jnianendra, 1919 Cal 667=41 I C 250.
9. Kali Sundari v. Harish Chunder. (1881) 6 Cal 594=7 C L R 543.
10. Harish Chunder v. Kali Soondery, (1883) 9 Cal 482=10 I A 4 (P C).
11. Ebrahim v. Fuckrnnissa (1879) 4 Cal 531=3 C L R 311.
12. Brojo Gopal v. Amar Chandra, 1929 Cal 214=114 I C 88=56 Cal 135 (F B).
13. Sarat Chandra v. Maihar Stone and Lime Co. Ltd., 1922 Cal 335=67 I C 917=49 Cal 62.
14. Tuljaram Rao v. Alagappa, (1912) 35 Mad 1 =8 I C 340 (F B).

tion for temporary injunction or for the appointment of a receiver.

Mookerjee, J., in several decisions of his, when characterizing the definition of Couch, C. J., in 17 W. R. 364 (1) as too narrow has referred to 35 Mad. 1 (14), and in at least one decision of his has, applying the tests laid down in the latter case, held a particular order to be a 'judgment' as it satisfied the third of the said tests: 21 W. R. 303 (7). To remove the incongruity which appears in the decision of this Court and to lay down some definite rule by which orders might be tested when it has to be determined whether or not they are 'judgments' within the meaning of the clause, this Court will some day have to abandon its fond adherence to the antiquated definition of Couch, C. J., and boldly acknowledge its allegiance to the tests laid down by White, C. J. For the purposes of the present case however it is not necessary to go so far. As an order refusing to appoint a receiver, it comes within the words of the third test of White, C. J., and is indeed one of the illustrations to the test which he himself has given.

As an order refusing an application for the appointment of a receiver based on a provision in the indenture of hypothecation, that on a breach of any one of the covenants contained therein the plaintiff's assignor would be entitled to have a receiver appointed, the order has determined a right which is one of the matters in the controversy itself, and so it satisfies the definition of Couch, C. J., as well. The order appealed from in this case is, in our opinion, a 'judgment' within the meaning of Cl. 15, Letters Patent. We may add that there are decisions of this Court in which orders discharging or refusing to discharge a receiver appointed in a suit, after the suit had come to an end or had become infructuous, have been held to be 'judgments,' and so appealable: e. g., 5 C. W. N. 781 (2) and 1930 Cal. 803 (15). But there is another and a far simpler ground on which it must be held that an appeal is competent. The order in the present case is one for which a right of appeal is provided in Cl. (s), R. 1, O. 43 of the Code. Under the present Code (Act 5 of 1908) it cannot be contended that the Code and the Rules made under it do not apply to an appeal from a learned Judge of the High Court; such a contention was elaborately dealt with and repelled in the case of 1916 Cal. 361 (4).

Turning now to the merits of the appeal, we must say that we are unable to find any sufficient ground on which the order of the Court below may be supported. We have been referred by learned counsel for the respondent to a judgment of the said Court in another suit, to which the present appellant was no party, as containing reasons which would justify the present order. We have read that judgment, but we cannot see how what has been said therein touches the controversy in the present suit and may in any way affect the question of appointment of a receiver which has been asked for on the strength of a stipulation contained in the indenture. That there has been a breach of at least two of the covenants in the indenture is a fact which must be held to have been prima facie established. It is possible that there has also been some deterioration of the security for which the defendants are responsible; but on this point we do not consider it necessary to express any definite opinion.

The defence is that the covenants are not enforceable or, at any rate, are not enforceable in their entirety. That defence will have to be considered at the hearing of the suit itself; and it is far from clear that it can be regarded as well-founded at the present stage. The breach having been prima facie established it is clearly just that a receiver should be appointed, for that is what the parties had bargained for in the indenture itself. We are not satisfied that any circumstance exists which may be taken as indicating that the appointment of a receiver would be anything but convenient; indeed, the parties themselves appear to have considered in their contract that it would be convenient. The appeal, in our judgment, should be allowed, and we order accordingly. The order of Cunliffe, J., is set aside and it is ordered that the Official Receiver do forthwith take possession as prayed for on behalf of the appellant. The appellant will have her costs of this appeal and of the costs of the application in the Court below. The receiver

15. Baidyanath Sen v. Rajendra Nath Sen, 1930 Cal 803=129 I C 879.

will take possession before the order is drawn up and on counsel's endorsement only.

Patterson, J.—I agree.

K.S. *Appeal allowed.*

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S. K. GHOSE, J.

Majid Bux Mondal—Plaintiff—Petitioner.

v.

Ajghar Mondal—Defendant—Opposite Party.

Civil Rule No. 1447 of 1933, Decided on 6th June 1934, from order of Dist. Judge, Alipur, D/- 26th August 1933.

Bengal Village Self Government Act (5 of 1919), S. 81 — Intimation to Union Court about application to civil Court must be given before commencement of hearing of suit in Union Court.

Under S. 74 of the Act, the Union Court has concurrent jurisdiction with the Court of the Munsiff ; but the Munsiff has the power to withdraw the suit on the application of the defendant made in accordance with the provisions of S. 81. According to the latter section, if before the commencement of the hearing of the suit the defendant notifies to the Union Court that he intends to apply, that Court shall postpone the trial. It is necessary therefore that an intimation to the Union Court be given before the commencement of the hearing of the suit.

[P 38 C 2]

Panchanon Ghose and *Satyaendra Nath Ghose*—for Petitioner.

Abdul Hossein—for Opposite Party.

Order.—The petitioner in this case instituted a civil suit before the Union Bench Court making a claim of Rupees 136-12-9 against the opposite party. On 7th May 1933 the case came on for hearing, but the opposite party applied for time on the ground of ill-health. This was refused by the Union Court and the trial of the suit was proceeded with. Three witnesses for the plaintiff were examined and cross-examined. Thereafter, the Union Court fixed 21st May 1933 for further hearing. On that date the opposite party appeared and stated that he had no witness to examine. On the same day the Union Court decreed the suit. Meanwhile, on 12th May 1933, after the conclusion of the examination of the plaintiff's witnesses, the opposite party made an application before the local Munsiff for the transfer of the suit and the learned Munsiff made an order calling for the record of the suit from the Union Court. But apparently, this order did not reach the Union Court before it delivered judgment as mentioned already. It also does not appear that the opposite party intimated to the Union Court that an application as aforesaid had been made to the Munsiff. Thereafter, the opposite party moved the District Judge of 24 Parganas to have the decree of the Union Court vacated and to have the suit re-tried in the Court of the Munsiff. On 26th August 1933, the learned Judge made an order in favour of the opposite party whereupon the plaintiff filed this application under S. 115, Civil P. C., and under S. 107, Government of India Act. Under S. 88, Bengal Village Self Government Act 1919, a District Judge may make an order, such as has been made by the learned Judge in this case, if he is satisfied that there has been a failure of justice. In his order the learned Judge does not say that there has been a failure of justice, and it seems to me to be doubtful whether the learned Judge at all directed his mind to this aspect of the question. On the facts as they appear, no case of failure of justice has been made out, since the case was decided upon the evidence in a Court of competent jurisdiction. Under S. 74, of the Act, the Union Court has concurrent jurisdiction with the Court of the Munsiff; but the Munsiff has the power to withdraw the suit on the application of the defendant made in accordance with the provisions of S. 81. According to the latter section, if before the commencement of the hearing of the suit, the defendant notifies to the Union Court that he intends to apply, that Court shall postpone the trial. It is necessary therefore that an intimation to the Union Court be given before the commencement of the hearing of the suit. This is the express provision of the Act and it is in accordance with the principles of Ss. 21 and 22, Civil P. C. The opposite party in a counter-affidavit states that on 7th May he did intimate to the Union Court that he intended to apply to the Munsiff. This statement appears to be false, because it is in conflict with his own application which was filed before the Union Court on that date in which he merely stated that he wanted an adjournment on the ground of illness. He appears to have been present before the Union Court throughout the trial and apparently took the

chance of getting a decision in his favour. On the facts stated above, the application for transfer before the Munsiff was not in accordance with S. 81 of the Act nor was the order of the learned Judge made in accordance with S. 88 of the Act.

In this view, the Rule must be made absolute. The order of the learned Judge complained of must be vacated and the decree of the Union Court must stand confirmed. The petitioner will get his costs: hearing fee two gold mohurs.

K.S. *Rule made absolute.*

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MUKERJI AND S. K. GHOSE, JJ.

Shivaprasad Singh—Defendant — Appellant.

v.

Prayagkumari Debee and *others* — Plaintiffs—Respondents.

Appeal No. 207 of 1927, Decided on 11th August 1933, from original decree of Sub-Judge, 24-Parganas, D/- 7th May 1927.

(a) Administration—Suit for— Nature of— Suit is in essence one for accounts and application of estate for satisfaction of all creditors and for beneficiaries.

The object of an administration suit is to have the estate administered under a decree of Court ; in such a suit the whole administration and settlement of the estate are assumed by the Court ; the suit in its essence is one for an account and for application of the estate of the deceased for the satisfaction of the dues of all the creditors and for the benefit of all the creditors and for the benefit of all others who are entitled, and the Court marshals the assets and makes such a decree : 1918 *Cal* 883 and 1931 *Mad* 683, *Rel on.* [P 45 C 2]

A suit for the recovery of an impartible estate and other properties, which the defendant is alleged to be in wrongful possession of, is not an administration suit, although accounts may have to be ordered against the defendant on the basis of the liability of an executor de son tort. [P 45 C 2]

(b) Executor—De son tort—No liability for general account unless whole is received —If wrong-doer, liability arises for loss whether due for negligence or not.

The executor de son tort is not liable for a general account unless he has rceeived everything. But from the moment he is a wrong-doer he has no right to retain the property and the beneficiaries are entitled to the property as it was on that date, irrespective of what may have happened to it thereafter, and whether its loss, if any, was due to his negligence or not : *Coote* v. *Whittington*, (1873) 16 *Eq* 534, *Rel on.* [P 46 C 2 ; P 47 C 1]

(c) Executor —De son tort — Possession is not necessarily of wrong-doer— Intention regarding acts is to be considered.

An executor de son tort is not for that reason only to be regarded as a person who is necessarily a wrong-doer ; nor is his possession necessarily wrongful at its inception. His intentions, in respect of the acts attributed to him, must be taken into account to determine when the conversion took place, and on what date liability is to be fastened on him. [P 48 C 1]

(d) Practice—Evidence— Party can refrain from producing evidence — Other party may then apply for its production — Else adverse inference cannot be drawn from non-production—Evidence Act (1872), S. 114.

It is open to a litigant to refrain from producing any evidence, not forming part of his case, that he considers irrelevant ; if the other litigant is dissatisfied it is for him to apply for its production and inspection as evidence in the case if he thinks proper ; if this is not done the Court is not entitled, at his suggestion, to draw an adverse inference and the presumption will also not arise when there is sufficient explanation. [P 48 C 2]

(e) Practice—Evidence — Withholding evidence by tortious acts — Strongest presumption applies to India.

Adverse inferences from non-production of evidence is one of the strongest presumptions known to law, and the law allows it against a party who, by his tortious acts, withholds the evidence by which the nature of his case would be manifested. That presumption is applied to India : 2 *M I A* 113, *Applied.* [P 49 C 1]

(f) Maxims—Presumption against spoliator should be reasonably softened.

The rigour of the maxim, *omnia proesumuntur contra spoliatorem or omnia proesumuntur in odium spoliatorem* has to be reasonably softened upon the facts and circumstances of each particular case : 12 *M I A* 157 and 10 *M I A* 429, *Rel on.* [P 49 C 2]

(g) Civil P. C. (1908), O. 20, R. 10—Decree under R. 10 — Decree-holder cannot enforce money part before applying for delivery — Defendant has his election.

When a decree is in the form contemplated by O. 20, R. 10 and there is no question of deterioration in value of the articles decreed to be recovered, the decree-holder is not entitled to execute the money part of the decree before applying for delivery of the articles ; it is in the defendant's election whether he would deliver the chattels or pay the assessed value on them : 1927 *Cal* 652 and 13 *M L J* 444, *Rel on.* [P 51 C 1, 2]

(h) Conversion — Value at date of conversion is recoverable.

In a case where conversion is proved and the articles will not be delivered the value recoverable should be the value at the date of the conversion. [P 51 C 2]

(i) Conversion — Defendant asserting non-existence or non-possession of articles — Plaintiff need not ask for delivery — Neither is Court bound to order specific delivery.

Where the defendant asserts that the articles are not in his possession, or not in existence, and it is not possible for the plaintiff to prove that the defendant's assertion is untrue, the plaintiff is bound to sue for delivery of the articles and the Court will not be bound to pass a decree for the articles in the first instance and in the alternative only for their value. [P 53 C 2]

(j) **Executor — Release or compounding of debts—For being excused he must prove that he acted honestly and reasonably.**

Where the executor and administrators release or compound debts due to the testator or the intestate, they must prove that they have acted honestly and reasonably, in which case only they can fairly claim to be excused. [P 54 C 2; P 55 C 1]

(k) **Transfer of Property Act (1882), Ss. 2 (d) and 36 — S. 36 does not apply to apportionment of rent collected by successor of impartible estate between him and heir of last holder—But S. 36 being rule of equity its principles should be applied.**

Having regard to S. 2 (d), S. 36 does not apply to a case of apportionment of rents, collected by the successor to an impartible estate as between him and the heir of the last holder. But S. 36 embodies a rule of equity which should be applied even though the section, in its terms, be not applicable. And the higher doctrine of equity, which is the foundation of Lord Hardwicke's dictum in *Paget* v. *Gee*, (1753) *Amb.* 198, should be applied to a case not between persons standing in the relation of lessor and lessee or persons not bound by covenants relating to payment of rent at stated intervals. S. 2 (d) of the Act does not except the application of this doctrine.

[P 58 C 2; P 59 C 1]

(l) **Executor de son tort — Interest — Debt carrying interest — Executor de son tort realizing debt is liable for interest.**

Where the debt itself carries interest and the executor de son tort does in connexion with the debt which in fact of law amounts to its realization, the executor de son tort is liable for interest whether actually realized or not. [P 59 C 2]

(m) **Executor de son tort—Appropriation—Rule of, does not apply to fiduciary relation—Executor de son tort cannot therefore remit any debt due to beneficiary and give preference to his own dues.**

If no express appropriation be made by either the debtor or the creditor, it may be implied or presumed that payments to and drawings against a running account are to be attributed to the earliest items on the opposite side of the account. But as between trustees and their beneficiaries and as to every person in a fiduciary character, the rule is modified, and so long as the trustee has money standing to his account, drawing by him will be attributed to his own money, the trust being intact. An executor de son tort or an executor or trustee has thus no right to remit any part of the amount that is legitimately due to the beneficiary and give preference to that extent towards satisfaction of his own dues: *Clayton's Case*, (1816) 1 *Mer* 572; *Pennell* v. *Deffell*, (1853) 4 *De G M & G* 372; *In re Stenning*, (1895) 2 *Ch* 433; *In re Hallett's Estate*, (1879) 13 *Ch D* 696, *Rel on.* [P 60 C 2; P 61 C 1]

(n) **Executor de son tort — Live-stock not delivered—No explanation for non-delivery—He is not entitled to feeding charges while delivering same to owner.**

If a rightful executor or administrator brings an action of trover or trespass against the executor de son tort, the latter may give in evidence in mitigation of damages payments made by him in the rightful course of administration. But where live-stock has not been delivered and for the non-delivery of which no explanation has been offered the executor de so tort from the moment of conversion becomes a wrong-doer and the owner would be entitled to the full value of the animal in trover, without any deduction for the feeding: *Wormer* v. *Biggs*, (1845) 2 *Car & Kir* 31, *Rel on.* [P 61 C 2; P 62 C 1]

(o) **Movable Property—Bond.**

A bond, as a physical object, is moveable property. [P 62 C 2]

(p) **Civil P. C. (1908), O. 21, R. 31 — Non-delivery of specific moveables—Damages can be assessed in execution — Assessment on footing of wilful neglect is not the only basis—Conversion, Damages.**

A decree for delivery of a specific moveable need not necessarily, in all cases, be in the alternative form. An inquiry as to damages in cases of this kind may more profitably be started by the Court in execution. Such damages are not necessarily to be assessed on the footing of wilful neglect or devastavit. [P 63 C 2]

(q) **Executor de son tort — Reimbursement — He is entitled to get deductions for income-tax.**

The executor de son tort is entitled to get a deduction of income-tax, etc., "which may have been paid by him on account of sums" meaning sums which fell due during lifetime of last holder and might have been realized by him. He is entitled to assume that the tax was rightly assessed. [P 65 C 2]

(r) **Interest — Cessation of—Creditor puting payment beyond debtor's power—Interest ceases—But mere appointment of receiver or temporary injunction does not make interest cease.**

One important principle, under which running of interest may be suspended, is where the delay in the payment of the principal debt is caused by some improper act or omission of the creditor. So if a creditor, by his own act, puts it beyond the power of the debtor to make payment, no interest should be recoverable for the period during which the creditor was thus prevented. But the appointment of a receiver to relieve the executor from execution, or an ad interim injunction, obtained by the beneficiary restraining the executor from transferring any part of the properties in the suit, is no ground for cessation of interest: 1917 *Cal* 630, *Rel on.* and 1921 *P C* 100, *Dist.*

[P 67 C 2]

(s) **Civil P. C. (1908), S. 34 — Detention of Debt—Interest can be awarded if not as interest then by way of damages—Allowing interest till decree and then to allow interest on amount decreed is justified.**

The allowing of interest up to date of decree and compounding it with the principal on the date of the decree and allowing of interest thereon at the Court rate, is justified by S. 34. The matter is purely one of discretion. In the case of a mere detention of a debt, where there is no contract, express or implied, to pay interest or no statute or mercantile usage allowing it, interest if it cannot be awarded as interest may be awarded by way of damages. A creditor cannot claim, as of right, interest at the contract rate, pendente lite or after decree although the Courts generally adhere to that rate unless it is inequitable to do so. Where there is no contract, express or implied, to pay interest, and interest has been

allowed, ante lite and pendente lite, at such rate as the Court considered fair, there is no point in compounding the principal and the interest due up to the date of the decree and making interest to run on the aggregate sum at the same rate. S. 34 or its principle was never intended to be used as a means for providing for compound interest but to relieve the debtor of a harder rate of interest : 1922 *P C* 46 ; 1 *W R (Mis)* 15 ; 18 *Cal* 164 and 3 *All* 91, *Rel on* [P 67 C 2 ; P 68 C 1]

(t) Interest—Award of, as damages — Creditor cannot appropriate payment towards interest—Payments made by executor should be deducted from principal—Debtor and creditor, Appropriation.

A right of a creditor to appropriate a payment against interest, awarded as unliquidated damages when no interest was in fact running under any contract, express or implied, is a thing unknown to law. All payments made by the executor de son tort for which he will get deduction must be credited against the principal amount due from him and they should bear interest, at such rate as the Court may order as from the dates on which they were made. [P 69 C 1]

(u) Civil P. C. (1908), S, 151 — Court can pass supplemental order for shortening litigation — Delay not amounting to waiver or acquiescence does not deprive party of his remedies—Laches.

Every Court has an inherent power to make a supplemental decree or such other order ex dibito justitae, with a view to the shortening of litigation, preventing duplication of proceedings and saving the parties from harassment and expense. And delay, by itself, is not sufficient to deprive a party of his remedies, if such delay does not amount to a waiver, acquiescence or abandonment of his claim or has not created a corresponding right in his opponent in extinguishment of his own. [P 72 C 1]

(v) Impartible Estate— Whether holder can burden estate with liabilities under contract entered into by him personally—*Quaere.*

Quaere.—Whether the holder of an impartible estate can burden the estate with liabilities arising out of contracts entered into with strangers by him personally : *Case law reviewed.*

A. N. Chaudhuri, S. K. Gupta, Shantimay Majumdar and *Ambikacharan Mallik*—for Appellant.

P. R. Das, Nagendra Nath Basu and *R. C. Ghose*—for Respondents.

SHORT HISTORY

Judgment.—Durgaprasad Singh succeeded to the gadi of the Jharia Raj in 1899, on the death of his elder brother Raja Joymangal Singh. The family is governed by the Mitakshara school of Hindu law. By custom the raj is impartible, and succession to it is governed by the rule of lineal primogeniture. Raja Durgaprasad died on 7th March 1916 (=24th Falgun, 1322 B. S.), leaving three widows, Ranee Prayagakumari, Ranee Subhadrakumari and Ranee Hemkumari, but no issue. The three Ranees were the plaintiffs in this suit; and one of them, namely, Ranee Subhadrakumari having died since the suit was commenced, the other two are now on the record as plaintiffs, in their own rights and also as her heirs and legal representatives. Raja Durgaprasad had, on 27th August 1915, made a will, purporting to dispose of some of the properties in dispute; but no detailed reference to its particulars are necessary because although its genuineness is beyond question, the parties have not, at any stage of this litigation, sought to establish any right under the will but have all along pressed their respective claims on the basis of intestacy. In 1912, Raja Durgaprasad had made certain mokarrari grants for life in favour of his wives, the Ranees. By the will, he bequeathed to them a ten annas share of the jewellary and the cash that would be left by him at his death, and declared that the remaining six annas share thereof should form part of his zamindari, and he further provided that whoever should get the zemindari on his death would be bound to pay to each of his wives maintenance at the rate of Rs. 3,600 per year. The allowance was to be payable in monthly instalments of Rs. 300 carrying interest at the rate of one per cent per mensem in case of default, and such was to form a charge on the estate. On the death of Raja Durgaprasad and within a few hours thereafter, Shivaprasad Singh, the defendant in this suit, was treated by the officers of the raj as the next rightful successor, and, his name being entered in the rokar of the estate, accounts began to be kept in his name. Shortly afterwards, disputes arose between him and the widows. On 5th August 1916, three bantannamas were executed, one by each of the widows, whereby, for a consideration stated therein, they purported to acknowledge Shivaprasad Singh as the rightful successor of the late Raja and relinquished their claim as the heirs of their husband to all properties left by him. On the same day Shivaprasad Singh executed three khorposh deeds, one in favour of each of the three Ranees, wherein Rs. 300 a month was fixed as allowance for her maintenance and a charge for the amount on one-third of the raj was created. On

13th April 1917, each of the three Ranees purported to execute an ammukhtearnama conferring power-of-attorney upon Shivaprasad Singh.

On 6th March 1919, the present suit was commenced by the three Ranees as plaintiffs against Shivaprasad Singh as defendant. Shivaprasad Singh's claim to the succession was denied; it was alleged that the bantannamas were taken by practising fraud and undue influence, and that the ammukhtearnamas were also similarly obtained; and it was asserted that the three Ranees, as heirs of their husband, were entitled to succeed to the raj and all other properties left by him. In respect of the raj, it was also asserted, in the alternative, that if the three widows together were not entitled to it, at least the senior widow was so entitled. And a decree substantially in the nature of a decree for declaration of the plaintiff s title, as heirs to their deceased husband, and for recovery of possession of the estate and effects left by him, which, it was alleged, the defendant had wrongfully and fraudulently taken possession of, was asked for.

The suit was in the first instance, tried by the Subordinate Judge, Mr. N. K. Bose, whose judgment bears the date, 3rd November 1921. From this decision two appeals were preferred, one (F. A. No. 194 of 1921) on behalf of the plaintiffs and the other (F. A. No. 51 of 1922) on behalf of the defendant. These appeals were dealt with by this Court (Chatterjee and Panton, JJ.) by a judgment, 1926 Cal. 1 (1). By this judgment, a part of the decision of the trial Court was affirmed and another part was set aside, while an inquiry was directed with regard to certain matters which had either been left undecided or which needed further investigation. The result of the appeals in this Court, barring certain minor matters of an interlocutory nature, was summarized in its judgment in nine clauses, (i) to (ix), of the portion containing its decretal order Cl. (v) containing four sub-clauses (a) to (d). From the decision of the High Court, passed in the aforesaid appeals, both parties appealed to His Majesty in Council: P. C. Appeals Nos. 71 and 72 of 1925 were preferred by the defendant, and P. C. Appeal No. 79 of 1925 by the plaintiffs. These three appeals together with two others in which the defendant was the appellant, namely, P. C. Appeals Nos. 2 and 3 of 1923 which arose out of certain interlocutory matters but of which the particulars are no longer material, have all been disposed of by a judgment of the Judicial Committee, delivered on 7th April 1932: 1932 P. C. 216 (2). By this judgment, their Lordships have ordered that the appeals preferred by the plaintiffs (No. 79 of 1925) and by the defendants (Nos. 71 and 72 of 1925) be allowed in part and that the decree of the High Court should be affirmed subject to certain directions and modifications. These directions and modifications have been enumerated in certain clauses, (1) to (5), Cl. (5) itself consisting of three sub-clauses (i) to (iii). Of these, Cl. (5), sub-Cl. (iii) merely contains a general order to give effect to the declaration and directions contained in their Lordships' judgment. In the meantime, the inquiry directed by the High Court, as aforesaid, was held by Mr. M. N. Das, Subordinate Judge, who completed it by his decision dated 7th May 1927. From the decree that was drawn up in accordance with this decision the defendant has preferred an appeal (F. A. No. 207 of 1927) and the plaintiffs have preferred a cross-objection.

Matters now outstanding.—At the outset, it is necessary to have a clear idea as to how far the decision of the High Court, dated 17th August 1925, has been affected by the decision of the Judical Committee, referred to above; in other words it is necessary to have a correct appreciation of the matters that are now outstanding, on the combined effect of the High Court's and the Judicial Committee's decisions. For this purpose, it would be convenient to recite here the plaintiffs' claim in the suit, as summarized in the judgment of the Judicial Committee, with reference to the two schedules to the plaint, Sch. ka and Sch. kha. It is as follows:

(1) The impartible Raj . . . Sch. ka 1.

(2) Immovable properties which came into the hands of Raja Durgaprasad from his predecessors . . . Sch. ka, 2 to 77.

1. Prayag Kumari Debi v. Siva Prasad Singh, 1926 Cal 1=93 I C 385.

2. Shiba Prasad Singh v. Prayag Kumari Debi, 1932 P C 216=138 I C 861=59 I A 331=59 Cal 1399 (PC).

(3) Immovable properties acquired by Raja Durgaprasad . . . Sch. kha, 1 to 8.

(4) Improvements on the Raj estate . . . Sch. kha, 9 to 19.

(5) Jewellery . . . Sch. kha, 20 (1-23).

(6) Furnishings and equipments of the palace, etc. . . . Sch. kha, 20 (24-83), etc.

(7) Cash and deposits in banks . . . Sch. kha, 21.

(8) Besides the above, the plaintiffs claimed all other properties, both moveable and immovable, left by the Raja, which might, on inquiry, be found to have come to the hands of the defendant.

If these items are taken, and the direction and modifications contained in the judgment of the Judicial Committee Cls. (1) to (5) with sub-Cls. (i) and (ii) of the last-mentioned clause and the directions contained in the decretal order of the High Court Cls. (i) to (ix) with sub-Cls. (a) to (d) of Cl. (v) are compared, the results as given below will follow:

A.—Immovable properties—(1) *to* (4) *and a part of* (8) *of the plaintiff's claim*:

[High Court's decretal order, Cl. (i).]

"(1) The impartible *Raj* . . . Sch. *ka*, 1."

"(2) Immovable properties which came into the hands of Raja Durgaprasad from his predecessors . . . . Sch. *kha*, 2 to 7."

"(4) Improvements on the *Raj* estate . . . . . Sch. *kha*, 9 to 19."

The High Court had affirmed Mr. Bose's decision disallowing the plaintiff's claim. The Judicial Committee has affirmed the High Court's decision.

[High Court's decretal order, Cls. (ii) and (iii).]

"(3) Immovable properties acquired by Raja Durgaprasad . . . . Sch. *kha*, 1 to 8."

The High Court had affirmed Mr. Bose's decision allowing the plaintiff's claim and directing an inquiry into mesne properties. The Judicial Committee has reversed the High Court's decision Cl. (1).

[High Court's decretal order, Cl. (iv).]

Part of (8). Any other immovable property left by Raja Durgaprasad which might on inquiry be found to have come into the hands of the defendant. The High Court had directed an inquiry and had ordered that, if any such be found on inquiry, the same together with mesne profits will go to the plaintiffs. This direction has been modified by the Judicial Committee as will be seen hereafter: Cls. (2) and (5) (i).

B.—Movable properties—(5) *to* (7) *and the other part of* (8) *of the plaintiff's claim*:

[High Court's decretal order, Cls. (v), (d) and (vi).]

"(5) Jewelleries . . . . Sch. *kha*, 20 (1-23)—part of (8). Other jewelleries of Raja Durgaprasad which might, on inquiry, be found to have come into the possession of the defendant."

(5) had been decreed to the plaintiffs by Mr. Bose. The High Court affirmed that decree but ordered that there should a further and proper inquiry as to their value. As to part of (8) an inquiry was ordered by the High Court. The High Court's decision has been affirmed by the Judicial Committee.

[High Court's decretal order, Cls. (v), (d) and (vi).]

"(6) Furnishings and equipments of the palace, etc. . . . Sch. *kha*, 20 (24-83)."

"Part of (8). Other movables of Raja Durgaprasad which might, on inquiry, be found to have come into the possession of the defendant."

Mr. Bose had awarded the greater part of the articles in (6) to the plaintiffs, giving some to the defendants on the ground that "they would follow the estate." The High Court affirmed this decree with some variation. And the High Court also ordered an inquiry as to the part of (8). The Judicial Committee has overruled the view as to movables following the estate and ordered that all movables so found should go to the plaintiffs Cl. (4).

[High Court's decretal order, Cl. (v) (b).]

"(7) Cash—Rs. 48,249-3-9."

This amount had been disallowed to the plaintiffs by Mr. Bose. The High Court reversed his decision. The Judicial Committee has restored Mr. Bose's decision with a direction as to how the amount was to be credited: Cl. (3).

[High Court's decretal order, Cl. (v) (a) and (d).]

"(7) Cash—Money in the bank."

Mr. Bose allowed it to the plaintiffs. His decision was slightly varied by the High Court in plaintiff's favour as regards interest. The Judicial Committee has upheld the decision of the High Court.

[High Court's decretal order, Cl. (v), (c) and (d).]

"(7) Cash—Cash in the till, rents, royalties and moneys realized from Maharaja Manindrachandra Nandi. Part of (8): Such cash as would be found on inquiry."

Mr. Bose's decision was silent as to these items, except as regards the cash in the till which was awarded by him to the plaintiffs. The High Court ordered an inquiry and gave directions as to how all these were to be decreed in plaintiffs' favour. The Judicial Committee has upheld the decision of the High Court..

C.—Deductions.

[High Court's decretal order, Clause (v) (c).]

The High Court allowed deduction of costs of realizations, income-tax, super-tax and other public charges paid by the defendant, and also for payments made by the defendant on account of shop debts and other outstanding bills against Raja Durgaprasad, otherwise than for the estate and the impartible estate or immovable properties incorporated therewith. The Judicial Committe has affirmed the High Court's decision and has directed this Court to determine whether the defendant is also entitled to credit for payments referred to in ground No. 30 of the defendant's petition (No. 75 of 1925) for leave to appeal to His Majesty in Council, except expenses incurred on account of funeral and sradh of Raja Durgaprasad [Cl. (5) (ii).]

D.—Discovery.

[High Court's decretal order, Cl. (vii).]

The High Court made an order for discovery. This has been affirmed by the Judicial Committee.

E.—Maintenance.

[High Court's decretal order, Cl. (viii).]

The High Court left over the question of maintenance for decision in a separate suit, but made an order that since its decision and till the final decision of the case in the Court below the defendant should pay to each of the plaintiffs Rs. 300 a month, and further ordered that the defendant would get credit for such amounts against the amount which would be payable by him to the plaintiffs.

The Judicial Committee has ordered a determination of the claim as to maintenance if it is made [Cl. (5) (ii).]

F.—Costs.

[High Court's decretal order, Cl. (ix).]

This has been varied by the Judicial Committee.

CONDUCT OF THE PARTIES SINCE THE DEATH OF RAJA DURGAPRASAD AND TILL THE INSTITUTION OF THE SUIT.

Before dealing with the respective claims of the parties as involved in the various matters referred to above as outstanding, it is necessary that we should deal with some of the arguments that have been addressed to us in order to establish some general principles, on the basis of which, it is contended, such claims should be dealt with.

One of these matters relates to the conduct of the plaintiffs and of the defendant since the death of Raja Durgaprasad and till the institution of the suit. Mr. Chaudhuri, appearing on behalf of the defendant, has asserted that on Raja Durgaprasad's death the defendant bona fide took possession of the estate on the strength of his title on the ground of lineal primogeniture, that he did so openly and honestly and without the slightest intention to injure the just rights of the plaintiffs, and that it was in that spirit and with that attitude that he has acted ever since. He has also attempted to show that it was the plaintiffs who from the very beginning took up an unreasonable and obstructive attitude, and that though they subsequently came round and consented to a settlement which was duly effected and was also acted upon for a good long time, they eventually went back upon the settlement at the instigation of some of the self-seeking and intriguing officers of the raj, who, to serve their own ends, got them to commence this suit. Mr. Das, on behalf of the plaintiffs has, on the other hand, endeavoured to make out that the defendant, with the help of people with whom he had entered into a diabolical conspiracy to deprive the plaintiffs of their just dues, lost no time in pouncing upon everything that he could get hold of on the death of the late Raja and has spared no pains or device, ever since, in thwarting the plaintiffs from obtaining what legitimately belongs to them. He has repudiated all suggestions of bona fides on the part of the defendant and has tried to paint him as a wrongdoer of the worst type, who not only took what did not belong to him, but tried his utmost not to disclose what he had taken and also to unlawfully and fraudulently induce the real owners, the plaintiffs, to consent to his retaining the things he had thus acquired, and further put every obstacle in the way of their seeking or obtaining relief from proper quarters. These arguments have been pressed on our attention with considerable force and insistence.

The arguments can possibly be relevant from two points of law: one, for the purpose of determining the footing upon which the rights and the liabilities of the parties are to be adjudged; and

the other, for the purpose of determining the attitude or what may technically be said to be the frame of mind of either of the parties, a matter which is pertinent to the question whether it may or may not legitimately give rise to any presumption in relation to some particular matter or some particular item of property, rights and liabilities in respect of which have got to be considered in this case. The former point of view has now lost all its importance by reason of the decision of this Court, dated 17th August 1925, in which it has been expressly and definitely held that the defendant is in the position of an executor de son tort and that his liability is to be adjudged on that footing. This conclusion has been assailed on behalf of either side directly as well as indirectly, and some reference to this matter will be made hereafter. The other point of view is still of some importance ; and therefore the respective contentions of the parties, as noted above, have got to be considercd. [Their Lordships then considered the various contentions of the parties in detail, and proceeded.]

We have dealt with these contentions in detail, only out of deference to the learned counsel who have put them forward. We do not see, however, that, at the stage at which the case has reached, anything materially turns on them, because this Court has, in its judgment of 17th August 1925, accepted the plaintiff's ccntention that if they had established their title to the self-acquisitions they are entitled to discovery on the ground that the defendant was an executor de son tort, and has made its decree generally and for discovery especially, on the footing of the liability of the defendant as an executor de son tort. The Judicial Committee, not having disturbed this conclusion, must be regarded as having affirmed it. Whatever decision we may have to come to on the various questions which arise for our determination now must be on that footing and no other.

Nature of the present suit.—The next question is, what is the true nature of the present suit. Mr. Das has strenuously contended that this is a suit in the nature of an administration action. "Administration" means the management of the estate of a deceased person who has left no executor. The object of an administration suit is to have the estate administered under a decree of the Court ; in such a suit the whole administration and settlement of the estate are assumed by the Court ; the suit in its essence is one for an account and for application of the estate of the deceased for the satisfaction of the dues of all the creditors and for the benefit of all others who are entitled, and the Court marshals the assets and makes such a decree. (see 1918 Cal. 883 (3), 1931 Mad. 683 (4).) The administration consists, generally speaking, in the payment of the funeral expenses of the deceased, in the payment of debts and legacies and in the collection, realization, preservation and distribution of the assets. Forms of plaints in such suits are given in Sch. I, App. A, Forms Nos. 41 to 43. O. 20, R. 13, Civil P. C., provides that, in an administration suit, the Court shall pass a preliminary decree, before passing the final decree, directing accounts to be taken and enquiries to be made. Forms for preliminary decree are given iu App. D, Forms Nos. 17 and 19, and forms for final decree are given in App. D, Forms 18 and 20. Neither the constitution of the suit nor any of the prayers resemble those which are to be found in a suit for administration, and, although a few of the directions that have been given by this Court in its decision of 17th August 1925, as regards the enquiries to be made, resemble those that are given in an administration suit, in their essence the directions are widely different. In para. 15 of the plaint, the plaintiffs have averred, (a) that the plaintiffs are the real heirs of their husband and they are entitled to recover the properties left by him, (b) that plaintiff 1 or at any rate one amongst them is entitled to succeed to the impartible estate, and (c) that the defendant has no right or title to the properties left by the plaintiff's husband, but has obtained wrongful possession of them by exercising fraud, misrepresentation and undue influence. The prayers in the plaint substantially are:

(Ka) declaration of title; (kha) recovery of possession of the impartible estate; (ga) recovery of

3. Shashi Bhushan Bose v. Manindra Chandra Nandy, 1918 Cal 883=38 I C 835=44 Cal 890.
4. Ramaswami Ayyar v. Rangaswami Ayyar, 1931 Mad 683=134 I C 1137=55 Mad 26.

possession of the late Raja's self-acquisitions, moveable and immovable; (gha) declaration of title and recovery of possession of such properties as may be found on discovery made by the defendant; (uma) removal of the defendant from his wrongful possession, (cha) mesne profits; (chha), (ja) and (jha) declaration that the bantannamas, ammukhtearnamas and the High Court Original Side Decree in Suit No. 164 of 1917 are not binding; (ina) receiver, (ta) injunction and (tha) costs; (da) reserving a right to make special statements, in case any new facts came to the plaintiff's knowledge; and (dha) such other or additional relief as the circumstances of the case may require.

The High Court, in its judgment of 17th August 1925, described the suit as a "suit for recovery of possession of the Jharia Raj, an impartible estate, on declaration of the plaintiff's right by inheritance thereto."

The Judicial Committee, in dealing with a question of jurisdiction, which arose, has held:

"As to jurisdiction, their Lordships are of opinion that the cause of action in respect of the rents, royalties and other items was the same as that in respect of the immovable properties, namely wrongful withholding of possession by the defendants."

A passage in their Lordships' judgment has been relied upon by Mr. Das in which the word "accounts" is mentioned; but that passage obviously cannot be called by him in aid because it deals with the defendant's case that on the taking of accounts he would be entitled to some deductions. Their Lordships have said:

"Their Lordships will turn to the subsidiary questions raised by the defendant in regard to moveables and to accounts."

There is, it is true, a passage in the judgment of the High Court, dated 17th August 1925, which may be read as supporting Mr. Das' contention, and Mr. Das has relied on it. The passage runs thus:

"It is next contended that the defendant, even if liable as an executor de son tort to executors, administrators, creditors or legatees, are not liable to the plaintiffs. But an action for administration which means that the legacies and debts have to be paid off may be brought by the next of kin (see Form No. 17, App. D, Civil P. C)."

There is however no express finding in the judgment that the present suit was of that nature. And even if there was any, we think it is no longer binding on us, having regard to the view which the Judicial Committee has taken. In another passage, in the same judgment, it was said:

"But the suit is for recovery of the impartible estate as well as other properties, moveable and immovable, of which the defendant is said to have been in wrongful possession, and there is only one cause of action, viz. the withholding of all those properties by the defendant, etc."

The suit, in our judgment, is a suit against the defendant for wrongful withholding of possession of immovable and moveable properties, and is not in the nature of an administration suit at all.

Executor De son tort—Date of conversion.—The next question is as regards the rights and liabilities of an executor de son tort. It has already been observed that the High Court has definitely held that the defendant when he came to be in possession on the death of Raja Durgaprasad Singh was in the position of an executor de son tort. Both the parties have attempted to have this conclusion revised, either directly or indirectly, and in one form or another, each to suit his or their respective contentions. But, as we have already said, the conclusion must be taken to have been affirmed by the Judicial Committee and we are not permitted to resile from it, even if we were inclined to take any different view. Mr. Chaudhuri has contended: (a) that an executor de son tort is liable in equity not for a general account but only for such assets as he has received and so far as it can be stated that he has received a particular asset; (b) that he has no liability for devastavit unless negligence or wilful default has been specially pleaded and proved; (c) that he is entitled to be absolved from liability unless negligence on his part has been established; and (d) that he is entitled to all costs reasonably incurred by him in due course of administration. For these contentions he has relied upon 16 Eq. 534 (5), and has also referred to Ss. 303 and 304, Succession Act. So far as these contentions are concerned, the position taken up by Mr. Das is the following: As regards contention (a) he has pointed out that the case of 16 Eq. 534 (5), upon which Mr. Chaudhuri has relied, itself shows that the executor de son tort is not liable for a general account unless he has received everything, and that in the present case the defendant did, in fact, come and take possession of all that was left by Raja Durgaprasad. He admits the propositions enunciated in contentions (b) and (d).

5. Coote v. Whittington, (1873) 16 Eq 534=42 L J Ch 846=21 W R 837=29 L T 206.

But as regards (c) he maintains that from the moment the defendant was a wrong-doer he had no right to retain the property and the plaintiffs were entitled to the property as it was on that date, irrespective of what may have happened to it thereafter and whether its loss, if any, was due to the defendant's negligence or not. We are of opinion that the view contended for by Mr. Das is correct.

Mr. Chaudhuri has also urged that up to the time of demand and refusal, or roughly speaking the date of the suit, the defendant having come into possession with the will before him, which made him a co-sharer with the plaintiffs in respect of the moveables which were undivided, he was in the position of a bailee or a trustee to the extent of the ten annas share of the Ranees therein, and that, if at all, he became an executor de son tort only on demand and refusal or roughly speaking at the date of the suit. To this argument Mr. Das' reply is two-fold: firstly, that the question is concluded by the judgment which the High Court has already passed; and, secondly, that the defendant was a wrong-doer from the moment that he came into possession. Before dealing with the contention and the reply, it is necessary to refer to an extreme contention which Mr. Das in one part of his argument put forward, namely, that an executor de son tort, being an executor of his own wrong, is nothing else than a wrong-doer; and as a person who is a wrong-doer cannot be allowed to take advantage of his own wrong, it is right to hold that,

"an executor de son tort has all the liabilities, though none of the privileges, that belong to the character of an executor."

Williams on Executor, Edn. 12, Vol. I, p. 161. The passage is referred to in 16 Eq. 534 (5). If Mr. Das' argument is that the possession of an executor de son tort must always be regarded as wrongful, we must say we are not prepared to uphold it; for, though an executor acting before probate is called an executor de son tort, the term must not be understood as meaning that he is a wrong-doer [See 5 C. P. 113 (6)]. Moreover as is said in Williams on Executors, 12th Edn., 158-159:

"There are many acts which a stranger may perform without incurring the hazard of being involved in such an executorship; such as the locking up the goods for preservation, directing the funeral in a manner suitable to the estate which is left, and defraying the expenses of the funeral himself or out of the deceased's effects, making an inventory of his property, feeding the cattle, repairing his houses or providing necessaries for his children; for these are offices merely of kindness and charity."

The following extract from Walker and Elgood's Law of Executors, 4th Edn., pp. 336-338, will be to the point:

"It has been said to be clear from all the cases that the slightest circumstance will make a man executor de son tort [per Alexander, L. C., B. in 1 T. & J. 409 (7)].

. . . . . It has not always been clear what amount or kind of possession is requisite to charge a man as executor de son tort. The cases cited above from Dyer go a long way and of the same character is 5 Cob. Rep. 336 (8), where it is laid down broadly that the using of the goods of a deceased by any one or the taking of them into his possession. . . . . is a good administration to charge him as executor de son tort. On the other hand it has been denied by Vaughan B, that the bare possession of goods would not make a man executor of his own wrong unless he undertook to do some acts which none but an executor could lawfully do; and a distinction may be taken between goods which are in a man's possession at the death of the deceased and goods which he subsequently takes into his possession. Again if a person in possession of the goods of a deceased makes out a prima facie legal title thereto though he may not be able to complete his title is not to be charged as executor de son tort.

Then after referring to and quoting a decision of Sir Thomas Plumer, M. R., it is said:

The most recent, and the most luminous judgment on this question is to be found in 47 L. J. Q. B. 573 (9), where Lush, J., says: The definition implies a wrongful intermeddling with the assets, a dealing with them in such a way as denotes a usurpation of the functions of an executor, an assumption of authority which none but an executor or administrator can lawfully exercise. It is obvious that it is not every intermeddling with the goods of the deceased which is wrongful. Acts which are not destructive of the property, and which do not otherwise amount to a conversion of goods, are wrongful or not according to the intent. Milking the cows, feeding the horses, locking up the goods, doing repairs, and such like acts, if done as an assertion of dominion and act of ownership, would be wrongful—if an act of necessity, or an office of kindness and charity, would be meritorious. So the removing and holding possession of the goods if done for the purpose of keeping them in safe custody till a lawful representative should appear, is rightful; if for the purpose of making away with them, is wrongful."

The defendant therefore though he is to be judged on the footing of an executor de son tort, is not for that reason

6. Sykes v. Sykes, (1870) 5 C P 113=39 L J C P 179=22 L T 236.

7. Rogers v. Frank, (1827) 1 T & J 409.
8. Read's case, (1604) 5 Cob Rep 336.
9. Peters Leeder, (1878) 47 L J Q B 573.

only to be regarded as a person who was necessarily a wrong-doer; nor was his possession necessarily wrongful at its inception. His intentions, in respect of the acts attributed to him, must in our judgment, be taken into account to determine when the conversion took place, and as on what date liability is to be fastened on him.

So far as the merits of the contention put forward by Mr. Chaudhuri and its reply given by Mr. Das are concerned, we think we must hold that the question as to the date as on which the defendant should be held liable is concluded by the decision of this Court already passed; for there are clear indications in that decision making him liable as on the death of Raja Durgaprasad. The question in the shape in which it has been raised now, was never raised before, not at least with the amount of precision which the present contention involves; and even though it were res integra, we would have come to the same conclusion as this Court has previously done, in view of the fact that the conduct of the defendant, by which is meant that of himself and of his people, in relation to the cash and valuables, even as disclosed on the very next day after the death of Raja Durgaprasad, that is to say, on 8th March 1916, was ample proof of an intention from which conversion may be legitimately inferred. Subsequent conduct on the part of the defendant need not be referred to for this purpose; but if the defendant seeks to do so he gains nothing thereby. (Their Lordships then considered the question of the suppression or withholding the documentary evidence and concluding that the Hat Khatas had been purposely suppressed or done away with, and the other documents had been deliberately withheld, proceeded.)

PRESUMPTION FROM WITHHOLDING OF EVIDENCE AND NON-PRODUCTION OF ARTICLES.

As regards the non-production of evidence, illus. (g), S. 114, Evidence Act, says that the Court may presume that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it. The section dees not, in all cases, make it obligatory on the Court to act on such a presumption, because a particular case may be such that notwithstanding that there is an intentional non-production, other circumstances may be present upon which such intentional non-production may be justifiable on some reasonable grounds or may be attributable to some justifiable cause. The illustration itself says that the Court shall also have regard to other facts in considering whether the maxim does or does not apply to any particular case. But where no other cause is apparent or proved, the Court will be entitled to rely on such presumption. The Judicial Committee has, in several cases, strongly condemned the practice of parties to a suit withholding, from the Court, evidence which may throw light on the points for determination. In the case of 1917 P. C. 6 (10) their Lordships have said that in such circumstances they felt free to conclude that if the evidence withheld did, in any manner, help the case of the party who were guilty of such non-production, they would have brought it before the Court : see also 32 All. 104 (11) and 1916 P. C. 256 (12). Their Lordships however have said that it is open to a litigant to refrain from producing any evidence, not forming part of his case, that he considers irrelevant; if the other litigant is dissatisfied it is for him to apply for its production and inspection as evidence in the cause if he thinks proper ; if this is not done the Court is not entitled at his suggestion to draw an adverse inference, 1915 P. C. 96 (13), and that the presumption will not arise when there is sufficient explanation, 10 I. C. 963 (14).

Apart from the withholding of the documentary evidence just dealt with, the plaintiffs have also complained that the defendant has not produced the articles themselves, excepting only a few, which they have claimed. The

10. Murugesam Pillai v. M. D. Gnana Sambandha Pandara Sannadhi, 1917 P C 6 = 39 I C 659=44 I A 58=40 Mad 402 (PC).
11. Lal Kuuwar v. Chiranji Lal, (1910) 32 All 104=37 I A 1=5 I C 549 (PC).
12. Ram Parkash Das v. Anand Das, 1916 P C 256= 33 I C 583 = 43 I A 73 = 43 Cal 707 (PC).
13. Bilas Kunwar v. Desraj Ranjit Singh, 1915 P C 96=30 I C 299 = 42 I A 202 = 37 All 557 (PC).
14. Durga Kunwar v. Mathura Kunwar, (1911) 10 I C 963 (PC).

details with regard to this matter will be referred to hereafter; but it is a fact that many of them have not been produced. On behalf of the defendant several explanations, possibly three, have been given: one is that the articles were never called for, or in other words there was no order made for their production; another, that the time for production has not yet come, but that it is only when the decree, which it is said should be in the form provided for in O. 20, R. 10 of the Code, will be made and such decree will be executed that the defendant will have to produce the articles, if they are in existence, and that if he does not do so then he will be liable fo pay their money-value, payment of which has been ordered, in the alternative, in the decree; and a third explanation is that many of the more valuable articles have been taken away by relations and friends of the defendant, presumably as gifts or rewards. Of this third explanation there is no evidence, though it is not unlikely that it is true; and the other two are also good so far as they go. The plaintiffs have also complained that not merely has the defendant refrained from producing some important and material documentary evidence but has committed spoliation, that is to say, suppressed or destroyed evidence which he ought to have produced and to which the plaintiffs were entitled and that in the circumstances there should be strongest presumption against him.

This presumption which the plaintiffs seek to invoke, in this case is one of the strongest presumptions known to law, and the law allows it against a party who, by his tortious acts, withholds the evidence by which the nature of his case would be manifested. This presumption was applied to India by the Privy Council so far as back as 1838, in the case of 2 M. I. A. 113 (15). In that case Lord Brougham in delivering the judgment observed:

> And the Court below, we have no doubt, proceeded upon this principle, that everything is to be presumed against a party keeping his adversary out of possession of the property, and out of possession of the evidence, and taking means to retain that evidence in his own custody.

In the leading case of 1 Sm. L. C. 393 (16), a jewel found by a chimney sweeper's boy was presumed to be of the best description as against the jeweller who had received it from the boy and refused to return it. The principle has been applied in this country in several cases amongst which reference may here be made to one, namely, the case of 11 W. R. 536 (17), a case upon which the Court below has relied. That was a suit to recover possession of plundered property, and in which the question arose as to the amount of the property misappropriated and it was ruled that unless the defendant produced the property and showed it not to be of the value stated by plaintiffs the strongest presumption should be made against him and the highest value assumed. This doctrine, commonly called *omnia proesumuntur contra spoliatorem* or *omnia proesumuntur in odium spoliatorem*, is a favourite one in law. This presumption against a spoliator has been carried to different extents in different cases, the cardinal basis of the principle being that no one shall be permitted to take advantage of his own wrong. But it has also been said (vide Best on Evidence, Edn. 11, S. 414):

> However salutary and in general equitable, the maxim "*omnia proesumuntur contra spoliatorem*" must be acknowledged to be, it has been made the subject of very fair and legitimate doubt whether it has not occasionally been carried too far. "The mere non-production of written evidence", says Sir W. D. Evans, "which is in the power of a party, generally operates as a strong presumption against him. I conceive that has been sometimes carried too far, by being allowed to supersede the necessity of other evidence, instead of being regarded as merely matter of inference, in weighing the effect of evidence in its own nature applicable to the subject in dispute" So in 2 Russ 63 (18), Lord Eldon said:—"Now, this Court has a peculiar jurisdiction in cases of spoliation * * * * The jurisdiction of the Court in matters of spoliation has gone a long way; indeed it has gone to such a length, that, if I did not think myself bound by authority and practice, I should have great difficulty in following them so far. To say that, if you once prove spoliation, you will take it for granted that the contents of the thing spoliated are what they have been alleged to be, may be in great many instance, going a great length.

The rigour of the maxim in our opinion has to be reasonably softened upon the facts and circumstances of each particular case. As observed by

15. Sooriah Row v. Cotaghery Boochiah, (1838) 2 M I A 113=5 W R 127 (P C).
16. Armory v. Delamirie, (1721) 1 Sm L C 393.
17. Soondur Monee Chowdhrain v. Bhoobun Mohan Chowdhry, (1869) 11 W R 536.
18. Barker v. Ray, (1826) 2 Russ 63.

the Judicial Committee in the case of 12 M I A 157 (19) :

"Presumptions even in odium spoliatoris have known reasonable limits. They must not be conjectures, nor grounded on data which the evidence itself shows to be inexact."

And as their Lordships observed in another case, 10 M I A 429 (20) :

"If the facts are once ascertained, presumptions arising from conduct cannot establish a right which the facts themselves disprove."

It is also to be borne in mind that where a wrongful withholding or tortious act is not proved the presumption cannot apply, 26 Bom 339 (21). Mr. Chaudhuri has argued that the High Court in its previous judgment, in a manner, held that the spoliatoris maxim is inapplicable to the case because the High Court set aside Mr. Bose's decision by which he had accepted the plaintiffs' valuation without any inquiry as to value, and remanded the case for such an inquiry. We do not think this to be a correct appreciation of the judgment of the High Court. Mr. Bose had disposed of the question of value of the moveables in these words :

"The parties have not adduced any evidence before me as regards their price. I shall therefore accept the price of these items as given in the plaint."

The High Court pointed out that there was an issue, viz., No. 13, on the question of value and that the proper procedure was to be followed so that the values might be determined and that the question could not be disposed of in the way it was, because the values put on the articles by the plaintiffs had been disputed by the defendant. We may also point out that the application of the presumption of odium spoliatoris is not so uncommon in this country as Mr. Chaudhuri has suggested in his argument. Apart from the cases to which reference has already been made we may refer to two others. In the case of 3 Bom H C R 116 (22), it was applied against the Government, because the Collector had destroyed a material document. In (1907) A W N 227 (23) it was applied in a case in which the plaintiff sued for recovery of certain jewellery which he had valued at a certain figure and gave evidence in support of the valuation, which was found unreliable by the trial Court but which nevertheless stood unrebutted; and the High Court, applying the presumption on the ground that the defendant did not produce the jewellery and gave no evidence of its value, decreed the plaintiff's claim.

Onus of Proof.—Some argument has been addressed to us on the question of burden of proof. It is very curious that in the Court below the parties took somewhat extreme views on this question : the plaintiffs going the length of claiming at least some items of property which they could only show as having belonged at one time or another to Raja Durgaprasad and resting content with relying entirely on the valuation stated by them in their statements of claim; and the defendant, on the other hand, sitting absolutely quiet and disclosing nothing either about their existence or their values, because, as it is said, it was for the plaintiffs not only to prove that they came into his hands but also what their exact values were and relying upon the view that in the event of the plaintiffs failing to prove the latter they would be entitled to nominal damages only. The plaintiffs in adopting such a course were led by the notion that as the defendant was an executor de son tort and had taken possession of everything within the meaning of 16 Eq 534 (5), he was liable for a general account, and as such articles as they claimed were not produced nor their valves proved, they were entitled to what they claimed on the doctrine of odium spoliatoris. But even then it should have been realized, as apparently it was not, in respect of some of the articles, that the existence of such articles at the time of the death of Raja Durgaprasad must be shown. As regards the attitude taken up by the defendant, it can hardly be justified on any conceivable principle : it assumed that the plaintiffs, on whom the onus undoubtedly lay of proving all the elements which go to constitute their claim, must do so by direct evidence only and it ignored such presumption which the plaintiffs are at liberty to call in their aid, and it also overlooked that infer

19. Shah Makhanlal v. Srikrishna Sing, (1868) 12 M I A 157=2 Bom L R 44=11 W R 19 =2 Suther 190=2 Sar 403 (P C).
20. Tayammaul v. Sashachalla Naiker, (1865) 10 M I A 429=2 Sar 139 (P C).
21. Vinayak v. Collector of Bombay, (1901) 26 Bom 339=3 Bom L R 910.
22. Ardeshir Dhanjibai v. Collector of Surat, (1866) 3 Bom H C R 116.
23. Anand Chandra v. Dhanrup Mal, (1907) A W N 227.

ences drawn from circumstances and probabilities are also a legitimate means of proof. In Mayne on Damages, Edn. 9, p. 384, the matter has been put in this way :

"When the defendant in trover will not produce the article, it will be presumed against him to be of the greatest value that an article of that species can be."

And after referring to certain cases in which the aforesaid principle has been laid down or applied, it has been said :

"In all other cases, however, the plaintiff must strictly prove the amount taken, and its value, even though the conversion be admitted by the pleadings. Otherwise there would be no evidence of damage more than nominal."

In this Court, Mr. Das has very frankly said that he does not dispute that it was for his client to trace the articles to the possession of the defendant. The whole question must therefore be, whether upon the materials that are on the record, such a fact can be said to have been proved. In this connexion the definition of proof given in S. 3, Evidence Act, should also be borne in mind.

A question has been raised as regard some of the properties, whether certain matters relating to them were "especially within the knowledge" of the plaintiffs or of the defendant within the meaning of S. 106, Evidence Act. We do not propose to go into this question beyond saying that, having regard to the nature of the properties and the circumstances bearing upon them, no special knowledge can legitimately be attributed to either of the parties.

Valuation, — Damages. — As regards valuation the principles are well settled. In an action for specific restitution of chattels, the judgment is ordinarily in the alternative (S. 10, Specific Relief Act, and O. 20, R. 10, Civil P. C.) that the plaintiff do recover the possession of the chattels or their assessed value in case possession cannot be had, together with any damages for their detention. It is for the defendant, and not the plaintiff, to determine the manner in which the alternative judgment of the articles or their value is to take effect, and it is in his election whether he would deliver the chattels or pay the assessed value on them. And the plaintiff has no right or power to obtain their specific restitution. But when a decree is in the form contemplated by O. 20, R. Civil P. C., and there is no question of deterioration in value of the articles decreed to be recovered, the decree-holder is not entitled to execute the money part of the decree before applying for delivery of the articles . 1927 Cal. 652 (24) and 13 M. L. J. 444 (25). The technicalities of English forms of action, e. g., trover, detinue, conversion or replevin, need not concern us. But in a case where conversion is proved, and it is on the supposition that the article will not be delivered that the question of assessment of its value becomes necessary,—it is well settled that the value recoverable should be the value at the date of the conversion. So it has been said :

"The value recoverable in an action for conversion is in general the value of the property at the date af the conversion and not its value at any earlier or later date."

"[Salmond on Torts, Edn. 7, p. 413.]"

Also,

"The damages to which a plaintiff who has been deprived of his goods is entitled are prima facie the value of the goods, together with any special loss which he may have incurred in consequence of the wrong * * *. Where the value has fluctuated it must be taken as it stood at the time of the wrongful act. In 1 C & P 625 (26), where the cotton which formed the subject-matter of an action for trover rose in value between the date of the conversion and that of the trial, Abott, C. J., held that the jury in estimating the damages were not limited to the mere value of the property at the time of the conversion, but were at liberty to find as damages the value at a subsequent time at their discretion. There does not appear to be any reported decision in which 1 C & P 625 (26) has been either questioned or followed, but it has been frequently laid down, and the rule now appears to be established, that the proper measure of damages is the market value of the goods at the time of the conversion. [Clerk and Lindsell on Torts, Edn. 8, p. 250.]"

Under the English law,

"If the plaintiff obtains a verdict for the value of the chattel it is common to provide that it shall be reduced to a nominal sum on return being made. But this is simply a matter of arrangement between the parties. Even though no such provision is made, yet if in fact the plaintiff gets his property back again, the Court will treat this as pro tanto a satisfaction and reduce the verdict accordingly. (Ibid, p. 256.)"

Inventories, Ex. 153 *and Ex. Z* 270.—

We pass on now to another contention that has been urged on behalf of the defendant, namely, that the plain-

24. Balmakunda Bisseswarlal v. B. N. Ry. Co., Ltd., 1927 Cal 652=103 I C 740=55 Cal 26.
25. Manavikraman v. Moyan Kutti, (1903) 13 M L J 444.
26. Greening v. Wilkinson, (1825) 1 C & P 625.

tiffs by their conduct have precluded themselves from going behind the inventories which the defendant had filed; In other words, it has been urged, that the plaintiffs are not entitled to ask the Court to launch into an investigation as regards moveables other than those of which the existence is admitted in the said inventories. One answer to this argument is that such a contention goes against the directions expressly given by this Court in its previous judgment. But apart from that the position is the following: After the institution of the suit the plaintiffs on 11th September 1919, applied for a receiver. On 28th October 1919, when that application was pending, the Court on a further application of the plaintiffs issued an interim injunction prohibiting the defendant from transferring any part of the properties in suit. On 28th January 1920, a joint petition was filed by the parties for a consent order disposing of the receiver application upon an agreement between the parties upon certain terms, one of which was,

"that the defendant would within three months deliver to the plaintiffs or their agents an inventory of all valuable moveables in his possession out of that left by Raja Durgaprasad Singh and the defendant agreed not to dispose of the same."

An inventory (Ex. 153) was accordingly made over to the plaintiffs' pleader on 12th May 1920. To this inventory, an objection was taken, on behalf of the plaintiffs, by a petition dated 1st June a920, on the ground that it was untrue 1nd incomplete. On 23rd June 1920, a petition was put in on behalf of the defendant explaining the omission. It is not necessary to go into details over the controversy that arose then, for we are not deciding here whether the explanation was acceptable or not; and it would be enough to say that as a result of the controversy, the Court, by its order dated 23rd June 1920, called for a further inventory, and in pursuance of that order, a petition together with a fresh inventory (Ex. Z. 270) and certain affidavits, of Smith and of Mahendranath Chatterji, together with certain annexures explaining certain matters in connexion with tbe inventory previously filed, were filed on 12th July 1920. The Court had previously ordered that,

"if the plaintiffs consider the list to be filed by the defendant to be incomplete they should move the Court then for deputing a Commissioner for the preparation of the list."

The plaintiffs never took any further action in the matter and the fresh inventory filed (Ex. Z. 270) was allowed to rest as it was. On these facts, it has been contended on behalf of the defendant that inasmuch as the plaintiffs took no further action, as ordered by the Court, they are not entitled to challenge the correctness of the said inventory. This contention has also been emphasized on the principle of conclusiveness of affidavits of documents, which is this: that if a party states in his affidavit of documents that he has no document relating to the matters in question in the suit other than that set forth in the affidavit, his oath is conclusive and the other party cannot cross-examine upon it, nor adduce evidence to contradict, nor administer interrogatories asking whether he has not in his possession or power documents other than those set forth in his affidavit: 29 Ch. D 307 (27) and 17 Q. B. D. 101 (28). Mr. Chaudhuri's argument on this matter however is based upon an entire misconception. For it would appear from the order of the Subordinate Judge, dated 23rd June 1920, to which reference has been made, that the inventory that was called for from and undertaken to be produced by the defendant was to contain a list of the articles left by Raja Durgaprasad, which the defendant had been in possession of on the date of the petition of compromise, that is to say, the 28th January 1920, and Ex. Z. 270 itself says so.

FORM OF THE DECREE AS REGARDS MOVABLES.

A question has been raised as regards the form of the decree that should have been passed as regards the movable articles. Mr. Chaudhuri has contended that the decree in respect of all such articles should have been made by the Subordinate Judge in the form contemplated by O. 20, R. 10 of the Code, and he has pointed out that that is the correct form of the decree to be passed in this case which would appear from what their Lordships have said as regards the furniture, furnishings and equipments left by Raja Durgaprasad, in respect of which

27. Hall v. Truman, Hanbury & Co., (1885) 29 Ch D 307.
28. Nicholl v. Wheeler, (1886) 17 Q B D 101.

the High Court had refused the plaintiffs a decree. Their Lordships have said in Cl. (4) of their directions in the decretal part of their decision:

> That the defendant should be directed to deliver them to the plaintiffs, or to pay the value thereof as determined by the High Court.

Our attention has also been drawn to the words of Cl. (5) (d) and Cl. (6) in the judgment of this Court as laying down the kind of decree that should be passed, because it is said there that the plaintiffs will get all movable properties, etc., and they will get 'a decree for such of them, etc.' That such is the form in which the decree is to be ordinarily passed has already been stated. But in the present case, the defendant, by his own petition of 20th December 1926, made such a decree unnecessary. By that petition, he notified his intention to deliver to the plaintiffs some movables and documents specified in two schedules (A and B) appended thereto. As a result of this petition, a commissioner was deputed to inspect the articles and make a report of their condition, and on that being done, a compromise was reached; some of them were delivered to the plaintiffs and the others were allowed to go to the defendant on his agreeing to pay Rs. 21,000, as their value, and it was agreed that the said amount was to be included in the decree. With this arrangement we are not concerned, but what is important is para. 2 of the 'said petition, in which the following statement appears:

> That your petitioner is ready and willing, in obedience to the decree of the Honourable Court, and without prejudice to his appeal to His Majesty in Council, to deliver possession to the plaintiffs of such of the movables as actually came into the possession of your petitioner and are now in his possession, in the same condition in which they were left by the said Raja Durgaprasad Singh.

In making this statement, the defendant clearly and deliberately assumed the attitude that besides the articles mentioned in the two schedules (A and B) to the petition, he had in his possession no others which had belonged to Raja Durgaprasad Singh. It is quite possible, as Mr. Chaudhuri has suggested, that the statement is not true or correct. Indeed, Mr. Chaudhuri, at one stage of the argument, produced some articles before us and offered delivery; but, as could only be expected, there was no acceptance of them on the side of the plaintiffs, on the ground that they were not the articles under claim. It is obvious that it would be quite wrong after the defendant had adopted such a clear attitude in 1926 to give him a chance now, seven years after, of giving delivery. Such an opportunity would only open up a wide field of controversy on the question of identification, deterioration and other matters, and would be productive of no real good. So far as the documents are concerned they stand on a very different footing, and rightly enough a decree for delivery thereof has been made. We think the learned Judge was right, in view of the circumstance to which we have referred, in making the decree as regards the moveables in the form in which he has made it. As regards certain items of moveables in respect of which delivery was offered but not taken, the Judge below has taken care to make a decree for the moveables themselves, and in the alternative for their values.

Order 20, R. 10, Civil P. C., does not say that a person who is entitled to delivery of specific moveables must in all cases sue for such delivery and not for their value or for damages; for in many cases the moveables themselves would be of no use to him after conversion or detention. Nor does the rule say that the Court must invariably decree the articles claimed and not their value only. It has been held also that in order to entitle the plaintiff to obtain delivery of specific moveable property by suit and to enforce the decree so obtained by the stringent methods provided for in O. 21, R. 31, Civil P. C., it is necessary that he should allege and prove that the moveable concerned is in defendant's possession: (see 1916 Mad. 314 (29) and 22 Mad. 478 (30). And it would be something very strange, if the law would require that even in a case where the defendant asserts that the articles are not in his possession, or not in existence, and it is not possible for the plaintiff to prove that the defendant's assertion is untrue, the Court would still be bound to pass a decree for the articles in the first instance and in

29. Jaldu Venkatasubba Rao v. Asiatic Steam Navigation Co., 1916 Mad 314=30 I C 840 =39 Mad 1 (FB).
30. Murugesa Mudali v. Jotharam Davay, (1899) 22 Mad 478.

the alternative only for their value. The question as regards the form of the decree has also arisen in connection with one of the grounds taken in the plaintiff's cross-objection. But it will be convenient to deal with it later on and at its proper place.

STATEMENTS OF CLAIMS

We shall now pass on to the various items of claim. But only as preparatory to the consideration thereof a few more words need be said. On the case going back to the Subordinate Judge on the order of remand made by this Court, and in pursuance of the order for discovery that was made, the defendant, on the 28th May 1926, filed a verified petition with annexures alphabetically marked. On 1st June 1926, another petition was filed on his behalf praying that the plaintiffs be called upon to file a detailed statement of their claims. On 29th July 1926, the plaintiffs filed a petition together with a number of statements in the shape of annexures to the said petition and marked numerically. On 16th August 1926, certain issues were proposed on behalf of the plaintiffs and on behalf of the defendant; and additional issues were proposed on their behalf, respectively, on 24th and 26th August 1926. Thereafter the learned Judge settled the issues on 26th August 1926. Some of these issues underwent some amendment later on at the instance of the parties; and thereafter the enquiry was held and completed.

The learned Judge has recorded his conclusions in 18 paragraphs at the end of his judgment, consecutively numbered, the paragraphs dealing separately with claims falling under different categories. For us to deal with the case, the most convenient way would be to take these paragraphs, one by one, and to consider, as regards each of them, the appeal and the cross-objection that may relate to it.

* * * *

ITEM NO. 8—MORTGAGES-MONEY-LENDING.

The direction of the High Court in its decretal order, Cl. (v) (c), so far as this item is concerned, is contained in these words:

"The plaintiffs will get all monies on account of mortgages and the money-lending business of Raja Durgaprasad which have been realized by the defendant after the death of Raja Durgaprasad, up to the date of institution of the suit, together with interest thereon at 6 per cent from the dates of such realisation.

The claim which the plaintiffs put forward on this head is detailed in their annexure 4. Amongst the items in respect of which the Judge has made a decree in plaintiffs' favour, objection is taken on behalf of the appellant to 4 only, viz., 2, 95, 96 and 155.

2. A rokar entry, Ex. 780, dated 28th Chaitra, 1316 B. S., shows that Rs. 8,000 was lent to Nandagopal Banerji on a mortgage bond dated 23rd Chaitra, 1316. Ex. 12/19, an entry, dated 28th August 1917, in the Register of bonds, etc., of the estate, shows that the bond was made over, on satisfaction of the amount due on it, to the khajanchi to be returned to Nandagopal Banerji. The Judge has given the plaintiffs a decree for Rs. 8,000 and Rs. 2,015, being the amounts of the principal and of the interest due on the bond up to the date of satisfaction. The appellant's argument is that under the decision of the High Court the plaintiffs are entitled only to the amounts actually realized and so a claim on a bond which has been remitted cannot be taken into account.

In England, the law formerly pressed very hardly on executors and administrators who, in the exercise of an honest discretion, released or compounded debts due to the testator or the intestate. Subsequent legislation, viz., Lord Cranworth's Act (23 & 24 Vict. c. 145, s. 30) and the Conveyancing and Law of Property Act (44 & 45 Vict. c. 41) modified the rigour of the law to a very large extent, but these Acts applied only to executors and not to administrators, and to the latter, those decisions still applied in which it had been previously held that if an executor releases a debt due to the testator or cancels or delivers to the obligor a bond of which the testator was the obligee, this shall charge him to the amount of the debt, whether in point of fact he received it or not: see Williams on Executor, 11th Edn., Vol. 2, p. 1419; and that debts or damages due to the deceased will be regarded as assets, although never in point of fact received, if they be released by the executor, for the release in contemplation of law shall amount to a receipt. (Wil-

liams on Executor, 11th Edn., Vol. 2, p. 1284). The Trustee Act, 1893 (56 & 57 Vict. c. 53, s. 21) expressly gave powers to executors, administrators as well as trustees, to compromise, compound, abandon, submit to arbitration or otherwise settle any debt, account, claim or thing whatever, relating to the testator's or intestate's estate or to the trust. Recent legislation in England, in the shape of the Trustee Act, 1925, and the Administration of Estates Act, 1925, see Lewin on Trusts, 13th Edn., pp. 353, et seq, have also confirmed and enlarged those powers. But even under present conditions an executor or administrator under the English Law who desires to avoid liability for a debt released must, we take it, give some explanation for the course he adopted. Reference was made in this connexion to S. 43, Trusts Act (2 of 1882), which is much on the lines of the English Trustee Act of 1893. It was admitted that the Act would not apply to the case, but it was the principle underlying the section that was relied on. To the application of the principle, regarded as an equitable principle there can be no objection unless any statutory provision stands in the way. But the essence of the principle is that the trustee has acted honestly and reasonably, in which case only can he fairly claim to be excused. For founding such a claim not a particle of evidence has been adduced and nobody knows why this release was granted. We agree with the learned Judge in the view he has taken.

* * *

ITEM 9—RENTS AND ROYALTIES.

As regards rents and royalties the direction contained in the High Court's judgment, decretal order, Cl. (v) (c), was in these words:

> The plaintiffs will get all rents and royalties, which fell due during the life-time of Raja Durgaprasad which have been realised by the defendant up to the date of institution of the suit, together with interest thereon at 6 per cent. per annum from the dates of such realisation.

In the Court below, the most important question, that arose in connection with this item, was as regards the principle to be adopted in calculating the dues of the parties. On behalf of the plaintiffs it was urged that rents and royalties accrued from day to day and they are entitled to such as accrued to Raja Durgaprasad till his death on 7th March (=24th Falgun). The defendant on the other hand contended that since the Raja died before the year 1322 B. S. was out, rents and royalties for that year did not fall due to him, because though under the leases rents were payable in four kists (end of Ashar, end of Ashwin, end of Poush and end of Chaitra), such payments were payments in part of an entire rent, really payable for the entire year, and as regards royalties they were commissions which could only be determined at the end of the year. The Subordinate Judge has held that the plaintiffs are entitled to only such rents and royalties as had fallen due before the death of Raja Durgaprasad according to stipulated kists, and has thus overruled the contentions of both the parties, and he has made a decree for such amounts in respect of the first three kists of 1322 B. S., as were proved to have been realised by the defendant.

APPEAL AND CROSS OBJECTION.

Both parties have challenged the decision of the learned Judge and their respective contentions are on the lines on which they were put forward in the Court below. On behalf of the appellant reference has been made to 21 Ch. D. 9 (31). This was a case where there was an executory agreement for lease, one of the terms of which was that a certain minimum rent or dead rent was to be payable in advance and the balance of the rent was to be determined at the end of the year upon the number of looms that would be worked by the lessee and upon other conditions. The question that arose was what should be the terms as regards the rent in the lease to be executed. We do not see how this decision is in point. It has also been argued on behalf of the appellant that if the words in a decree are ambiguous they should always be construed in favour of the judgment-debtor. This principle need not be controverted. The words used are "fell due during the life-time of Durgaprasad", and the question is what can be their meaning. We have been asked to construe these words in the light of Art. 110, Lim. Act, where the words are "when the arrears become

. Walsh v. Lonsdale, (1882) 21 Ch D 9=52 L J Ch 2=31 W R 109=46 L T 858.

duc". And a learned argument based on S. 108, Cl. (c), T. P. Act, as to what is the "rent reserved" which secures quiet enjoyment to the lessee, has been addressed to us by Dr. Gupta, who has argued this part and one of the other parts of the appellant's case with considerable care and skill, and he has also referred us to the case of 1926 Cal. 204 (32), where it was held that rent paid in advance amounted to a loan for the purposes of S. 50, T. P. Act.

In our opinion, some indication as to what was meant by the expression "which fell due" used in the decretal order of this Court, quoted above, is afforded by this Court's judgment itself. The learned Judges, in dealing with the question of moneys realized after Raja Durgaprasad's death, referred to the case of 1924 Pat. 451 (33) and observed :

"In that case the present defendant Shivaprasad Singh, sued a tenant for arrears of rent and royalty, a portion of which related to Raja Durgaprasad's time and the High Court held that the right to recover rents which fell due during the life-time of the holder of an impartible estate, but which are not realized such, by holder passes to the latter's heirs and not to the person who succeeds to the estate."

It will be seen that in the decision, thus referred to, the rents were apportioned as up to and as after 7th March 1916, the date of Raja Durgaprasad's death. But it is not wholly impossible that the expression "fell due" as used in this passage was not meant to be taken in the same sense in which it was used in the decretal order. We shall therefore have to consider the question on its merits.

The Subordinate Judge has observed that S. 36, T. P. Act, does not, having regard to S. 2, sub-S. (d) of the Act, apply to the case, and has referred to the case of 33 Cal. 786 (34) as covering the point in dispute. So far as S. 36, T. P. Act, is concerned the learned Judge is right. As regards 33 Cal. 786 (34), Mr. Das has contended that that case is distinguishable. In that case one R. was a hikim and as such was entitled to certain mouzas which were held by one M. as mortgagee in possession under him ; on a particular date in Sraban 1307 Fasll, R ceased to be the hikim and the plaintiff became hikim and took possession of the mouzas by ousting M. M had collected rents from the tenants of the mouzas, the entire rent for 1307 Fasli. The plaintiff sued M for the rent of the period commencing from that date to the end of the year. The learned Judges held that S. 36, T. P. Act, not being applicable, the plaintiffs could not succeed. In that case, under the contract between M and the tenants, the rent for the entire year 1307, Fasli, was payable in the month of Jaistha, Fasli, and M had realized the entire rent in advance though the year had not run out. The learned Judges observed that the plaintiff may have had a claim against the tenants for that over-payment and the tenants may perhaps be entitled to be recouped by M, but they expressed no opinion on those questions. The case, it cannot be disputed, is distinguishable because the excess amount had been realized by M, before the plaintiff ever came on the field. The learned Judges referred to two decisions. 21 Cal. 383 (35) and 26 Mad 540 (36), the former as supporting their view and the latter as distinguishable and, if anything, also as a decision against the plaintiff, 21 Cal. 383 (35) was a case in which a landlord had instituted a suit for rent for the entire year against the auction-purchaser of the tenant's interest, though the said auction-purchaser had made his purchase before the year had closed, and it was held that he was liable for the whole instalment of rent, which had accrued due after the date of his purchase, but before the confirmation of the sale. It was held that rent was to be regarded not as accruing from day to day, but as falling due only at stated times according to the contract of tenancy, or, in the absence of any contract, according to the general law laid down in S. 53, Ben. Ten. Act. The case, therefore, was as between a landlord and a tenant and governed by the principles of the law applicable to that relationship. The case of 26 Mad. 540 (36) is one of the cases upon which Mr. Das has relied in his support. In that case a tenant for life had leased an immov-

32. Tiloke Chand v. J. B. Beattie & Co., 1926 Cal 204=91 I C 213.
33. Aparna Debi v. Shiba Prasad Singh, 1924 Pat 451=83 I C 623=3 Pat 367.
34. Mathewson v. Shyam Sunder Sinha, (1906) 33 Cal 786.
35. Satyendra Nath Thakur v. Nilkanta Singha, (1893) 21 Cal 383.
36. Lakshminaranappa v. Melothraman Nair, (1902) 26 Mad 540.

able property to sub-tenants on rents which were payable in half-yearly instalments; four days before the instalment fell due the tenant-for-life died; the plaintiff, who held an assignment of the right of the tenant-for-life to recover the rent due to the latter from a person who had purchased that right at a Court sale, then instituted a suit against the sub-tenants for rent of the entire instalment. The plaintiff, in the Court below, obtained a decree for the rent for the six months' less four days. This decree was upheld by the High Court. Davies, J., held that as the rent was due in the month in which the tenant-for-life died the right to the rent accrued to him on the first day of the month though he might not have sued for it till the end of that month. He held that no question of apportionment really arose, but if it did he would not be inclined to go beyond the statute law in force in this country, and would be reluctant to apply any principles of English statute law to the case.

But Subrahmania Ayyar, J., held that in absence of a specific rule, applicable to cases like this in India, the Courts are entitled to follow the broad and just principle underlying the English statute law, which culminated in the Apportionment Act of 1872, and held that ,as a matter of equity and good conscience, the assignee of the tenant-for-life was entitled to an apportionment of the rent due up to the date of the death of the tenant-for-life. It may be, and on this question we express no opinion, that the learned Judge went somewhat too far in holding that as between the tenant and the assignee of the landlord's right the equitable principle of apportionment may be applied, notwithstanding the covenant as to instalment. The view taken by Subrahmania, J., in the case just referred to appears to have been adopted in 1916 Mad. 768 (37), in which it was held that on principle there was no reason why an assignee from a lessee should not be entitled to apportionment as between himself and the lessor and why rent should not be deemed to accrue due from day to day as between them.

It was observed that in England, the law of apportionment has long been regulated by statutes, and all rents, etc., are, like interest on money lent, considered as accruing from day to day and apportionable in respect of time accordingly, and that there is no reason for not applying in India, in case of rent, the principle of apportionment which obtains in England as to interest. 1916 Mad. 323 (38) was a case in which a mortgagor in possession, after the mortgage-decree, had leased the property to a lessee for one year, i. e., from July 1907, to June 1908, with a covenant for payment of rent on 10th January 1908. In ignorance of this lease and the reservation of a rent, the mortgaged properties and the crops were brought to sale in November 1907, and the plaintiff purchased the lands together with crops thereon and the sale was confirmed in December 1908. The crops were harvested in January 1908 by the lessee. The plaintiff then sued the mortgagor and the lessee for rent for the year July 1907 to June 1998. It was held that the auction-purchaser was entitled to the whole rent reserved which was the thing substituted by the mortgagor for the crops. As regards the plea for apportionment it was held that neither S. 8 nor S. 36, T. P. Act, applied to a purchase at a Court auction and further, that the stipulation to pay a year's rent on a particular date is a contract to the contrary within the meaning of S. 36, T. P. Act, which enacts that the right to rent as between the transferor and the transferee ordinarily accrues from day to day. This decision, complicated though it is, by reason of the equities as between a mortgagor and his mortgagee, is undoubtedly against Mr. Das' contention. In the case of 1918 Mad. 557 (39), however it was held that though according to S. 2 (d), T. P. Act, the Act does not apply to sales in executlon, the principle of S. 36 of the Act, which embodies a rule of justice, equity and good conscience, can be applied and rent apportioned from day to day as between a lessor and the transferee of his interest in execution.

The learned Judges distinguished the case of 21 Cal. 383 (35), as a case of

37. Kunhi Sou v. Mulloli Chathu, 1916 Mad 768=17 I C 933=38 Mad 86.

38. Snbbaraju v. Seetharamaraju, 1916 Mad 323=28 I C 232=39 Mad 283.

39. Rangiah Chetty v. Vajravelu Mudaliar, 1918 Mad 557=43 I C 78=41 Mad 370.

transfer of the lessee's interest, and observed that they were unable to follow the decision in 33 Cal. 786 (34). Several other cases have also been referred to in this connexion by Mr. Das, but as they are not directly in point we do not propose to discuss them. One of the cases is that of 1927 All. 569 (40), in which, as far as may be gathered, S. 36, T. P. Act, was applied to the case of an auction-purchase: 1924 Cal. 1069 (41), in which 21 Cal. 383 (35) and 33 Cal. 786 (34), were followed, was a case between a zamindar and his patnidar. Reference has also been made before us to the decision of the Judicial Committee in the case of 1923 P. C. 171 (42). What was actually decided in the case was a question of intention, as evidenced by a deed of settlement, as to whether income derived from rents and shares was apportinable de die in diem: (i) between the estate of the deceased settlor (who had retained a life-interest) and persons beneficially entitled for a period of thirteen months after his death, (ii) between those persons and persons beneficially entitled after that period, and it was held that the income was not so apportionable, as such an intention did not sufficiently appear from the words "arising or accruing" used in the deed. The decision however is not wholly irrelevant, because in that case both the parties assumed a common ground that the law of apportionment applicable to India was the old law in England, as referred to in 1818 by Lord Eldon in 1 Swams 337 (43). It was an admission on a point of law made by the two parties, antagonistic before the Courts, and if such an admission was erroneous or wrong it may perhaps be reasonably expected that their Lordships would have said something against it. Their Lordships have said:

"The English Apportionment Act of 1870 provides that after its passing, all rents, annuities, and other periodical payments in the nature of income are, unless it is expressly stipulated that no apportionment is to take place, to be considered as, like interest on money lent, accruing from day to day, and shall be apportionable in respect of time accordingly. But this Act does not apply in India, nor do any of the earlier English Apportionment Acts. It is common ground that the principle which applies in the present case is that of the original English law as it stood apart from statute. The older English law on the subject was stated by Lord Eldon in 1 Swams 337 (43), and is amplified in the learned note appended to the report of that case by Mr. Swanston. The latter traces it to the two propositions, that an entire contract cannot be apportioned, and that under such an instrument as, for instance, a lease with a reservation of periodically payable rent, the contract for each portion is distinct and entrie. The rule however while applicable to periodical payments becoming due at fixed intervals, did not apply to sums accruing de die in diem . . . . . .

The distinctions drawn were often fine. But it is not necessary for their Lordships to discuss them. . . . . .

It is common ground that the old law in England, as referred to in 1818, by Lord Eldon in 1 Swans. 337 (43), was the law applicable in India to the present case."

Mr. Das has referred us to the English statutes dealing with apportionment, but we do not propose to refer to them as we can only be concerned with the old English law, "as it stood apart from Statute, the "English Statute law not applying to this country. Lord Eldon in 1 Swams. 337 (43) expressly referred to the decision in (1753) Amb 198 (44), in which Lord Hardwicke said :

"I do not mean to give this as an absolute opinion, for that must be against the tenant; though I am strongly inclined to it. But in the present case, I found my opinion on the tenant having actually paid the rent, and out of conscience and equity waived any strict right he might have. The payment has been for the use and occupation during all the half-year. Defendant cannot be entitled to more than for one week. It is against conscience for him to retain the whole money. Many cases, where a man pays money from equity and conscience, and though not bound at law, such money shall be divided according to equity. Suppose two traders, partners or correspondents and a man pays money to one of them, though not obliged but by conscience, the other trader shall have his proportion of it. A case to that purpose was before Lord Macclesfield.

Mr. Swanston thinks that the case last referred to was probably that of 9 Mad 21 (45). We are inclined to think that S. 36, T. P. Act, itself embodies a rule of equity and that principle should be applied to a case of this nature even though the section in its terms be not applicable. In any case, the much higher doctrine of equity, which is the foundation of Lord Hardwicke's dictum just quoted, is directly applicable and should be applied to this case, which is not a

40. Nand Kishore v. Ram Sarup, 1927 All 569= 102 I C 144.
41. Satya Bhupal Banerjee v. Rajnandini Debi, 1924 Cal 1069=83 I C 144.
42. Phirozshaw Bomanjee Petit v. Bai Goolbai, 1923 P C 171=76 I C 929=50 I A 276=47 Bom 790 (PC).
43. Ex parte Smyth, (1818) 1 Swans 337.
44. Paget v. Gee, (1753) Amb 198.
45. Earl of Stafford v. Lady Wentworth, (1722) 9 Mad 21.

case between persons standing in the relation of lessor and lessee or persons who are bound by covenants relating to payment of rent at stated intervals. Dr. Gupta has argued as if S. 2, Cl. (d), T. P. Act, excepts the application of this doctrine, but we are not prepared to accept such a contention.

We are therefore of opinion that the plaintiffs are entitled to such rents and royalties due up to date of the death of Raja Durgaprasad, that is to say, till 7th March 1916, corresponding to 24th Falgun 1322, B.S. No distinction is necessary to be made between agricultural tenancies and colliery leases; both will be treated on the same footing, the plaintiffs being held entitled to a further decree for 54/90ths = 3/5th share of such amounts payable for the last (Chaitra) kist of 1322 B.S. as may have been actually realised before suit. As regards royalties, they really represent the price of coal taken from the mines, and the proper way to calculate them should be on the basis of the quantities of coal despatched till * * * * that date. The royalties also would be calculated in favour of the plaintiffs on the basis of the said 3/5ths, upon such amounts due for the last kist of 1322 B.S., as may have been realised by the defendant before the date of the suit * * * * * In the cross-objection another point has been urged in connexion with decrees for claims for damages which accrued to Raja Durgaprasad in his lifetime. The learned Judge has disallowed these items on the ground that they relate to claims for damages which were unascertained at the death of the late Raja * * * * * * We are in agreement with the learned Judge in the view he has taken.

ITEM 10.—MAHARAJA MANINDRACHANDRA NANDI'S PAYMENT.

The claim as regards this item was for a realization made by the defendant, before the institution of the suit, on account of royalties due from the Maharaja and certain decrees obtained against him by Raja Durgaprasad, with interest thereon up to the date of such realization.

* * * *

The plaintiff's case was that the full amouuts due on Raja Durgaprasad's account (principal, together with such interest, as was payable and was running) had already been satisfied by the amounts of Rs. 5,10,000 received till April 1917, and so they are entitled to such full amounts. The Judge has accepted this contention. The decision of the High Court enabled the plaintiffs to get the amounts realized by the defendant on this debt up to the date of institution of the suit together with interest thereon at 6 per cent from the dates of such realization. The Judge has made a calculation of interest, on this basis, and has found that, up to the date of the decree, the dues would amount to Rs. 6,20,271-9-3.

Dr. Gupta, on behalf of the appellant, has urged, in the first place, that the High Court decree meant that only such amounts as had been actually realized, according to the true meaning of the word 'actually,' as used in English, should be taken into consideration and the decree that has been made by the Subordinate Judge was not on the footing of what was actually realized but of what should have been realized. His contention is that for such interest as was not actually realized the defendant could not be made liable because the High Court never intended that interest which had not been realized on a debt, which was due, should be regarded as interest actually realized. In other words, he has contended that while the High Court decree meant to make the defendant liable on the footing of actual realizations, the Subordinate Judge has made him liable on the footing of what he should have realized, that is to say on the footing of wilful default or devastavit. This argument is ingenious but not sound. It overlooks the fact that the debt itself was carrying interest, and the principal and the interest payable thereon formed the entire debt. And if what the defendant did in connexion with the debt did, in fact or in law, amount to its realization, the defendant was liable.

Dr. Gupta has also argued that a certain amount of latitude and discretion must be allowed to a person who, situated in the position in which the defendant was then placed, had to realize the dues of the late Raja. It is said that a remission of interest was allowed for speedy realization of the debt: such a thing indeed was not impossible, but

there is no evidence or explanation to that effect. The question, looked at as an act of release, stands on the same footing as other items of release of debts already dealt with and need not be discussed again. But, in our opinion, this item stands on a different and on a much worse footing so far as the defendant was concerned. It is not suggested that the payment of Rs. 3,10,000 and Rupees 2 lakhs, when made, were earmarked for the defendant's dues. Indeed, there are, on the other hand, some indications to the contrary and showing that the payments were for the decretal dues of the late Raja. But leaving that aside, the position is that there were two debts owing from a debtor, one to the estate which the defendant was handling as executor de son tort and the other to himself. Dr. Gupta has referred, on the subject, to the power of trustees to release or compound debts under the English Trustee Act, 1925, and the power of personal representatives as to appropriation under the Administration of Estates Act, 1925 (Lewin on Trusts, Edn. 13, p. 352, et seq.), and also the provisions of the Trust Act, 1885, S. 43 and the principle underlying it. This matter has been already dealt with in connection with other items of releases discussed above. He has also referred to the case of 22 L. J. Q. B. 448 (46), in which it was laid down, a principle which has never been disputed, that where an executor de son tort really acts in the character of executor and out of the assets in his hands makes a payment in satisfaction of a debt from the deceased, to a person who at the time might reasonably suppose that he had authority to act as executor, such payment is valid and binding upon the person who afterwards becomes the rightful administrator. So:

> though an executor de son tort cannot by his own wrongful act acquire any benefit, yet he is protected in all acts, not for his own benefit, which a rightful executor may do. And accordingly, if he pleads properly, he cannot be made liable beyond the extent of the goods which he had administered, and therefore under a plea of plene administravit, he shall not be charged beyond the assets come to his hands, and in support of the plea he may give in evidence payments made by himself of debts of the deceased of equal or superior degrees and, even after action brought, he may dispose of the assets in discharging a debt of a higher degree. [Ingpen on Executors, Edn. 2, p. 68].

The case of 1924 P. C. 34 (47), to which our attention has been drawn, does not seem to us to have any bearing on this matter.

> Where the assets are sufficient to answer the debts and specific legacies, but not the general legacies, the latter are subject to abatement.
>
> This abatement must take place among all the general legacies in equal proportions. An executor has no power to give himself a preference in regard to his own legacy as he has with his own debt (Williams on Executors, Edn. 12, Vol. 2, p. 883).
>
> If it were a question of the executor paying off his own debts out of the assets getting in, he could perhaps have, under the general law, given preference to his own debts and was not bound to pay off the debts of others before satisfying his own. It may be stated here that according to the present practice under the English law, the bond required to be given by a creditor on a grant to him of administration binds him to pay the debt rateably and proportionately and according to their priority in law, and not preferring his own debt by reason of his being administrator (see Ingpen on Executors, Edn. 2, p. 377) and in England an executor de son tort cannot retain for his own debt though he be a creditor of a higher degree. (Ibid, p. 69).

On 24th April 1919, the amount due on Raja Durgaprasad's account was far less than the five lakhs and ten thousand, which was the total amount which had, by that date, been realised. If the payments were made specifically in satisfaction of these debts the defendant had no right whatsoever to keep that account open so as to appropriate any part of that money towards his own account. On the assumption that no appropriation towards Raja Durgaprasad's dues was specifically intended by the debtor the position is in no wise better. On paying money to his creditor the debtor may at the time of payment, appropriate it to any particular debt, even though the creditor says he takes it in payment of another debt. If the debtor makes no appropriation to particular items, the creditor has the right of appropriation. If no express appropriation be made by either the debtor or the credi-

46. Thompson v. Harding, (1853) 22 L J Q B 448 =2 U & B L 630=1 W R 468=18 Jur 58.

47. Nagendrabala Dasi v. Dinanath Mahish, 1924 P C 34=81 I C 752=51 I A 24=51 Cal 299 (PC).

tor, it may be implied or presumed that payments to and drawings against a running account are to be attributed to the earliest items on the opposite side of the account (1 Mer. 572 (48), 4 DeG. M. & G. 372 (49), and 2 Ch. 433 (50)). But as between trustees and their beneficiaries and as to every person in a fiduciary character, the rule is modified, and so long as the trustee has money standing to his account drawing by him will be attributed to his own money, the trust money being intact. (13 Ch. D. 696 (51)). So where a solicitor paid into his own account moneys of different clients, but the balance of the account always exceeded the amount first paid in, though less than the amount of other client's moneys, it was held that the money of the client first paid in must be taken to have been drawn out (1895) 2 Ch. D. 433 (50): see also Lewin on Trusts, 13th Edn., p. 933.

The defendant, even if he was an executor or trustee, must on these principles be held to have had no right to remit any part of the amount that was legitimately due to Raja Durgaprasad and give preference to that extent towards satisfaction of his own dues. We therefore agree with the Subordinate Judge in holding that the plaintiffs are entitled to a decree, so far as this item is concerned, for the full amount of Raja Durgaprasad's dues from Maharaja Manindrachandra Nandi, irrespective of any deduction or remission which the defendant may have allowed to the latter. Another question of interest has also been raised but that will be dealt with hereafter.

CROSS-OBJECTION.

From what has been said above in connexion with "Item 9 — Rents and Royalties," it would follow that in addition to the decree which the Subordinate Judge has made the plaintiffs would be entitled to a further decree for the portion of the royalty for 54 days of the quarter ending 13th April 1916, that is to say, up to 7th March 1916, on the three-fifths basis explained under that item, such amount being taken to have been realized by the defendant notwithstanding any deduction or remission that he may have allowed to Maharaja Manindrachandra Nandi.

ITEM 11—MISCELLANEOUS ITEMS IN ANNEXURE 6.
APPEAL.

The appellant's objection as regards this item is directed against item 13 of annexure 6, namely the value of paddy in the different granaries. The main argument is that the High Court's judgment did not contemplate any inquiry about the paddy in the granaries. With this we are unable to agree, because we do not see why paddy should not be included in 'movables' for which discovery and inquiry were ordered. . . . . It has also been argued that some deduction should have been allowed for such quantity as must have been spent for maintenance of live-stock, consumption for the family, and sidbas. The second of these items cannot be allowed, because the defendant as the holder of the impartible estate was bound to maintain the family out of the income of the estate as it came into his hands, as we shall afterwards see. The case as regards the other two items lacks precision. But there is some evidence from which it is found that sidhas were given to servants as wages of servants for the period prior to Raja Durgaprasad's death and some paddy was also used for maintaining the elephant and other live-stock.

If a rightful executor or administrator brings an action of trover or trespass against the executor de son tort, the latter may give in evidence in mitigation of damages, payments made by him in the rightful course of administration. (Ingpen on Executors, 2nd Edn., p. 69.) That also is the law in India under S. 304, Succession Act, for it cannot be maintained that the maintenance and upkeep of live-stock is not in due course of administration. So also would an executor or administrator be bound to pay the debts of the deceased. These principles however will only apply to the wages of servants for the period of Durgaprasad's lifetime and the feeding of the elephant which subsequently died of lightning stroke and of the several items

48. Clayton's case, (1816) 1 Mer 572.
49. Pennell v. Deffell, (1853) 4 De G M & G 372 =23 L J Ch 115=1 W R 499=18 Jur 273.
50. In re Stenning. Wood v. Stenning, (1895) 2 Ch 433=73 L T 207.
51. In re Hallet's Estate. Knatchbull v. Hallett, (1879) 13 Ch D 696=49 L J Ch 415=28 W R 732=42 L T 421.

of live-stcck which have been delivered. As regards those which have not been delivered and for the non-delivery of which no explanation has been offered the defendant, from the moment of conversion, became a wrong-doer. To a wrong-doer or trespasser. in our judgment, a different principle, should apply. For example where the proprietor of land seized an animal, as damage feasant, under circumstances which made the seizure wrongful, and after feeding it for several days sold it, the owner was held entitled to the full value of the animal in trover, without any deduction for the feeding. [2 Car & Kir 31 (52)]. On all these considerations, and taking into account what Gostha has said, we think we must disallow 1,500 maunds of paddy, with the result that the Judge's decree on this head should be reduced by Rupees 3,000. There is also a question of interest, which will be dealt with later.

ITEM 12—BONDS AND PROMISSORY NOTES.

This item relates to a number of bond and promissory notes which the Subordinate Judge has ordered the defendants to deliver to the plaintiffs. The plaintiffs in the course of their arguments in the Court below gave up their claims with regard to such bonds and promissory notes as were time-barred. The decree, therefore purports to be in respect of such only of the bonds and promissory notes as are not time-barred,

This however is disputed on behalf of the defendant.

APPEAL

Dr. Gupta's argument is, as was his client's argument in the Court below, that the bonds and promissory notes do not come within any of the items for which enquiry was ordered by the High Court. The Subordinate Judge was of opinion that they would come within the words "all moveable properties" in Cl. (g) (d) of the decretal order of the High Court, as, under the General Clauses Act, all properties which are not immovable are moveable. Before him a construction on the "ejusdem generis" basis was put forwrrd, based on the words "jewelleries". "cash.' and "moneys" which followed (and not preceded) in that clause, but the learned Judge overruled it. The learned Judge also pointed out how absurd it would be to suppose that while moneys realised on bonds, etc., were taken into consideration and provided for, such bonds, etc., in respect of which no realisation had been made were lost sight of by the learned Judges. We entirely agree with the reasons which the Subordinate Judge has given for overruling this contention. A bond, as a physical object is, in our judgment, moveable property.

* * * *

CROSS-OBJECTION.

Mr. Das in his cross-objection has urged that the Subordinate Judge should have assessed the values of these bonds and should have made a decree in the alternative for the said values, in the form contemplated by O. 20, R. 10. He has pointed out that issue 16, which related to bonds and promissory notes, had these words: "Are the plaintiffs entitled to get them or their money value,", and that the defendant had moved the Subordinate Judge to delete the words "or their money value," but the learned Judge has refused to accede to this prayer and that upon that the defendant moved this Court for the same purpose but failed. He has therefore argued that the learned Judge was wrong in refusing to assess the money value of these bonds.

The Subordinate Judge has disposed of the matter in these words:

> If the bonds, etc., that came into the defendant's hands were discovered, the plaintiffs could bring suits as successors to the interest of Raja Durgaprasad on these bonds for the recovery of the moneys due thereon. They may still do so, even without filing the bonds, provided the necessary particulars are available, and it is open to them to claim damages from the defendant, in the alternative, if the defendant fails to deliver the bonds to them and they suffer any loss in consequence. But I think that an enquiry regarding the damages which the plaintiffs would be entitled to recover from the defendant in the event of non-delivery of the bonds and promissory notes which may be found to have come into his hands does not come within the scope of any of the enquiries directed by the High Court. If the plaintiffs suffer any loss on account of non-delivery of the bonds and promissory notes there will arise a cause of action quite independent of the cause of action for the present suit. I therefore find that the plaintiffs cannot at this enquiry claim by way of damages the value of the bonds and promissory notes in the event of non-delivery thereof by the defendant.

Mr. Das has pressed us to have a money-value assessed for these bonds

52. Wormer v. Biggs, (1845) 2 Car & Kir 31.

and promissory notes. He has said that in view of O. 20, R. 10, Civil P. C., it was obligatory on the Judge to make such assessment, that the learned Judge was wrong in reviewing his own order previously made and that there is no just reason why his clients should be driven to a fresh suit and compelled to incur additional trouble and expense or be obliged to remain satisfied with an infructuous decree which the defendant will not hesitate to disobey.

It is quite true that under O. 20, R. 10, the decree shall also state the amount of money to be paid, in the alternative, if delivery cannot be had. But in a case of this kind if the Court has to assess the money-value of the bonds, it will have to embark on an enquiry as regards each bond in order to find out what money should be paid for it if no delivery be offered. Such an enquiry may often prove unnecessary, in the end, because the bond itself may be delivered or it may prove inadequate, for events may happen between the date of the enquiry and the date of the decree which may alter the whole basis and complexion of the liability on the footing of which the liability of the defendants is to be assessed. As a mere piece of moveable property, and irrespective of its character as representing an actionable claim, the value of the bond is only nominal, but the measure of the damages would be upon the basis of its character as representing an actionable claim. As regards the contention that the Subordinate Judge had no power to review his own order, we are not prepared to give too much weight to it; for since the Code of 1908 with its provision as regards inherent jurisdiction of Courts came into being, the old theory of finality of interlocutory orders has been almost wholly exploded. And as regards the harassment that the plaintiffs will have to undergo if they are relegated to a future suit, the matter requires no very serious consideration, for the legislature has provided in O. 21, R. 31, a remedy which seems to us to amply meet the requirements of the case. That rule after laying down in Cl. (1) the different modes in which the decree may be enforced, says in Cl. (2) that

"the Court may award to the decree-holder in case where any amount has been fixed by"

the decree to be paid, as an alternative to delivery of moveable property, such amount and, in other cases, such compensation as it thinks fit. This provision itself shows that a decree for delivery of a specific moveable need not necessarily, in all cases, be in the alternative form. That an enquiry as to damages in cases of this kind may more profitably be started by the Court in execution, cannot, in our opinion, be disputed.

The principles on which such damages have to be assessed, are not very difficult of appreciation. Dr. Gupta has argued that it is only on the footing of wilful neglect or devastavit, that such damages may be assessed. But with this we do not agree.

If the security is void at the time of conversion, and not by any act of the defendant, only nominal damages can be recovered, because if the document, which was itself valueless, was detained by the defendant after his right to it ceased, the plaintiffs would be entitled to a verdict with nominal damages for the parchment (Mayne on Damages, 9th Edition, pages 387-388)

Otherwise, the plaintiffs having been, by the defendant's wrongful act, prevented from realizing their dues, damages will have to be assessed on the footing of the injury or loss. [Ibid] Remarkable instances of the estoppel which arise against the defendant in such circumstances are given in the book after the passage quoted above.

The cross-objection should be overruled.

ITEM 13—DEDUCTIONS.

A. Shop-debts and outstanding bills (Annexure D).—In the judgment of the High Court's ordering portion, Cl. (v) (c) it was ordered that the defendant would be entitled to get a deduction of any shop-debts and other outstanding bills and debts of Durgaprasad paid by the defendant up to the date of the suit, otherwise than for the estate or the other immovable properties incorporated thereinto. The defendants's claim on this head was contained in his Annexure D. The Subordinate Judge has allowed Rs. 43,681-11-0 on this account.

APPEAL

The defendant's appeal relates to a number of items which have been disallowed by the Judge.

The argument is that no distinction should have been made between per-

sonal contracts and estate contracts, but that the liability for all such contracts should fasten on the heirs who. and not the successor, were bound to bear the consequences of such contracts. The words " Shop-debts and other outstanding bills and debts of Durgaprasad, otherwise than for the estate, etc.," have been sought to be interpreted as meaning such debts as would be chargeable on the estate.

Mr. Chaudhuri has argued in substanee that where there is an impartible estate and the holder dies the estate becomes extinct, and so his successor succeeds to a new estate free from all liabilities except such as may have fastened on to the estate under the law : in other words, that the holder for the time being of an impartible estate with liabilities arising out of contracts, entered into with strangers, by him personally. He has argued that ordinarily such a distinction is not necessary to be made, because ordinarily the person succeeding to the impartible estate is the person who, as heir, would be liable for such contracts, but where, as here, the heir is one person or one body of persons and the successor another, the distinction becomes necessary and has to be made. To put it in another form, his argument has been that contracts which have a concern with the estate should be treated as creating liability on the estate in the hands of the successor only, in the same way and to the same extent as alienations made for the benefit of the estate are binding —an argument which, if pursued, gives rise to a vexed question, namely, what is the true meaning of the words " for the benefit of the estate " which occur in the judgment of the Judicial Committee in 6 M. I. A. 393 (53). (See Mulla's Hindu Law, Edn. 7, pp. 243-243-A.) Several cases have been cited in this connexion—31 Cal. 224 (54), 34 All. 79 (55) and 3 I. C. 907 (56). In these cases following the observations contained of the Judicial Committee in 9 M. I. A. 539 (57) and 18 Cal. 151 (58) and other cases, it was held that where ancestral property is impartible and is held by a single member of the family all the members of the family must be deemed to be joint in estate and the rule of succession to the property is the same as that which governs the case of impartible property, so that a junior member of the family who gets maintenance from the person holding the impartible estate succeeds to the estate by right of survivorship. It was held that where an impartible estate devolved, by right of survivorship, on a member of the family or any male lineal descendant, not being the son or grandson of the last male holder, it cannot be regarded as assets of the deceased so as to entitle the holder of a decree against him to proceed against such property in execution. 10 All 272 (59) and 22 Mad 383 (60) were distinguished in these cases as only referring to the power of the next taker of an impartible raj to question the validity of alienations (in the former case by way of gift, and in the latter case by way of will) and as not having touched the question of mode of descent or the incidents of succession. On the other hand, in the case of 6 C W N 879 (61) the learned Judges, relying upon 22 Mad 383 (60) and particularly the passage therein which runs in these words :

" where the Mitakshara law prevails and there is the custom of primogeniture the eldest son does not become a co-sharer with his father in the estate, the inalienability of the estate depends upon custom which must be proved, or it may be in some cases upon the nature of the tenure."

held that where the right of primogeniture exists, in a Mitakshara family, the son who takes the estate does not become a co-sharer in the estate and does not take by survivorship, and such an estate is not prima facie inalienable and that the son takes the estate with the burden of the decree against the father and is liable to be proceeded against in

53. Hunoomanpersaud Panday's case, (1854-57) 6 M I A 393=18 W R 81n=2 Suther 29=1 Sar 552 (P C).
54. Kali Krishna Sarkar v. Raghunath Deb, (1904) 31 Cal 224.
55. Inder Sen Singh v. Harpal Singh, (1911) 34 All 79=12 I C 915.
56. Harpal Singh v. Bishan Singh, (1909) 3 I C 907.
57. Kutama Natchiar v. Rajah of Shivagunga, (1863) 9 M I A 539 (P C).
58. Jogendro Bhupati v. Nityanand Man Singh, (1890) 18 Cal 151=17 I A 128=5 Sar 596 (P C).
59. Sartaj Kuari v. Deoraj Kuari, (1888) 10 All 272=15 I A 51=5 Sar 139 (P C).
60. Rao Venkata Surya Mahipati Rama Krishna Rao v. Court of Wards (1899) 22 Mad 383 =26 I A 83=7 Sar 481 (P C).
61. Ram Das Marwari v. Braja Behari Singh, (1902) 6 C W N 879.

execution. In Madras also there has been a conflict of judicial opinion on the question, 29 Mad 453 (62), taking the former view, while the latter view was taken in 30 Mad 454 (63), 32 Mad 429 (64). An exhaustive and illuminating review of the case law on the point will be found in the decision in the case of 1927 All 616 (65) in which it was held that the interest of the holder of an impartible estate is liable for his debts, in the hands of his heir, and that it is only for the purpose of ascertaining the person entitled to succeed to an impartible estate that recourse must be had to the rule which would have governed the succession, if the estate had remained partible. The decision of the Judicial Committee in 1921 P C 62 (66) in an attempt to reconcile the different decisions of the Board [with the exception of the decision in 1920 P C 34 (67) which was said to have been the result of acceptance of an off-hand view without argument and without citation of authorities] has predicated for succession to an impartible estate, governed by the Mitakshara law, a rule by survivorship not based on the theory of co-ownership by birth. This has created a tangle which it will be for their Lordships to settle some day, and no result will follow from pursuing the point any further here

But an examination of the items, as regards which the decision of the learned Judge has been taken exception to, relieves us of the necessity of arriving at a definite conclusion on the aforesaid question. It appears that Nos. 1, 5, 6 36 to 41, 311, 312, 334, 337a, 338, 338a, 341, 348 and 349 are clearly in repect of the impartible estate. Nos. 2, 3 and 310 are bills in connexion with law suits, which presumably were in connexion with the impartible estate; and in any case the defendant has not shown that they were for Durgaprasad's personal matters. No. 273a is for clothes supplied for the Rajbatee and no evidence is available to show when the purchases were made. In such circumstances, we think the Judge was right in disallowing the deductions. There is a question of interest to be considered and that will be done later on. * * * * *

D.—INCOME-TAX.

An agreement was reached in the Court below according to which the income-tax was calculated, but this was without prejudice to the plaintiffs' contention that the defendant is not entitled to any deduction for it at all. The contention is that income-tax was not legally payable on what was the unrealized income of Raja Durgaprasad's time realized afterwards by the defendant. The contention is that it was a voluntary payment because there was at the time a decision of the Calcutta High Court (of Greaves, J.) in the case of 1927 Cal. 518 (68), (Ex. 9a), which supported such a contention. The previous judgment of this Court in this case, in our opinion, concludes the matter, because it has laid down that the defendant will be entitled to get a deduction of income-tax, etc., "which may have been paid by the defendant on account of sums," meaning sums which fell due during Raja Durgaprasad's lifetime, and might have been realized by the defendant. It has been argued that the word "paid" in this direction means "legally payable and actually paid," and it is also pointed out that the correctness of the decision of Greaves, J., cannot be questioned because it led to the amendment of the Act. We do not see the force of these contentions because the evidence is that the income-tax people examined the books and assessed the tax and the defendant was in consequence obliged to pay. He was entitled to assume that the tax was rightly assessed and he then made the payment, for which in our opinion he is clearly entitled to be reimbursed.

* * * *

62. Nachiappa Chettiar v. Chinnayasami Naicker, (1906) 29 Mad 453=16 M L J 339.
63 Rajah of Kalahasti v. Achigadu, (1905) 30 Mad 454=17 M L J 367.
64. Zamindar of Karvetnagar v. Trustee of Tirumalai, Tirupati, etc., Devastanams, (1909) 32 Mad 429=2 I C 18.
65. Shyam Lal Singh v. Bijay Narayan Kunda, 1917 Pat 616=39 I C 36=2 Pat L J 136 (F B).
66. Baijnath Prasad Singh v. Tej Bali Singh, 1921 P C 62=60 I C 534=48 I A 195=43 All 228 (P C).
67. Bishun Prakash Narayan Singh v. Janki Koer, 1920 P C 34=62 I C 289 (P C).
68. Mitchell v. Macniell, 1927 Cal 518=103 I C 120.

A.—ITEM 18—INTEREST AND B.—MODE OF ACCOUNTING.

A—Interest.

Appeal.

The contentions of the appellant as regards interest, from the date of the liability up to the date of decree, are in the following three heads:

First.—That the Judge was wrong in compounding interest, from the date of liability up to date of decree, with the principal amount of the liability, and then decreeing interest on the total amount, at 6 per cent per annum, from the date of the decree until realization. This contention relates only to items 6, 7, 8, 9, 10 and 11.

Second.—That there should have been a stoppage of interest from some point of time till now. This contention relates to all the items on which interest has been allowed.

And *Third.*—That the rate of interest should not be 6 per cent. per annum but much less.

The third contention is wholly untenable. Nothing less than 6 per cent per annum can be thought of. Besides, the High Court and the Judicial Committee have already allowed that rate. The second contention requires consideration. In support of this contention, the facts to which our attention has been drawn are the following. Soon after the institution of the suit, that is to say, on 28th October 1919, the defendant was, at the plaintiffs' instance, prohibited by an ad interim injunction from transferring any part of the properties in suit. By the order that was passed, by consent, on 28th January 1920, though the appointment of a receiver was put off, yet the defendant continued to be under a restraint, in the matter of dealing with the properties and of resorting to such means as might be necessary for paying off the plaintiffs' dues. It is said that the end of 1919 or the beginning of 1920 was the first point of time from which there should have been a cessation of interest. It is then said that if this cannot be allowed, then, at any rate, interest should cease to run from 22nd December 1927, when the receiver was appointed. The circumstances under which the last mentioned order was passed were these. After the Subordinate Judge had made his decree on remand, the plaintiffs commenced execution and there was in this Court, on behalf of the defendant, an application for its stay. On 22nd December 1927, this Court made an order appointing a receiver for the immovable properties and gave certain directions. The order opens with these words:

"We acknowledge the help which both sides have given us in this vexed matter, because neither of the parties is in a position to furnish security to the extent of what ordinarily this Court directs in such matters.

Nextly, our attention has also been drawn to the fact that the High Court, in its judgment, contemplated that the proceedings on remand should be concluded within four months from the date of the judgment and those proceedings, notwithstanding such direction, went on till 7th May 1927. It was shown that from Mr. M. N. Das' decision the appeal was lodged on 17th August 1927 and the appeal first came on the list on 13th December 1932. It has also been urged that on 10th February 1933, the plaintiffs obtained an adjournment of the appeal sine die, without placing proper materials before the Court, and that it was not until March 1933 that a date could be fixed for the hearing of this appeal. On all these facts, Mr. Chaudhuri has contended that there should be a stoppage of interest from such point of time as to us may seem just and equitable. He has referred in this connexion to certain cases which we shall now notice. 5 H L C 555 (69), which was a bill for distribution of a testator's estate. One of the questions was whether interest should be charged on arrears of an annuity. The Lord Chancellor, while holding that the general rule of the Court was that arrears on an annuity do not carry interest, observed:

"The cases in which, in later times, the Court, in the absence of express contract, has allowed interest have been confined to those where the annuitant has held some legal security which, but for the interference of the Court, he might have made available for the obtaining of interest; or where the accumulation of arrears have been occasioned by the misconduct of the party bound to pay. * * * But on the best consideration of the facts, I am unable to fix the blame of delay on those who were to pay the annuities rather than to those who were to receive them."

Curiously enough, one great and perhaps the only point of similarity bet-

69. Torre v. Browne, (1855) 5 H L C 555=24 L J Ch 757.

ween that case and the case before us is that each was or has been "a lamentably protracted litigation." The rule of Court in England, in this matter, is not the same as the statute law in this country (vide Ss. 351 to 354, Indian Succession Act). (1892) A C 166 (70) is a very different case. The question was one of damages for detention of some cargoes, and one of the periods for which such damages were to be determined was subsequent to the date when the cargoes came into the possession of a receiver appointed by the Court. Lord Watson in his speech said:

"The order of 17th December 1880, for the appointment of a receiver had the immediate effect of making the company bare custodians for the Court; and the appointment of 23rd February 1881 transferred the actual possession of the cargoes or their proceeds from the company to an officer of Court. In my opinion, detention by the company, whether it had been legal or illegal, ceased at the first of these dates. When possession of the subject of controversy is with the Court, the competing parties are simply preferring their claims in the ordinary course of law; and any damages which the successful party may suffer from the continuance of the litigation are due to the law's delay, and not to any wrong perpetrated by the unsuccessful competitor."

In the present case no receiver was appointed of the movables or the cash. In 1 Jo 51 (71), (Mews' Digest, Vol. 2, Col. 265), one creditor had, by appointing a receiver, obtained preference in respect of his debt, and the interest claimed by the latter against the debtor was refused.

None of the cases abovementioned have any analogy to the present case. Neither the interim injunction of 28th October 1919, nor the consent order of 28th January 1920, nor the appointment of a receiver on 22nd December 1927, could have prevented the defendant, if he was so minded, from obtaining an order for dealing with his properties in any way he liked, if only such dealing was meant to raise funds to pay his liabilities. Nor again was the time taken up in the disposal of the proceedings on remand, nor the period taken up by the appeal, which the defendant himself preferred to this Court from Mr. Das' decision, and the conduct and preparation of which were in his hands, a matter which can be put against the plaintiffs, so long as it has not been shown that the plaintiffs in any way have stood in the way of the speedy disposal thereof. The defendant could well have applied to the Court to give him liberty to raise funds and could at least have offered to pay off his liability in full or in part. The adjournment that was obtained on 10th February 1933, was, as far as we can gather, not on the application of one side only.

One important principle, under which running of interest may be suspended, is where the delay in the payment of the principal debt is caused by some improper act or omission of the creditor, (1917 Cal. 630 (72), in which several authorities have been cited), because in such a case the wrong is with him. So if a creditor, by his own act, puts it beyond the power of the debtor to make payment, no interest should be recoverable for the period during which the creditor was thus prevented. This principle is based on the plainest principles of justice equity and good conscience. Again, in 1921 P C 100 (73), the Judicial Committee disallowed interest for the period taken up by appeals by the mortgagee, the case having been hung up by his persistence in asserting an unwarrantable claim for interest. In the present case we can see none of such circumstances existing. The order for the appointment of a receiver, as far as we can gather, was made by this Court to relieve the defendant from execution and the order itself looks like an order by consent, though it does not expressly say so. As regards the first contention, namely, that relating to the allowing of interest up to date of decree and compounding it with the principal on the date of the decree and allowing of interest thereon at the Court rate, S. 34, Civil P. C. of 1908, justifies such a course. Even under the Code of 1861 the law was the same. But their Lordships of the Judicial Committee have never said anything and, on the other hand, have said much to indicate that the matter is purely one of discretion. It is quite true that

"the rate of interest however to be allowed on the principal debt up to the date of the decree ought to be that, if any, which has been fixed by

70. Peruvian Guano Co. v. Dreyfus Brothers & Co., (1892) A C 166=61 L J Ch 749=7 Asp M C 225=66 L T 536.
71. Stirling v. Wynne, (1834) 1 Jo 51.
72. Gopeshwar Saha v. Jadav Chandra, 1917 Cal 630=32 I C 537=43 Cal 632.
73. Mohammad Ali Mohammad Khan v. Ramzan Ali, 1921 P C 100=69 I C 65 (PC).

contract, express or implied, between the parties: 3 All. 91 (74)."

Also, where there is no contract, express or implied, there is a discretion as to what interest, if any, has to be allowed : 1922 P C 46 (75). There is a divergence of judicial opinion on the question whether in the case of a mere detention of a debt, where there is no contract, express or implied, to pay interest or no statute or mercantile usage allowing it, interest can be awarded as interest. But that in a proper case it may be awarded by way of damages has been the view generally taken. S. 34 of the Code of 1908, also expressly sanctions the form of the decree that has been passed. But if one looks into the section a little closely one finds that while, except in cases in which the contract rate, for some reason or other, fails, that rate should be enforced up to date of suit, so far as the period pendente lite and also the period post decree are concerned reasonable rates of interest are to be allowed. This clearly shows that the plaintiff cannot, as of right, ask for the contract rate of interest for the period pending the suit, though Courts have always held that that rate should be adhered to unless it would be inequitable to do so. So far as post decree interest is concerned, there again the Court has a discretion. But the object of allowing such interest on the aggregate amount, compounded of principal and interest up to decree, is twofold. One is to enable the debtor to know the exact amount of his liability, which as soon as it is found in the decree it is his duty to discharge ; for, under the law, it is the duty of the debtor to find his creditor out and to make the payment. The other object is what was pointed out by the Judicial Committee in the case of 3 All. 91 (74) :

"A practice, indeed, of giving upon the aggregate sum decreed for principal, interest, and costs, interest at only 6 per cent, does seem to have grown up ; but that may have been in order to prevent the parties from enforcing their decree, and allowing their demand to roll on at 12 per cent".

In the present case, there was no contract, implied or express, and the interest ante lite as well as pendente lite has been allowed at 6 per cent, because presumably the Subordinate Judge considered that that was a fair rate. There was no point therefore in compounding the principal and the interest due up to the date of the decree, and making interest to run on the aggregate sum at that rate. S. 34 of the Code or its principle was never intended to be used as a means for providing for compound interest : see 1 W. R. (Misc.) 15 (76), but to relieve the debtor of a hard rate of interest for a contract rate, express or implied, is seldom 6 per cent or less. And if the decree is maintained, it will only mean that the Court is allowing compound interest, compounded at the point of the decree. The Judicial Committee has pointed out that

"the plaintiff getting the security of a decree has his interest reduced in the generality of cases." 18 Cal. 164 (77).

The present decree, far from reducing the burden of interest, has immensely increased it. We are aware that the discretion exercised by a Court of trial should not be lightly interfered with by a Court of appeal. But the compounding in our judgment is based on no principle, and we must accordingly set it aside. Indeed we feel, as will appear from what we propose to say now, that we are bound to interfere with this part of the learned Judge's decision.

* * * *

B.—MODE OF ACCOUNTING.

Closely connected with the question of interest is the question as to how the payments made by the defendant are to be credited. Here again, as has already been pointed out, under Mr. Bose's decree, such payments, as he dealt with, were credited against the principal amounts due and this manner of accounting was upheld by this Court: Cl. (v) (a). This has also been affirmed by the Judicial Committee and their Lordships in dealing with Rs. 48 259-3-9 have ordered the deduction of this amount with 6 per cent per annum with interest from the date of its payment, from the amount payable by the defendant to the plaintiffs "as provided by the decree of the Subordinate Judge": Cl. (3).

74. Sophia Orde v. Alexander Skinner, (1880) 3 All 91=7 I A 196=4 Sar 178 (PC).
75. Panna Lal v. Nihal Chand, 1922 P C 46=67 I C 423 (PC).
76. Jodoonath Roy v. Dwarkanath Chatterjee, (1864) 1 W R (Misc) 15.
77. Umes Chunder Sircar v. Zahur Fatima, (1890) 18 Cal 164=17 I A 201 = 5 Sar 507 (PC).

The Subordinate Judge has adopted another mode. He has, for instance, as regards the bank money credited the payments of Rs. 2,00,000 and Rs. 50,000 in the first instance against the interest due. This is in clear contravention of what is provided for in Mr. Bose's decree and in the High Court's decision and what has been approved and confirmed by the Judicial Committee. As regards the items (14) and (16) of the decretal order in his judgment, the learned Judge has not given details as to how the credit was to be made, but if the same process has been resorted to, in arriving at the figure, which is to be found in item (16) of the decree which was drawn up in pursuance of his judgment, the decree cannot be upheld. The interest that has been awarded in plaintiffs' favour in this case is not an interest provided for in any contract between the parties, express or implied, but by way of damages only. The payments that were made were not payments made against interest expressly, and there has been no agreement between the parties and no order of Court under which such payments or any of them, if made, were to be credited against interest. A right of a creditor to appropriate a payment against unliquidated damages and when no interest was in fact running under any contract, express or implied, is a thing unknown to law. The payments were made subject to adjustment in future. In these circumstances, all payments made before the decree of the Subordinate Judge, dated 7th May 1927, must necessarily be regarded as payments on account and on the same footing as the payment of Rs. 48,259 referred to above. Payments made since that day are also to be regarded on that footing, because they have not been made in execution of the decree but as advances under order of the Court, which never said that they were, if made, to be credited against interest.

In our judgment, all payments made by the defendant for which he will get deduction must be credited against the principal amount due, that is to say they should be credited in the same way as this Court had ordered as regards Rs. 2,50,000 and the Judicial Committee has ordered as regards Rs. 48,259-3-9, namely that they should bear interest at 6 per cent per annum as from the dates on which they were made and should be deducted from the amounts payable by the defendant to the plaintiffs under the decree.

CROSS-OBJECTION.

The plaintiffs' cross-objection relates to items 1 to 5 with respect to which no interest has been allowed, either since conversion up to suit, or from the date of suit up to date of decree. Mr. Das has relied upon (1892) A. C. 166 (70), in support of his case that the plaintiffs are entitled to damages for the detention of the goods. This claim however was never made in any of the annexures and not put forward as a ground in the memorandum of appeal. Such a claim was never made as regards the value of movables in Mr. Bose's decree, when that decree came up before this Court. It has been put in as a supplementary ground at the hearing of the case before us. We would disallow this claim, especially as we have, bearing this matter in mind, not interfered with the Judge's valuation on the point of depreciation.

APPLICATION FOR A SUPPLEMENTAL DECREE OR FOR FURTHER DIRECTIONS.

The High Court, as already stated, had made a decree in plaintiffs' favour ordering discovery and in respect of all rents, royalties and moneys on account of mortgages and money-lending which had fallen due to Raja Durga Prasad and had been realized by the defendant "up to the date of institution of the suit." The Court below, as appears from its judgment, was asked to give the plaintiffs a decree in respect of some amounts realized by the defendants after the institution of the suit. The Subordinate Judge, in his judgment, held that such realization, whether amicably or by obtainment of decrees, did not come within the scope of the inquiry ordered by this Court.

The plaintiffs have taken exception to this decision, by way of a cross-objection; but it has been conceded by Mr. Das that the objection, as a cross-objection, cannot succeed, because the High Court's decree having limited the inquiry, in the manner stated above, it was beyond the competency of the Subordinate Judge to override it and to enlarge the scope of the inquiry and to give the plaintiffs a decree for realizations made after the institution of the suit.

The plaintiffs however have, at the hearing of this case before us, put in a petition asking for a supplemental decree or further directions, in respect of such realizations. They say that when, after Mr. Bose's decree, the question of stay of execution was brought up to this Court there was an order made by this Court (Mookerjee and Cuming, JJ.) on 9th February 1922, maintaining an injunction which had been previously issued and which restrained the plaintiffs from executing the decree upon certain terms, one of which was that the defendant was to forthwith deposit in Court all sums which he might from time to time realize out of moneys invested in various money-lending businesses. They say also that, as no such deposit was made, they had, at the time when the High Court passed its decree in 1925, no knowledge that the defendant had made any realization after suit. They say further that it was only after they had obtained discovery, in pursuance of the order of this Court in its previous judgment, that is to say, in 1926, and while the inquiry was being held by the Subordinate Judge, that they came to know that such realizations had in fact been made by the defendant. They refer to their plaint and contend that the prayers therein are such as would include a claim in respect of all realizations, whether made before or after suit. On these grounds, they pray that the decree, which the Court has already made, being an administration decree they are entitled to a supplementary decree or further directions entitling them to these realizations.

In support of the applicatian, and to establish the proposition that his clients are entitled to such a decree or such directions, so that they may not have to seek their remedy in another litigation, and so that complete justice may be done between the parties in this suit, Mr. Das has referred to a number of decisions. He has in the first place pointed cut that the decision of the Judicial Committee, in this very case, is an instance of the application of this principle; for, as regards the plaintiffs' claim for maintenance and the defendant's claim for deduction for certain payments that he had made, their Lordships have said:

"Their Lordships see no reason why the defendant's claim should not be considered in the present proceedings and why, if the plaintiffs claim maintenance in addition to the properties awarded to them, their case also should not be considered together with the plaintiffs' claim. A separate suit would involve a repetition of good many facts already recorded in this suit."

In 21 Ch. D. 757 (78), it was held that when the statement of claim, in an administration action, against an executor, alleges that he has committed wilful default, but the judgment at the trial gives no relief on that finding (the claim to such relief not being however dismissed), the Court can at any subsequent stage of the proceedings, if evidence of wilful default is adduced, direct further accounts and inquiries to be taken and made on that footing. In 29 Ch. D. 170 (79), which was a partnership action for dissolution and accounts and in which accounts and inquiries having been ordered a further direction was asked for in order to credit premium which had been paid, the prayer was refused. Kay, J., laid down the rule in these terms:

"That which is asked now is a very important addition to the decree indeed. The first question, when leave is asked for to bring a supplemental action is, when were the facts discovered? The answer here would be that the plaintiff discovered them before he obtained judgment in his action. This is a very serious objection to granting leave to bring an action for a supplemental relief."

Instances where, in order to shorten litigation and best attain the ends of justice by preserving the rights, events subsequent to the suit, or even posterior to the decree appealed from, have been taken cognizance of by the Court, have been cited: 1931 Cal. 45 (80), (administration suit), 11 C. W. N. 732 (81), (mortgage suit). The case of 1924 Cal. 160 (82) has also been referred to, in which, in pursuance of the order of the Judicial Committee 1922 P. C. 235 (83), an accounting on the footing of wilful default was ordered, by way of further

78. In re, Symons. Luke v. Tonkin, (1882) 21 Ch D 757=52 L J Ch 709=30 W R 874=46 L T 684.
79. Edmonds v. Robinson, (1885) 29 Ch D 170=54 L J Ch 586=33 W R 471=52 L T 339.
80. Balakbala Dasee v. Jadunath Das, 1931 Cal 45=129 I C 566=57 Cal 1358.
81. Ram Ratan Sahu v. Bishun Chand, (1907) 11 C W N 732=6 C L J 74.
82. Peary Mohan v. Manohar Mookerjee, 1924 Cal 160=74 I C 373.
83. Peary Mohan v. Manohar Mookerjee, 1922 P C 235=62 I C 76=48 I A 258=48 Cal 1019 (PC).

directions or supplemental decree. As regards the delay in making the application, it has been urged that where the delay does not amount to acquiescence, waiver or abandonment of right, it does not disentitle a person to a relief which he is otherwise entitled to: 33 Cal. 633 (84), 2 Bom. 133 (85). And the decision of the Judicial Committee in 5 C. P. 221 (86) is cited in which it has been observed:

> Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet, put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitation, the validity of that defence must be tried upon principles substantially equitable.

The plaintiffs have asked us, if we are willing to accede to their prayer to make a decree in respect of the following items in annexure 4:

(*A*) 3. *Items of money realised from debtors.*

1. Rs. 33,052-16-6 realised from the Barabhum Coal Co. in different instalments between 9th May 1919, and 21st July 1921; 2. Rs. 37,692 realised from Mr. Smith in different instalments between 15th July 1919, and 22nd July 1926; 3. Rs. 8,224-10-9 realised from Hardayal Singh on 22nd December 1933.

(*B*) 2. *Items of money realised upon decrees.*

Item 52.—Rs. 450, and Item 53—Rs. 800. In these cases decrees were obtained by the defendant before suit, but the moneys were realised after suit.

This application has been strongly opposed on behalf of the defendant, and Mr. Chaudhuri has urged that, if the plaintiffs were desirous of having a decree of the character which they have now asked for, it was for them to have asked for it when the case was before Mr. Bose, or, at all events, when it was before this Court, on the previous occasion; and that it was because no such thing was attempted that this Court, expressly, limited its decree and directions to realisations made by the defendant before the institution of the suit. All rokars up to 1325 (pucca rokars from 1300 to 1308 and cutcha rokars from 1309 to 1325), it was found by the High Court, had been filed, on behalf of the defendant, in the original trial. In the decretal order of this Court's judgment, discovery was ordered in respect of matters up to date of suit, as is plain from the wording of Cl. (7) taken with the other clauses. When, in pursuance of the order of remand, the case went back to the Court below, documents up to 1325 only were called for (vide O. 542, dated 21st November 1925). The documents produced were inspected on behalf of the plaintiffs, and the parties then went on filing statements of their claims. On 15th February 1926, the plaintiffs made a further petition for discovery, and an order was made by the Subordinate Judge, which made it clear beyond the shadow of a doubt, if there could possibly be any doubt before, that it was only for the period up to the date of institution of the suit that the discovery was to be granted and enquiry made. On 16th August 1926, the plaintiffs suggested their own issues, 15 in number, all limited to discovery and enquiry before institution of the suit. On 24th August 1926, they proposed two additional issues as 5 (e) and 5 (f), to which reference will have to be made hereafter, in another connexion, but never suggested that the issues already proposed should be extended to cover any period subsequent to the suit. It is important to note that these additional issues 5 (e) and 5 (f), were meant to include a period up to decree, the former impliedly and the latter expressly. The issues were settled by the Court on 21st August 1926, and such of them as bear upon the realisations were issues 6 and 13, and they both deal with the period before suit. It was only during the arguments that the subsequent period was sought to be taken into account. As regards the plaintiffs' want of knowledge till 1926, Mr. Chaudhuri has referred to certain materials. One of them is that the Barabhum loan could not have been unknown to the plaintiffs because they called for papers and examined witnesses from that quarter: vide P. W. 18. As regards Hardayal Singh, he, Mr. Chaudhuri states, was the first witness for the plaintiffs themselves in the original trial. As regards the order of this

84. Kissen Gopal v. Kally Prosonno Sett, (1905) 33 Cal 633.
85. Jamnadas Shankarlal v. Atmaram Harjivan, (1877) 2 Bom 133.
86. Lindsay Petroleum Co. v. Hurd, (1874) 5 C P 221=22 W R 492.

Court (Mookerjee and Cuming, JJ.,) dated 1922, which related to moneys realised out of money-lending business and not to other realizations, he has not explained why the defendant did not comply with it, but has pointed out that it was known to this Court, when it dealt with the case in 1925, as a reference to it is to be found in this Court's judgment.

We have already said in a previous part of this judgment that the present suit, in our opinion, is not in the nature of an administration suit. Under the ordes of remand, which this Court made, no accounts had been directed. So, cases in which, after a general account was ordered, further accounts on the footing of wilful default have been directed are in our judgment not quite relevant. There is, of, course, the inherent power, which the Code has reserved to every Court, under S. 151 to make such orders as should be made ex dibito justitae, and every Court should have in view the shortening of litigation preventing duplication of proceedings, and saving the parties from harassment and expense. And delay, by itself, is not sufficient to deprive a party of his remedies, if such delay does not amount to waiver, acquiescence or abandonment of his claim or has not created a corresponding right in his opponent on extinguishment of his own.

But boaring these principles in mind, we find ourselves unable to hold that we should be justified in granting this application. Even assuming that the plaintiffs came to know of these realisations in 1926, and not earlier, what action did they take to have their right enforced? They never asked the Court below in proper time to enlarge the scope of the enquiry, but themselves proposed issues that limited it. And if it be said that such a prayer would have been fruitless because that Court was only carrying out the order of remand, one is justified in asking, what prevented them, from 1926 to 1933, from coming up to this Court and praying for a supplemental decree or further directions such as they are now praying for? Even when the hearing of the appeal commenced before us no such application was made, and though the hearing began on 19th June, the present application was put in with the Bench officers only on the 30th and was actually moved after Mr. Das had been addressing on behalf of the plaintiffs for two days. This delay, since 1920, disinclines us to make an order which, if it is to do the plaintiffs any good, must protract this already protracted litigation. For we do not see how we can accept Mr. Das' contention that upon the documentary evidence that we already have on the record we can make a decree in his favour. Such a contention ignores the other side of the case, because the defendant can justly say that if any period subsequent to the institution of the suit is to be included in the inquiry, he should have, besides other defences, an opportunity to put in and prove his claims for deductions for such period.

Then there are various other matters also, e. g., the question of limitation, the question under S. 11, Expl. 5 and other questions which may be raised by the defendant, by way of defence, in a suit properly framed. While we are not pronouncing any opinion on any such question, and desire to guard against being understood as doing so, we are not inclined to shut out these objections against the defendant by an order in plaintiffs' favour. The application is, accordingly, refused. * * * *

APPLICATION FOR DISCHARGE OF THE RECEIVER

On 16th August 1932, the appellant put in an application for the discharge of the receiver and that application has stood over pending the appeal. The receiver was appointed by this Court, by its order of 22nd December 1927, in order to get rid of a situation that arose when execution of the decree of Mr. M. N. Das was commenced, because this Court was moved on behalf of the defendant, as judgment-debtor, to stay the execution until the disposal of the appeal and neither party was in a position to furnish security to the extent of what ordinarily this Court directs in such matters. [Vide order of this Court, dated 22nd December 1927, in Civil R. 1134(F) of 1927]. He was not a receiver appointed for levying execution as provided for in S. 51, Cl. (d) of the Code. His appointment was limited until the final disposal of the litigation then pending, by which we understand the present appeal with its cross-objection. The ap-

peal and the cross-objection now being disposed of; we can see no reason why the receiver should not be discharged. The defendant has complained, and we think there is very substantial ground for his complaint, that he has had no fair chance of raising funds to pay off the decree which was made against him, and that while the receiver is managing the properties the burden of the interest accumulating on the debt is increasing every moment. He, through his counsel Mr. Chaudhuri, has expressed his willingness to remain bound by the condition that was imposed on him in the order referred to above, namely, that :

" The defendant will withdraw his application to the encumbered estate authorities and that he undertakes not to make any such application till the dues of the plaintiffs in the present litigation as finally adjusted are paid off."

The defendant must file an application containing such undertaking in this Court as early as possible and on his doing so our order will be that the receiver be directed to submit his final accounts so that he may be forthwith discharged.

RESULT

As the result of the appeal and the cross-objection, and of the determination of the matters arising on the remand, ordered by the Judicial Committee, the following decree emerges, in modification of the decree of the Court below (with reference to Cls. 16 of the decree of that Court, wherever such reference has been given) and in addition to the declarations contained in the decision of their Lordships of the Judicial Committee, and in the order of His Majesty in Council in this case, dated 10th June 1932 and in addition to so much of the decree of the High Court, dated 17th August 1925, as has been affirmed thereby :

I. That in lieu of Cl. (1) it should be declared that the plaintiffs are entitled to the property, coal-field, 100 bighas iu mauza Chandore, pargana Jharia, district Manbhum, described in Item 1 of the plaintiffs' annexure 1 (a) lying within the boundaries given in the said description, and that they do recover possession thereof from the defendant.

II. That in lieu of Cls. (2), (3), (4) and (5) it should be declared that plaintiffs are entitled to recover from the defendant (Rs. 1,44,000 | Rs. 45,311-12as | Rs. 21,000 | Rs. 6,060 | Rupees 7,270 | Rs. 5,784-15-6)=Rs. 2,29426-11-6 with interest thereon at 6 per cent per annum from 7th May 1927 (i.e., the date of the decree of the Court below) till realisation.

II (a). That the plaintiffs should get delivery from the defendant of the twoSwiss cottage tents, Item 54 of plaint schedule Kha 20, within, a month from to-day and in default of delivery, the plaintiffs be entitled to recover from the defendant the amount of Rs. 500 with interest thereon at six per cent per annum, from 7th May 1927, (i. e., the date of the decree of the Court below) till realization.

III. That in lieu of Cl. (6) it should be declared that the plaintiffs do recover from the defendant Rs. 4,34,531-10 as. with interest thereon at six per cent per annum from 7th March 1916, (i. e., the date of Raja Durgaprasad's death) till realization.

IV. That in lieu of Cl. (7) it should be declared that the plaintiffs do recover from the defendant the following amounts :

(a) Rs. 5,82,168-7 as. with interest thereon at six per cent per annum from 22nd September 1917, (i. e., the date of withdrawal) till realization ;

(b) Rs. 73,212-6 as. with interest thereon at six per cent per annum from 2nd October 1917, (i. e., the date of withdrawal) till realization ; and

(c) Rs. 56,117-12 as. with interest thereon at six per cent per annum, from 24th September 1917, (i. e., the date of withdrawal) till realization.

V. That in lieu of Cl. (S), it should be declared that the plaintiffs do recover from the dedant the two principal sums of Rs. 60,195-11-9 and Rs. 338-2 as. with interest on the constituent parts of the said sums at six per cent per annum as from the dates on which such parts were realized, and till realization.

The Commissioners will prepare a statement showing the calculations.

V-(a). That it should be further declared that the plaintiffs are also entitled to a sum of Rupees 5,025 with interest thereon at six per cent per annum from 22nd February 1918, (i. e., the date of sale) till realization.

VI. That in lieu of Cl. (9), it should be declared that the plaintiffs do recover from the defendant the amounts of rents and royalties realized by the defendant, for any period ending with 7th March 1916, less six per cent as collection and management charges, together with interest thereon at the rate of six per cent per annum from the dates when any such amount may have been collected and till realization.

The Commissioners will prepare a statement showing the calculations.

VII. That in lieu of Cl. (10), it be declared that the plaintiffs do recover from the defendant such amount as the defendant may have realized, in satisfaction of Raja Durgaprasad's dues, together with interest thereon, at the rate of six per cent per annum, from the date of each payment and until realization, the method of accounting being that Raja Durgaprasad's dues were to be satisfied first, before any part of the defendant's dues were satisfied.

The Commissioners will have to make the calculation on the basis of Ex. J (1), and bearing in mind, also, the directions already given in this judgment, that rent and royalties calculated up to 7th March 1916 are to be considered as having

been due to him. As regards interest chargeable on royalties no evidence having been given of the terms of the contract, none need be taken into account. The Commissioners will prepare a statement showing the calculations.

VIII. That in lieu of Cl. (11), it should be declared that the plaintiffs do recover from the defendant the sums of money found to have been realised by the defendant on the miscellaneous items of annexure 6, except item 13 thereof, with interest thereon at six per cent per annum from each payment till realization.

The Commissioners will prepare a statement showing the calculations.

VIII-(a). That it should be declared that the plaintiffs do recover from the defendant Rupees 6,000 from 7th March 1926, (i. e., the date of the decree of the Court below) till realization.

IX. That Cl. (12) should be affirmed subject to the modification that items 16, 17, 77 and 79 be deleted therefrom.

X. That in lieu of Cl. (13), it should be declared that the defendant is entitled to get credit for Rs. 28,619 with interest thereon, at the rate of six per cent per annum, from the date of payment of each of the items, comprised therein, from the amount payable by the defendant to the plaintiffs under this decree.

The Commissioners will prepare a statement showing the calculations.

XI. That in lieu of Cls. (14) and (16), it should be declared that defendant is entitled to get credit for the sums of money mentioned in the defendant's statement filed in this Court on 28th July 1933, with the exception of the items of Rs. 48,259-3-9 (bantannama money for which a declaration has already been made by the Judicial Committee and approved of by the order of His Majesty in Council, and Rs. 18,569-3 paid by the receiver on account of the collection of mouzas Bowa and Baghmari), with interest thereon, at the rate of six per cent per annum, from the amount payable by the defendant to the plaintiffs under this decree.

The Commissioners will prepare a statement showing the calculations.

XII. That Cl. (15) should be affirmed.

XIII. That the decree in the form of O. 20, R. 10, should be made in respect of the furniture furnishings and equipments, as ordered above.

XIV. That a decree for maintenance be passed as ordered above.

The amount of arrears of maintenance will be ascertained by the Commissioners on calculation and such amount will be incorporated in the decree.

XV. That the order as to costs made by the Court below will stand.

XVI. That there will be no order for costs in the appeal or in the cross-objection, each party bearing his or their own costs therein.

Terms of the decree to be drawn up.

We think it would be convenient to draw up the decree in the following form :

That in addition to the declaration contained in direction (1) in the judgment of the Judicial Committee delivered on 7th April 1932, and order of His Majesty in Council, dated 23rd April 1932, and to so much of the decree of this Court, dated 17th August 1925, as has been affirmed by the Judicial Committee the following declarations are made :

(1)	...	...	I	of result.
(2)	...	...	IX	,,
(3)	...	...	XII	,,
(4)	...	...	XIV	,,
(5)	...	...	IIa	,,
(6)	...	...	A decree for money in favour of the plaintiffs made in the following manner :—	

(a) in respect of the aggregate of the principal amounts of [II | III | IV | V | V-(a) | VI | VII | VIII | VIII-(a) | XIII] minus the principal amounts of (X | XI | Rs. 48,259-3-9) and with an order that the same shall bear interest at six per cent per annum from this day till realization.

(b) in respect of the balance of interest on the said items calculated in the aforesaid manner up to this day but with no direction as to interest thereafter.

The Commissioners will arrive at the figures on calculation.

(7)	...	...	XV	of result.
(8)	...	...	XVI	,,

The statements of calculations prepared by the Commissioners will be appended to the decree.

R.K. *Decree Varied.*

A. I. R. 1935 Calcutta 74

(Special Bench)

MUKERJI, COSTELLO AND S. K. GHOSE, JJ.

In re *Anandabazar Patrika*.

Application under S. 23 of the Indian Press (Emergency Powers) Act, 1931, Decided on 16th March 1934.

(a) Press (Emergency Powers) Act (1931), S. 4 (1)—"Reprisal" meaning explained—Held from the context that its use was not hit by S. 4.

Per *Mukerji, J.*—The word "reprisal" denotes an act of retaliation for some injury or attack, specially in warfare, the infliction of similar or severer punishment to the enemy. Divested from the context and used with reference to an act by the Government towards the people, the word would be objectionable inasmuch as it implies an idea of retaliation. "Reprisals" are admissible for international delinquencies only.

Held (By *Mukerji* and *Ghose, JJ*, *Costello, J., Dissenting*) that from the context in which it was used it was not hit by S. 4. [P 76 C 2]

(b) Press (Emergency Powers) Act (1931), S. 4 (1)—"Retaliative"—Use of word without ascribing base motive to Government held is not hit by Act.

The use of the epithet "retaliative," without reference to the punishments that Jail Code provides without ascribing any base motive to the Government is not hit by the Act. [P 77 C 1]

(c) Press (Emergency Powers) Act (1931), S. 4 (1)—Intention of writer is immaterial—Effect of words used must be considered.

Per *Costello, J.*—The intention of the writer is a thing which Courts are not entitled to take

into account; they are concerned with the effect of the words used by the writer: 1932 *Bom* 745, *Rel. on.* [P 77 C 1, 2]

(d) Press (Emergency Powers) Act (1931), S. 4(1)—Words imputing base motive to Government is offence—Saying that Government is acting from improper motive amounts to saying that it is acting from base motive.

Per *Costello, J.*—An offence may be constituted where the words used impute to the Government by law established in this country a base motive. It is very difficult to say that if the Government acts from any improper motive it is not acting from a base motive. To say, that the Government is adopting measures in the nature of reprisals or retaliation against any body of persons who are subjects of the country in question or against any individual is to say in effect that the Government is not merely putting into operation the ordinary laws of the land and the normal procedure of penal administration, but is also adopting some extraordinary and improper means of dealing with the persons concerned: 22 *Bom* 112, *Ref.* [P 78 C 1, 2]

(e) Press (Emergeney Powers) Act (1931), S. 4 (1) — Mere disapprobation however strongly worded does not show intention to excite disaffection.

Mere disapprobation however strongly and flagrantly expressed, does not imply that the intention was to excite disaffection: 38 *Cal* 253, *Rel. on.* [P 80 C 1]

H. D. Bose, A. K. Ghose and *S. Bhose* —for Applicants.

Advocate-General, N. N. Sircar and *S. M. Bose*—for the Crown.

Mukerji, J.—By two orders, made on 9th November 1933, one under S. 6, sub-S. (1) and the other under S. 10, sub-S. (1), Press (Emergency Powers) Act 23 of 1931, it has been declared that Rs. 1,000 out of the further securities deposited respectively by the keeper of a press, named the "Ananda Press," and by the printer and publisher of a vernacular newspaper of the name of "Anandabazar Patrika" which is printed in the said press, was forfeited. The present application has been made under S. 23 of the said Act, to set aside the said orders of forfeiture.

The offending passages are contained in two articles, one of which was published in the issue of the newspaper, dated 22nd Bhadra 1340 (=7th September 1933), and the other in its issue dated 1st Kartik 1340 (=18th October 1933). Before us the orders have been sought to be supported on the basis of the passages contained in the former of the articles. The passages run in these words:

(1) In brief, what underlies this arrangement is, in (the language of) modern political dictionary, "reprisal."

(2) The retaliatory measures of mediaeval sternness which exist are adequate enough for the preservation of order and discipline.

The passages occur in an article, which, on a plain reading of it, was intended to support a protest which had been issued by some Indian leaders against the measure which had been adopted by the Government of transporting to the Andman Islands prisoners punished for political offences. This protest is referred to at the very commencement of the article. It is then stated that this measure is one of those severest measures which had been adopted for the suppression of revolutionary movement. It is plain, upon a reading of the article, that the writer of it is not so much concerned with the question whether other classes of prisoners should be so transported or not; and that, though he would condemn the system as undesirable from the point of view of humanity and civilization, it would seem that he was willing to concede that as a measure it was not unsuitable or undesirable for some particular classes of convicts. For he has said:

"And it was a matter of pleasure that the Government, taking favourably the decision of the Jail Committee and public opinion in the country, directed that none that would be sentenced to transportation or imprisonment for life would be sent to Andamans against his will and that the said measure would be meant exclusively for the turbulent homicides and dacoits of various character of the frontier provinces."

The writer then quotes the report of the Jail Committee of 1919, which condemned the system as injudicious and as leading to moral degradation, and regrets that the protests that were raised against the sending of political prisoners to the Andamans were ignored by the Government, and that, under the new arrangement introduced, not only people sentenced to transportation and life imprisonment, but also political prisoners sentenced to imprisonment for three or four years, were being sent to the Andamans. The writer then gives two reasons neither of which was his own, as to why this was being done. One was what was said by the Government, namely:

"That only such irresponsible and obstinate people as are of violent character and disturb the peace and orderliness of jail at every step were being sent to Andamans."

Another was what was put forward by some others, who were in support of the measure and who said:

"These revolutionaries, if kept in Indian jails, get opportunities for communicating news to and get news from outside and it was necessary to deprive them of such opportunities."

Immediately following the last mentioned passage, appears the first of the two objectionable passages, which as already stated, runs thus:

"In brief what underlies this arrangement is, in (the language of) modern political dictionary, 'reprisal.'

The writer then proceeds to narrate that the adoption of the measure was immediately followed by hunger-strike and deaths in jail and gives certain details thereof. He then states that, notwithstanding certain measures which the Government had adopted to remedy the situation, the position was, in his view still unsatisfactory. He then says that any change in the system could only be made by the Government of India. Having said all this the writer proceeds to observe:

"The jails in India are not indeed heaven. The retaliative measures of mediaeval sternness, which exist, are adequate enough for the preservation of order and discipline."

The second sentence in the observations just quoted is the second of the two objectionable passages. The article then proceeds to say that, though the authorities had been influenced by the consideration that harder punishment was necessary, such punishment was not really necessary, and, further, that the persons, at whose advice and instance the Government had adopted the measure, had not given good and farsighted advice. The above, in my opinion, is the true import of the article. Now, so far as the first passage is concerned, a question arises at the outset, namely, whether it is resume of the passage immediately preceding in which the reason given by some of the supporters of the measure is set out or is the opinion of the writer himself as being the ground underlying the measure. I think, on a fair reading of the passage, taken along with the context, that he is there summing up the whole situation and means to say that whether you take the explanation of the Government that

"only such irresponsible and obstinate people as are of violent character and disturb the peace and orderliness of Jail at every step were being sent to "Andamans,"

or you take the reason of the supporters of the measure that the revolutionaries should be completely and effectively segregated, the underlying idea was "reprisal." The word "reprisal," the writer says, he has borrowed from the "modern political dictionary." What he means, as I understood, is that he is using a terminology of modern politics. The word "reprisal" denotes an act of retaliation for some injury or attack, especially in warfare, the infliction of similar or severer punishment to the enemy. Divested from the context and used with reference to an act by the Government towards the people, the word would be objectionable inasmuch as it implies an idea of retaliation. "Reprisals" are admissible for international delinquencies only. But the writer here was borrowing a term of International law for describing relations between the Government, on the one hand, and the revolutionaries, who are the enemies of law and order, and so, in a sense, enemies of the Government itself, on the other. He borrowed the word from what he calls "modern political dictionary," though strictly speaking there can be no question of "politics" as between the Government and the people. And he used the word as descriptive of the two ideas which underlie the two grounds, namely, the one given by the Government and which was to the effect that prisoners who behave in a lawless manner while in jail should be brought under control, and the other by which some of the supporters of the measure justified it, namely that the measure was needed to deprive the revolutionaries of the opportunities of communicating news to and getting news from outsiders,—a matter which he had stated in the passage immediately preceding. Whatever may be the lexicographical meaning of the word "reprisal," the sense in which he has used it is clear. To no reader of the article would the word convey any other meaning. The offending passage, inasmuch as it was meant to reproduce that idea and nothing else, by using the word "reprisal," cannot in my judgment be taken to "tend to bring into hatred or contempt the Government established by law in British India"—or "to excite disaffectipn towards the said Government," which are the only parts of S. 4 (1) of the Act 23 of 1931 as amended by S. 16, Act 23 of 1932, we are concerned with in the present case. I may observe here that I have heard no

arguments before me that the statement which the writer has made about the reason given by some of the supporters of the measure is not true or is a figment of perverted imagination on the part of the writer of the article. If such was the case, I would have looked upon the article in a different light altogether.

In the second of the offending passages, which immediately follows the passage, "the jails in India are not indeed heaven," the writer is evidently referring to the punishments which the Jail Codes provide for prisou offences and breaches of prison regulations. His only object is to say that those measures are quite sufficient for subduing recalcitrant prisoners and for the maintenance of peace and orderliness. He is ascribing no base motive to the Government, but is only characterising the jail measures aforesaid as harsh and retaliative. The use of the epithet "retaliative," with reference to the punishments that the Jail Code provides, is, in my opinion not hit by the Act.

The article read fairly and as a whole, is open to no real objection. It expressed disapprobation of a certain measure of the Government with a view to obtain its alteration by lawful means without exciting or attempting to excite hatred, contempt or disaffection, and what was said in it could not possibly tend directly or indirectly to bring into contempt or hatred the Government established by law in British India or to excite disaffection towards His Majesty's Government. In the orders complained of in the petition before us it was also said in the alternative that the passages tended to incite the commission of a cognizable offence involving violence. Of this I do not see any indication anywhere in the article. I am therefore of opinion that the application should be allowed and the orders complained of should be set aside.

Costello, J.—I regret that I have not been able to share the views of the other members of the Court. It is to be observed, at the outset, that in a matter of this kind, we are not concerned with the intention of the writer. In a previous case, in which the same publication was concerned, [1932 Cal 745 (1)], and entitled :

"In the matter of Anandabazar Patrika and Ananda Press and in the matter of an application under S. 23 (Act 23 of 1931) and in the matter of Satyendranath Majumdar, petitioner 1, and Jagadeeshchandra Mukherji, petioner 2,"

in the course of the judgment of the Court, we said this :

"The intention of the writer is a thing which we are not entitled to take into account, we are concerned with the effect of the words used by the writer."

In my opinion, the question we have to consider, in the present instance, is what is the effect of the words used in the passages complained of. I need hardly say that the criterion to be applied is that laid down in 22 Bom. 112 (2), as was pointed out by the learned Advocate-General, while he was addressing us in the course of the proceedings. He referred us once more to the passage at p. 137 of the report of the case of 22 Bom. 112 (2). In that passage, there is the authority for saying that an offence may be constituted where the words used impute to the Government by law established in this country a base motive. Looking at the article, which appeared in the Anandabazar Patrika of 7th September 1933, we find that the actual sentence which is set out in the order is in these terms :

"In brief, what underlies this arrangement is, in the language of modern political dictionary reprisal."

The learned Advocate-General says that, in order to ascertain what is meant by this sentence, one has to look back to the opening words of the article. They are in these terms :

"A statement protesting against the new measure of transporting to Andaman Islands prisoners punished for political offences has been issued by a host of reputed judicial leaders and they have requested the Government to bring back the prisoners to the jails in India immediately."

It follows therefore that the sentence complained of is referring to the question of sending political prisoners to the Andaman Islands and the sentence, taken by itself, would seem to say that the measure is in the nature of a reprisal for something which the political prisoners or their associates have themselves done. The other passage referred

1. *In re*, Anandabazar Patrika, 1932 Cal 745= 140 I C 5=1932 Cr C 754=33 Cr L J 839 =60 Cal 408 (S B).
2. Queen-Empress v. Bal Gangadhar Tilak, (1897) 22 Bom 112.

to in the order of Government of 9th November is in these terms :

"The retaliatory measures of mediaeval sternness which exist are adequate enough for the preservation of order and discipline."

In the official translation by the translator of this Court the epithet "harsh" appears in front of the adjective "relative" as applied to the word "measure." I do not think that this second passage, taken by itself, would be objectionable. But it seems to me that the first passage does suggest that the Government is acting from oblique and improper motives in bringing into operation the measure which is commented upon in this article. In my opinion, it is very difficult to say that if the Government acts from any improper motive it is not acting from a base motive. It is at that stage in the chain of reasoning that I think the matter does fall, though perhaps only just within the ambit of the criterion laid down by Strachey, J., in 22 Bom. 112 (2). It is argued on behalf of the present applicant that this sentence, which in the offcial translation is given at p. 18 of the paper-book and reads in this form :

"In fact, the thing underlying this measure is 'reprisal' in the vocabulary of modern statesmanship"

was not in fact a comment on the part of the writer, but is merely a continuation of the previous part of the paragraph, in which he was setting forth the views of other persons with regard to the introduction of the measure commented upon. The previous sentence reads thus :

"Some, in order to support the Government in this act, said that those revolutionaries, if kept in Indian jails, got opportunities for communicating news to and get news from outside and it was necessary to deprive them of such opportunities,"

and then comes the sentence complained of. I have not, of course, the advantage of being able to read the article in the languge in which it was originally written : but, taking this official translation to be reasonably accurate, it seems to me that this last sentence is not merely a quotation of somebody else's opinion as to the reason underlying the "measure" of the Government, but is in fact, the author's own comment upon it. That point was stressed by the Advocate-General in his argument before us. He invited us to take the view that this sentence was in fact, the author's own comment on the position. I think that is the reasonable view of the matter. It is all very well to say that "reprisal" is a word which finds considerable space in modern discussions about political movements and the relations between the Government of one country and the Government of another or even between the Government of a country and revolutionary bodies. I cannot help feeling, none the less, that to say that the Government is adopting measures in the nature of reprisals or retaliation against any body of persons who are subjects of the country in question or against any individual is to say in effect that the Government is not merely putting inte operation the ordinary laws of the land and the normal procedure of penal administration, but is also adopting some extraordinary and improper means of dealing with the persons concerned. In those circumstances, I have—though with some hesitation—come to the conclusion that the article does fall within the mischief aimed at by S. 4 of the Act of 1931 as amended by the amending Act of 1932 and, therefore, this application ought to be dismissed.

S. K. Ghose, J.—This is an application under S. 23, Indian Press (Emergency Powers) Act, 1931 and it is directed, against certain orders made under Ss.. 10 (1) and 6 (1) of the said Act. There is a Bengali vernacular daily newspaper called the "Anandabazar," Patrika, of which petitioner No. 1 is the printer, publisher and editor, petitioner No. 2 being a registered company. By two orders, dated 9th November 1933, made under sub-S. (1), S. 10, Indian Press (Emergency Powers) Act of 1931, it was directed that each petitioner should forfeit the amount of Rs. 1,000 out of the security furnished by them. The charge as set forth in the aforesaid orders was that, in the issue of the newspaper Anandabazar Patrika of September 7 and 18th October 1933, articles containing words of the nature described in sub-S. (1), S. 4 of the Act, the objectonable passages of which were given in the annexure thereto, were published, and that the said passages, in the opinion of the Governor-in-Council tended to bring into hatred or contempt the Government established by law in British India, or to excite dis-

affection towards His Majesty's Government, and also tended to incite to the commission of any cognizable offence involving violence. In this Court, the learned Advocate-General, appearing for the Crown, has stated that he would not press the case with regard to the article of 18th October 1933. Accordingly, the article of 7th September 1933, is the only article which is now relevant to the present proceedings. The question is whether the aforesaid order can be justified on the basis of the offending passages which are given in the annexure, viz:

"(1) In brief, what underlies this arrangement is, in (the language of) modern political dictionary, "reprisal." (2) The retaliatory measures of mediaeval sternness which exist are adequate enough for the preservation of order and discipline."

The relevant sections are S. 4, sub-S. (1), Cl. (a) of the Act of 1931 and S. 16, Cl. (d), Act 23 of 1932, and with this should be read the Expln. 2 and 3 to this section, these being to the same effect as those to S. 124-A, I. P. C. There is no dispute as to the application of these sections, though the Government order does not specifically refer to the Act of 1932. The learned Advocate-General has contended that the two offending passages impute base motive to, and consequently they seek to excite disaffection towards, His Majesty's Government. This argument was supported by a reference to the remarks of Strachey, J., in the case of 22 Bom. 212 (2). The principle of the argument need not be disputed. The question in a particular case is whether the evidence of the words used is sufficient to show that the imputation of base motive is a natural inference, so as to justify the conclusion that there is an attempt to excite disaffection towards His Majesty's Government. The two passages, by themselves, do not signify anything and they have to be taken along with their context. The first passage occurs at the end of a paragraph in about the middle of the article. It runs—in the paper book, there being a slight difference in the translation:

"On the contrary, it was noticed that under the new provision not only people sentenced to transportation and life-imprisonment but also those who are sentenced to imprisonment for 3-4 years were sent to Andamans and the Government said that only such irresponsible and obstinate people, as are of violent character and disturb the peace and orderliness of jail at every step, were being sent to Andamans. Some in order to support the Government in this Act, said that these revolutionaries, if kept in Indian jails, get opportunities for communicating news to and get news from outside and it was necessary to deprive them of such opportunities. In fact, the thing underlying this measure is "reprisal" in the vocabulary of modern statesmanship."

The second passage occurs at the beginning of the concluding paragraph of the article and it runs thus in the paper-book:

The jails in India are not indeed heaven. The harsh retaliative measures of mediaeval period that are there are quite sufficient for the maintenance of peace and orderliness. On the top of that, the introduction of Andaman-oppression is absolutely unnecessary. We shall, of course, remain silent to-day about the grudge born of apprehension of those persons at whose advice and instigation the authorities have approved of the short-sighted system. The authorities have been influenced by the mentality that even harder punishment should be given to those accused persons who are under sentence passed by the Court, on the supposition of the inadequacy of that punishment and have opened the Andaman jails. But the leaders requested the Government to change the arrangement, not only because the Government have broken the promise of their predecessors, that they have also expected a favourable consideration of the Government with a view to stopping of regrettable occurrence that was due to the hunger strike. Naturally enough the people of this country are anxious to learn what the Government of India say in reply thereto."

The article is headed "Transportation to Andamans" and the text of the article is given in the opening paragraph which runs thus:

"A statement, protesting against the new measure of transportation to Andaman islands prisoners punished for political offences, has been issued by a host of reputed leaders and they have requested the Government to bring back the prisoners to the jails in India immediately."

The entire article is in support of this protest. It amplifies the subject and ends up by referring to the fact that,

"the leaders requested the Government to change the arrangement"

and stating that,

"the people of this country are anxious to learn what the Government of India has said in reply thereto."

It does not seem to me that the two offending passages, on which the proceeding is based, are the only, or even the main, argument relating to the theme of the article. The second passage evidently refers to practices in the jails in India and may be a reflection on those responsible for the administra

tion of the jails, rather than on His Majesty's Government. The first passage refers more clearly to the Government as a whole and stress is laid on the word "reprisal" which is quoted in English. I do not think it necessary to enter upon a research into the question of the exact meaning of the word "reprisal" in modern politics, because I feel that the writer himself was doing no more than trying to display a learning which he did not possess. Reprisal or retaliation ascribed to an act of Government may indicate condemnation of such act, but the point is whether it necessarily ascribes a base motive. Mr. Bose for the petitioners has contended that the writer has used the words of the arguments unintelligently, without appreciating their true import and without any desire to inflame or incite any one, far less to excite disaffection towards the Government. Reading the artlcle as a whole, I am disposed to agree with him. Mere disapprobation, however strongly and flagrantly expressed, does not imply that the intention was to excite disaffection. This has been held in several cases, for instance, in the case of 38 Cal. 253 (3) and it is borne out by the express direction in the statute, the explanations to S. 16 of the Act of 1932. In the present case, there was clearly disapprobation of the Government, but the two passages, upon which alone the proceeding is now based, afford too slight a foundation for the conclusion that they tend to bring into hatred or contempt the Government established by law in British India, or to excite disaffection towards His Majesty's Government, and also tend to incite to the commission of any cognizable offence involving violence.

I think, therefore, the two orders of 9th November 1933, made by the Governor-in-Council under sub-S. (1), S. 10, Indian Press (Emergency Powers) Act of 1931 should be set aside.

Mukerji, Costello and S. K. Ghose, JJ.—The Court by a majority directs that the orders complained of in this application be set aside.

K.S. *Application allowed.*

3. Monomohan Ghose v. Emperor, (1910) 38 Cal 253=8 I C 531=11 Cr L J 667.

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NASIM ALI, J.

Golam Mustapha—Defendant—Appellant.

v.

Hanumandas Mundra — Plaintiffs — Respondents.

Appeal No. 1829 of 1931, Decided on 7th May 1934, from appellate decree of Second Sub-Judge, Midnapore, D/- 24th February 1931.

(a) Appeal—Appellate Court — Credibility of witness turning on demeanour—Appellate Court can come to different conclusion only under exceptional circumstances — But appellate Court may differ from trial Court under other circumstances.

When the question arises as to whether one witness should be believed rather than another and that question turns on the demeanour of the witnesses in witness-box, it requires circumstances of exceptional character to justify a Court of appeal in coming to a different conclusion. But there may be other circumstances and facts, quite apart from manner and demeanour, which may show whether a statement can be believed or not. These circumstances and facts may justify the appellate Court in differing from the trial Court even on a question of fact turning on the question of credibility of witnesses whom the appellate Court has not seen. [P 81 C 1,2]

(b) Bengal Tenancy Act (1885), S. 87—Question of abandonment is largely question of fact—But inference from facts as to existence or otherwise of abandonment is question of law.

The question, as to whether there has been abandonment of the land by the raiyat, is largely and principally a question of fact depending upon a number of circumstances to be proved in each case. The inference from the facts found, as to whether there was abandonment or not, is a question of law : 1928 *Cal* 891, *Foll.* [P 82 C 1]

(c) Bengal Tenancy Act (1885), S. 87 — There might be abandonment apart from S. 87.

There might be abandonment apart from ; S. 87 : 1915 *Cal* 242, *Expl.*; 1930 *Cal* 190 and 1931 *Cal* 657, *Rel. on.* [P 82 C 2]

Even if there be no abandonment within the meaning of S. 87, an inference of abandonment apart from the provisions of that section would be legitimate, if it is proved that the entire holding has been transferred and that the transferees have been put in possession of the whole holder : 1924 *Pat* 440, *Ref.* [P 82 C 2]

(d) Bengal Tenancy Act (1885), S. 25—Breach of implied condition—It is doubtful whether it is ground for ejecting occupancy raiyat.

It is open to doubt whether in view of the express provisions laid down in S. 25, the breach of an implied condition would be a ground for ejecting an occupancy raiyat. [P 83 C 1]

Ramaprasad Mukherji -- for Appellant.

Kshiteendranath Basu -- for Respondents.

Judgment.—This is an appeal by the defendant in a suit for recovery of possession of an occupancy holding on the allegation that it has been abandoned by the recorded tenant. The case for the plaintiff as alleged in the plaint is that defendant 3 was the original occupancy raiyat in respect of the land in suit, that defendants 1 and 2 are now in possession of this entire holding on the basis of purchase, and that defendant 3 is not in possession of any portion of the holding. It is on these allegations that the plaintiff wanted khas possession of the land. Defendant 1, who contested the suit, resisted the plaintiff's claim on the ground that the original tenant, that is defendant 3, was still in possession of a portion of the land, that there was not a transfer of the entire holding, inasmuch as the purchase of defendant 2 was only a benami purchase and was for the benefit of defendant 3. Defendant 2 and 3 did not appear and contest the plaintiff's claim. The trial Court held that defendant 3 was in possession of a portion of the holding and that defendant 3 never repudiated his liability to pay rent. The trial Court was further of opinion that the sale, at which defendant 2 purchased, was a collusive affair. In this view of the matter, the trial Court dismissed the plaintiff's claim for khas possession. On appeal, the lower appellate Court has held that the entire holding has been transferred and that defendant 3 is not in possession of any portion of the holding. On these findings the lower appellate Court came to the conclusion that the entire holding had been abandoned by the original tenant. In the result, the lower appellate Court has decreed the plaintiff's suit. Hence the present appeal by defendant 1.

The first contention of Mr. Mukerji, appearing on behalf of the appellant, is that the finding of the lower appellate Court about defendant 3's possession is not a proper finding, inasmuch as, reversing the finding of the trial Court, the learned Judge has overlooked the principle, that when the question arises as to whether one witness should be believed rather than another and that question turns on the demeanour of witnesses in the witness-box, it requires circumstances of exceptional character to justify a Court of appeal in coming to a different conclusion. It is urged by the learned advocate that the trial Court, in view of the demeanour of the plaintiff's gomasta in the witness box, disbelieved him and believed the evidence of defendant 1, as the latter appeared to him to have deposed in a very straight-forward manner. It is contended that the lower appellate Court however in believing the plaintiff's gomasta and in disbelieving defendant 1 has not at all taken into consideration the impression, which these witnesses made on the trial Court by their demeanour in the witness-box. There can be no doubt that, when a Court has got to deal with a pure question of credibility of witnesses, great weight ought necessarily to be given to the judgment of the Judge, who saw the witnesses. But there may be other circumstances and facts, quite apart from manner and demeanour, which may show whether a statement can be believed or not. These circumstances and facts may justify the appellate Court in differing from the trial Court even on a question of fact turning on the question of credibility of witnesses whom the appellate Court has not seen : see (1898) 1 Ch. 704 (1). It appears that the lower appellate Court disbelieved the evidence of defendant 1 about the residence of defendant 3 on a portion of the holding, mainly relying upon the record-of-rights, which shows that there is no homestead land in the holding. The lower appellate Court also relied upon another circumstance, namely, that, in the written statement, the story about the residence of defendant 3 on a portion of the holding was not specifically mentioned. There is therefore no substance in this contention.

It is next urged by the learned advocate in support of the appeal that the facts found by the lower appellate Court do not amount to abandonment and consequently the plaintiff is not entitled to khas possession. It may be pointed out, at the outset, that there is no finding in this case that there has been repudiation by defendant 3. It has not found also that there has been any abandonment within the meaning of S. 87, Ben. Ten. Act. The lower appellate Court has decreed the suit only on the ground

1. Coghlan v. Cumberland, (1898) 1 Ch 704= 67 L J Ch 402=78 L T 540.

that the holding has been abandoned by the original raiyat. Now the question is whether this finding can be challenged in Second Appeal. There can be no doubt that the question, as to whether there has been abandonment of the land by the raiyat, is largely and principally a question of fact depending upon a number of circumstances to be proved in each case: see 20 I C 198 (2) and 1926 Cal. 751 (3). It is no doubt true that Mitter, J., observed in the case of 1929 Cal. 120 (4) that the question of abandonment is a question of fact and that the finding about abandonment is binding in Second Appeal. But, in the case of 1928 Cal. 891 (5), a Division Bench of this Court has observed that the inference from the facts found, as to whether there was abandonment or not, is a question of law. In view of the decision of this Court, I am not prepared to dismiss this appeal on the ground that it is concluded by finding of fact.

The next question for determination then is whether the facts found by the lower appellate Court amount to an abandonment in law. In the case of 1915 Cal. 242 (6), the propositions laid down by the Full Bench are in these terms:

> Where the transfer is a sale of the whole holding, the landlord, in the absence of his consent, is ordinarily entitled to enter on the holding; but where the transfer is of a part only of the holding, or not by way of sale, the landlord, though he has not consented, is not ordinarily entitled to recover possession of the holding, unless there has been (a) an abandonment within the meaning of S. 87, Ben. Ten. Act, or (b) a relinquishment of the holding, or (c) a repudiation of the tenancy.

It has been found that, in this case, there has been a transfer of the entire holding. Consequently, the landlord is ordinarily entitled to enter on the land. Mr. Mukerji, on the authority of the decision in the case of 1924 Cal. 900 (7) however contends that the use of the word "ordinarily" in the proposition laid down by the Full Bench indicates that:

> "the circumstances mentioned in each branch are being regarded as evidence of, or as importing reference to, some higher, more precise or more ultimate test."

His further contention is that this ultimate test must be the same in both the branches of the proposition. It is clear from the second part of the proposition that the ultimate test is (a) an abandonment within the meaning of S. 87, Ben. Ten. Act, (b) a relinquishment of the holding, or (c) a repudiation of the tanancy. But the question as to whether that is also the ultimate test in the first branch of the proposition is not free from difficulty. The first branch of the proposition laid down by the Full Bench does not expressly state what the ultimate test is. Prior to 1915 Cal. 242 (6), it was settled, on good authority, that S. 87, Ben. Ten. Act, did not prescribe the only mode in which the holding could be abandoned. It is not very clear whether the decision in 1915 Cal. 242 (6) affects these decisions prior to the decision of that case. In the absence of any clear indication in the judgment of the Full Bench, I am not prepared to say that the view, which was taken by this Court prior to the decision of the Full Bench, namely, that there might be abandonment apart from S. 87, Ben. Ten. Act, must be taken now as wrong. I am fortified in this view of the matter by two recent decisions of this Court, viz., 1930 Cal 190 (8) and 1931 Cal. 657 (9). In the last mentioned case, Suhrawardy, J., refrained from using the word "abandonment" and used the word "relinquishment". In that case, the holding in question contained some undivided parcels of land and therefore could not be considered as a holding as contemplated by the Bengal Tenancy Act before the amendment of 1928. Consequently the question was whether the landlord is entitled to re-enter when the whole of this tenancy was transferred, though it was not a holding within the meaning of S. 87, Ben. Ten. Act. The learned Judges held that the landlord was entitled to re-enter. It was observed in that case that S. 87, Ben. Ten. Act, was not exhaustive and that there might be abandonment

2. Monohar Pal v. Ananta Moyee Dassee, (1913) 20 I C 198.
3. Moharamdi v. Asmat, 1926 Cal 751=91 I C 493.
4. Aminaddin Sheikh v. Chandranath Sen, 1929 Cal 120=114 I C 153.
5. Aswini Kumar v. Har Kumar, 1928 Cal 891 =114 I C 482.
6. Dayamayi v. Ananda Mohan Roy, 1915 Cal 242=27 I C 61=42 Cal 172 (F B).
7. Romesh Chandra Mitra v. Daiba Charan Das, 1924 Cal 900=78 I C 497.
8. Baikuntha Chandra Nag v. Chandra Nath Bondopadhya, 1930 Cal 190=123 I C 649.
9. Abdul Majid Bhuiya v. Ali Mia, 1931 Cal 657=132 I C 898=58 Cal 869.

apart from the provisions of that section. The decision was based on two grounds, namely, (1) that the right of the landlord to re-enter, when his land remained unoccupied or is in the occupation of a trespasser (the transferee of a non-transferable tenancy is a trespasser), is a right which is conferred upon the landlord under the general law, and (2) that the transfer of a non-transferable occupancy holding is the breach of an implied condition of a tenancy, namely, that the tenant would have no right to transfer and consequently on account of this breach of the implied condition the landlord is entitled to eject. It is however open to doubt whether, in view of the express provisions laid down in S. 25, Ben. Ten. Act, the breach of an implied condition would be a ground for ejecting an occupancy raiyat. Ejectment for breach of an implied condition has always been limited to cases where there had been estoppel by record or where there had been an attempt by the tenant to assert a title paramount to the landlord either in himself or in a third person. [see 1924 Cal. 900 (7)]. In fact, if that was the intention of the legislature that, apart from the provisions of S. 25, Ben. Ten. Act, the landlord would have the right to eject an occupancy raiyat for breach of an implied condition, the legislature would have said so expressly.

As pointed out above, in view of the above decisions of the Division Bench of this Court, I am not prepared to say that the ultimate test in the first branch of the proposition laid down by the Full Bench is restricted only to an abandonment within the meaning of S. 87, Ben. Ten. Act.

It is no doubt arguable that, in view of the ultimate test indicated in the second branch of the proposition laid down by the Full Bench, it is no longer open to contend that the ultimate test would be different, so far as the first branch of the proposition is concerned. But, as already observed, in view of the recent decisions of this Court, I am not prepared to hold that there cannot be an abandonment apart from the provisions of S. 87, Ben. Ten. Act. What then are the facts, which must be proved to show that there had been an abandonment apart from the provisions of S. 87 ? In the case of 1924 Pat 440 (10), Dawson Miller, C. J., observed as follows:

> I agree that, apart from S. 87, Ben. Ten. Act, there may be an abandonment of a holding but I consider that in such a case it must be proved either that the tenant has transferred his whole interest in the property and ceased to take any further interest therein as for example by a sale of the whole property or that he has abandoned the right to retake possession in future or has either left the village without any intention of returning or done some other act which would clearly indicate that he no longer retained the spes recuperandi.

Again in the case of 93 I. C. 86 (11), a Division Bench of this Court has made the following observation:

> It is not necessary to prove as a fact that the holding has been abandoned but it is a direct inference from the fact that the entire holding was sold and possession given to the predecessor.

In other words, even if there be no abandonment within the meaning of S. 87, an inference of abandonment apart from the provisions of that section would be legitimate, if it is proved that the entire holding has been transferred and that the transferees have been put in possession of the whole holding. This view can be supported on the principle that, after the entire holding has been transferred and the transferee has been put into possession, it becomes the khas land of the zemindar and the zemindar is therefore entitled to re-enter. See 21 I. C. 544 (12).

Now, from the facts found by the lower appellate Court, it is clear that the original defendant 3 is no longer in possession of any portion of the holding and that the entire holding has been transferred. In these circumstances, the lower appellate Court was right in holding that the holding had been abandoned by the original raiyat before the institution of the suit.

The result therefore is that the appeal is dismissed with costs.

K.S. *Appeal dismissed.*

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10. Ram Lal Mandar v. Kuldip Narayan Tewari, 1924 Pat 440=75 I C 841=3 Pat 126.
11. Prosonna Kumar De v. Ananda Chandra Bhattacherjee, (1926) 93 I C 86.
12. Pran Krishna Saha v. Mukta Sundari Dassya, (1913) 21 I C 544.

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COSTELLO AND LORT-WILLIAMS, JJ.

Ahamed Mahammad Paruk—Appellant.

v.

Praphullanath Tagore—Respondent.

Appeal No. 113 of 1933, Decided on 7th May 1934, from original order in Insolvency Suit No. 130 of 1930.

(a) Insolvency — Petitioning creditor inadvertently omitting to include security—Proceedings need not be wholly set aside.

If the petitioning creditor inadvertently, and not deliberately omits to include or mention a security, it is not right that the proceedings should be wholly set aside. [P 83 C 1]

(b) Presidency Towns Insolvency Act (3 of 1909), S. 13 (6)—Proceedings for 'postponement of question as to existence or otherwise of debt — Conditional adjudication order need not necessarily be added to order for furnishing security.

It was never contemplated by Sub-S. (6) of S. 13, Presidency Towns Insolvency Act, that a conditional adjudication order should be added, by way of sanction, to an order for furnishing security in connexion with postponement of determination of the question as to whether or not there was a debt. [P 86 C 1]

Page and *Clough*--for Appellant.

S. N. Banerjee and *I. P. Mukherji*—for Respondent.

Costello, J.—This is an appeal against a judgment of Panckridge, J., dated 22nd August 1933. That judgment was given by the learned Judge when exercising the Insolvency Jurisdiction of this Court and in connexion with a petition for adjudication, presented by one Praphullanath Tagore against Ahamed Mahammad Paruk. The petition set out that Paruk was justly and truly indebted to the petitioner to the extent of Rupees 1,05,647-15-9, being the total amount of several decrees which had been obtained by the petitioner in a number of suits, particulars of which are set forth in para. 2 of the petition. The petition alleged that within three months of the date of the presentation of the petition, Paruk had committed certain acts of insolvency. They are set forth in this form :

(a) that in execution of the decree obtained by me against the said Ahamed Mahammad Paruk and others for Rs. 10,270-1-9, in Rent Suit No. 2 of 1932, in the Court of the First Subordinate Judge of Faridpur, which was subsequently transmitted to this Court for execution and numbered as Execution Case No. 18 of 1933, the said premises No. 22, Canning Street, Calcutta, belonging to the said Ahamed Mahammad Paruk were attached on 11th May 1933, and his Motor Car No. 24843 was attached on 12th May 1933, and these attachments are still subsisting.

(b) that the decree obtained by me in Rent Suit No. 12 of 1932, against the said Ahamed Mahammad Paruk and others in the Court of the First Subordinate Judge of Backerganj, was executed and numbered as Execution Case No. 9 of 1933 of that Court, and, in the said execution, taluk named Idrak comprised in touzi No. 813 and taluks comprised in touzi Nos. 4537 and 4688 of the Backerganj Collectorate, belonging to the said Ahamed Mahammad Paruk and others were attached on 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 9th April 1933, and the attachment is still subsisting.

The act of Insolvency on which the petitioning creditor based his petition, was that the properties of the debtor had been attached for a period of not less than twenty-one days in execution of decrees of the Court for the payment of money. That is the act of insolvency described in S. 9, sub-S. (e), Presidency-towns Insolvency Act. There seems to be no dispute as regards the fact of the attachment. The answer set up by Paruk is contained in an affidavit, dated 11th August 1933. In para. 3 of that affidavit, he totally denied that he was indebted to Praphullanath Tagore in the sum of Rs 1,05,647-15-9 being the total amount of decrees set forth in para. 2 of the petition. He then proceeded to state that the suits were false suits filed against him, and that ex parte decrees were obtained without his knowledge, fraudulently, in conspiracy and in collusion with one Maulvi Mahammad Fazlul Karim. The appellant had been denying that the money was payable to the petitioner immediately. Put shortly, the petition was that Paruk was setting up that all the decrees obtained by Tagore were obtained by him fraudulently and that, consequently, they were invalid, and there were no debts due from him to the petitioning creditor, and so there was nothing on which the petition could rightly be founded. The learned Judge, at the hearing of the petition, having expressed himself satisfied as to the fact of attachment, stated:

"The situation is however complicated by the fact that debtor has instituted suits to set aside the rent decrees on various grounds. He has obtained injunctions, restraining the petitioning creditor from further proceeding with the execution of those decrees in respect of which the attachments have been effected."

It appears therefore that the debtor had in fact instituted a number of suits attacking the decrees which had been obtained against him by the petitioning creditor; and with regard to those decrees which were used for the purpose of cons-

tituting acts of insolvency, it is said that he had given security, no doubt for the full amount which had been ordered to be paid under those decrees. We are now informed that, with regard to one of them, the suit which was instituted for setting it aside, has been heard and dismissed with the result that the decree in effect has been confirmed. Seeing that the debtor put into Court a sum of Rs. 10,000 which is sufficient to cover the amount of the decree, it may well be argued, so far as that decree is concerned, that there is no existing debt, though the authorities go to show that, generally speaking, it is not sufficient to say that the debtor is in a position to pay the debt but he must show that he will immediately pay the debt, if he wishes to be in a position to say that there is a security by which he is able to discharge that particular debt. One would think that the right view of the matter is that, so long as a decree is subsisting, there will necessarily be a debt, unless of course means have been provided for discharging the particular decree. The learned Judge in his judgment says :

"I must attach some importance to the fact that the debtor has taken steps to challenge all the decrees. I must also give weight to the fact that, although the attachment prima facie constitutes an act of insolveny, yet the petitioning creditor has been restrained from further proceeding with the execution of those particular decrees, obviously because, as the result of the suit, it may turn out that the petitioning creditor has no claim to the amount of the decree.

[As regards one other decree it has been said that the matter has also already been adjudicated upon but, with regard to that, we have no precise information before us.] Having taken that view, the learned Judge proceeded to to make an order. He says :

I think that all things being considered the fairest order to make is an order for stay under S. 13, sub-S. (6), Presidency-towns Insolvency Act. As a condition of that stay, the debtor must furnish security, to the satisfaction of the Registar, in the sum of Rs. 10,000 within a month. Costs reserved. In default of such security being furnished there will be an order of adjudication and the petitioning creditor will add his costs to his claim.

Against that order the debtor has appealed and the matter is now before us.

Two points have been argued by Mr. Page : first of all, he urged that the latter part of the order is such that it was not within the power of the learned Judge to make, that is to say, Mr. Page was arguing that the matter did not properly fall within the purview of sub-S. (6) of S. 13. That sub-section says this :

Where the debtor appears on the petition and denies that he is indebted to the petitioner, or that he is indebted to such an amount as would justify the petitioner in presenting a petition against him, the Court, on such security (if any) being given as the Court may require for payment to the petitioner of any debt which may be established against the debtor in due course of law, and of the costs of establishing the debt, may, instead of dismissing the petition, stay all proceedings on the petition for such time as may be required for trial of the question relating to the debt.

Mr. Page has conceded that the first part of the order made by the learned Judge is unexceptionable. But he says that there should have been no order providing for adjudication in the event of the debtor not complying with the condition of stay given in the first part of the order. It is to be observed that obviously sub-S. (6), S. 13 contemplates that there may be a stay for a period and that after that the question shall be tried out as to whether or not there was such a debt as would found a petition in insolvency. It may be that, in the circumstances of the case, the learned Judge had justification to postpone the final determination of the matter rather than dismiss the petition. The debtor had denied the debts because he said that the decrees were invalid by reason of fraud on the part of the plaintiff in the suits. But. obviously, unless and until the decrees are set aside, they must be taken to be good in law. It may be that it would be reasonable to postpone the question whether or not the debtor ought to be adjudicated insolvent until after the question of the validity of the various decrees has been heard and determined

Mr. Banerjee pointed out to us that that question had been determined, in the Court of first instance. in Suit No. 2 of 1932. But he has also pointed out that as regards one of the decrees, namely, in Suit No. 1 of 1933 of the Court of the First Subordinate Judge, Backerganj, its validity has never been seriously challenged, but, on the contrary, it appears from what is stated in Para. 6 of the affidavit of Ramendranath Basu, dated 14th August 1933, as set out on p. 9 of the paper-book, that the debtor made certain statements in con-

nection with execution proceedings, in the Court of Small Causes of this city, which would indicate that he recognized the debt under that decree. So far as that decree is concerned, it must, I think, be taken as binding on him.

As regards the debts in the form of decrees, which the debtor is still challenging, we are of opinion that the right form of the order to be made, when the provisions of sub-S. (6) are being called into operation, is the form of order which was indicated in the case of 34 Bom. L. R. 1436 (1). In that case the respondents, who had been the petitioning creditors, had obtained a decree with costs against the appellant in the appeal Court. The appellant appealed to the Privy Council against the decree. The respondents attached certain property of the appellant for their taxed costs, but satisfaction not having been made within the usual period they filed an insolvency petition against the appellant and got an ex parte order of adjudication under Ss. 9 (e) and 10, Presidency Towns Insolvency Act, 1909. The appellant applied for a discharge of the adjudication order, contending that the order should not have been made pending his appeal to the Privy Council, but the Commissioner in Insolvency refused to discharge the order. There was an appeal from him which came before the Bombay High Court, in its appellate jurisdiction, and it was there held that the order ought to be discharged and that the proper order to be made in the circumstances of the case was one staying the insolvency petition generally, with "liberty to apply," provided adequate security was given by the alleged insolvent. The actual provision in sub-S. (6), S. 13 contemplates that there should be a stay for such period as may be necessary for the determination of the other matters in issue between the parties and that ultimately there shall be a trial on the question relating to the debt. We are clearly of opinion therefore that the order made by the .learned Judge cannot be supported and it must be set aside. By reason of another point taken by Mr. Page, we think that the whole order should be set aside and not merely altered by excising that part of it which directs conditional adjudication.

The other point taken by Mr. Page is that the petition itself, on which these proceedings were founded, is bad, and therefore no order involving adjudication could in any case be made. The point relied upon by Mr. Page is that S. 12, Presidency Towns Insolvency Act, sets out the conditions upon which a creditor can make a petition and in sub-S. (2), S. 12, it is enacted that:

"If the petitioning creditor is a secured creditor, he shall in his petition either state that he is willing to relinquish his security for the benefit of the creditors in the event of the debtor being adjudged insolvent or give an estimate of the value of the security. In the latter case, he may be admitted as a petitioning creditor to the extent of the balance of the debt due to him after deducting the value so estimated in the same way as if he were an unsecured creditor."

The object of that sub-section is of course this: The creditor cannot have it both ways. He has got his security. He must therefore use it to discharge the debt either wholly or pro tanto according to the value of the security or he must relinquish it. If he retains his security and uses it to discharge his debt as far as the security goes then if there is any balance remaining unsatisfied he can use that to constitute a debt for the amount of the deficit for the purpose of founding proceedings in insolvency. In the present case Mr. Page has taken exception to the statement in para. 3 of the petition. The petitioning creditor, Praphullanath Tagore there said this:

"I do not, nor does any person on my behalf, hold any security on the said debtor's estate or any part thereof for the payment thereof. That the said money is payable to me immediately."

That, says Mr. Page, is an incorrect statement and for the reason that the suits or the decrees which constitute the debt upon which the petition was founded are described as "rent suits," or at any rate, the particular suits in connexion with which the attachment relied upon took place, are described as "rent suit." Admittedly all the suits were, in fact for the recovery of arrears of rent. Indeed I find in the list set out in para. 2 that the heading of the first column is "rent suit." Then follows the numbers of the respective suits and the year in which they were instituted. The petitioning creditor was the landlord who was suing one of his

1. Rustomji Ardeshir Cooper v. Madhavji Damodar, (1928) 34 Bom L R 1436.

tenants or a number of co-tenants for rent. S. 65, Bengal Tenancy Act, applies to holdings in respect of which the suits were brought. S. 65 provides:

"Where a tenant is a permanent tenure-holder, a raiyat holding at fixed rates or an occupancy raiyat, he shall not be liable to ejectment for arrears of rent, but his tenure or holding shall be liable to sale in execution of a decree for for the rent thereof and the rent shall be a first charge thereon."

By virtue of the provisions of that section, Mr. Page has argued that Praphullanath Tagore is a secured creditor, as regards the debts upon which he is bringing the insolvency proceedings, because in S. 2, sub-S. (g), Presidency Towns Insolvency Act, "secured creditor" is described as including "a landlord who under any enactment for the time being in force has a charge on land for the rent of that land." Mr. Page says that the petitioner is a landlord and he has a statutory charge on the property for the rent. He is therefore a secured a creditor and must comply with the provision of sub-S. (2), S. 12.

It seems clear that that has not been done. It has been argued by Mr. Banerjee and various authorities have been placed before us in support of the contention that in this particular instance the landlord is not a secured creditor, in that he has no security because of the fact that he has lost, or at any rate become disentitled to avail himself of the effect of S. 65, Bengal Tenancy Act, for the reason that Praphullanath Tagore, as regards some of his suits, at any rate, did not make all the cosharer tenants defendants, but merely picked out the present appellant and sought to make him solely liable for the whole rents due. It is to be observed, however that, as regards Suit No. 12 of 1932, it is stated in para. 4 of the petition, which I have already read, that the decree was obtained against Paruk and others, and Mr. Page has informed us that it appears from the record that there were in fact a number of defendants in some of the suits at any rate. This does indeed seem to be the case from a statement, made in para. 6 of the affidavit of Ramendranath Basu. It appears that in making the application to the Court of Small Causes, Calcutta in connexion with the execution proceedings relating to Suit No. 1 of 1933, in the Court of the Subordinate Judge of Backerganj, Paruk said that there were several other defendants but the plaintiff had chosen to execute the decree against him alone by transferring the decree to this Court.

It would therefore seem that there was considerable doubt as to whether or not in all or any of the suits, the plaintiff has in fact lost his right under S. 65 by reason of his not having impleaded all the co-sharer tenants in what he himself described as the rent suits. If they were properly described as rent suits, it may well be that the plaintiff had indeed a remedy under S. 65, Ben. Ten. Act, and so it would not be correct for him to say that he had no security. In connexion with this point we were referred to the correspondence passing between the solicitors of the parties and particularly to a letter which was written by the present appellant's solicitors on 3rd May 1933. In course of that letter the solicitors said :

"our client does not appreciate the nervous anxiety on your client's part when your client has got as security the property in respect whereof the rent is due to your client."

That clearly was a definite statemeny indicating that the view of Paruk was that the plaintiff as landlord had gos security by reason of the provisions ot S. 65, Ben. Ten. Act. In reply to that letter of 3rd May 1933, the respondent's solicitors wrote a letter, dated 8th May 1933, wherein in no way, did they challenge the assertion of the other side. Mr. Page relied upon the case of 10 Ch. D. 681 (2), where Sir George Jessel, M.R. at p. 689, says:

"The rule in bankruptcy requires the judicial authority in bankruptcy—the Registrar or the Judge, as the case may be—before he adjudicates a man a bankrupt, to see that there is a proper unsecured debt in the manner I have explained. But if the adjudication is made without this being looked into, the only result is that the adjucation is bad, and you may set it aside in due time. It does not deprive the petitioning creditor of anything that I am aware of, and you must carefully distinguish between the notion of forfeiture and the decisions on the doctrine of election in bankruptcy which relate to a totally different subject."

But I would point out that this passage in the judgment of Sir George Jessel has been strongly commented upon in 2 K.B. 109 (3), the headnote of which says that :

2. Moor v. Anglo-Italian Bank, (1879) 10 Ch D 681=27 W R 652=40 L T 620.
3. In re, A Debtor, (1922) 2 K B 109.

Where a petitioning creditor had inadvertently omitted to mention in his petition a security which he in fact held, but which had been given many years ago in respect of another matter, and was admittedly valueless :

Held : that a receiving order made upon the petition was not invalidated by the omission, inasmuch as the Court had power to amend the petition even after the making of the receiving order.

Lord Sterndale, M. R., in that case said:

This case does not present any merits I do not know whether I may deal with a dictum of so great an authority as Jessel, M. R., and say I am sorry to see such a technical objection raised on the strength of that dictum. The petitioning creditors in their petition omitted to mention a security which had been given 15 years ago in respect of another matter altogether, which did however in form cover this particular debt. It was a matter of no importance, but, as the receiving order was made without this security having been mentioned in the petition, it is said that the receiving order is bad.

He goes on to say that the objection was founded upon a dictum of Jessel, M. R., in (1879) 10 Ch. D. 681 (2), where he says

"in the next place, I am not aware of any rule in bankruptcy that forfeits the petitioning creditor's debt."

Later on, Lord Sterndale continued:

It is said that that dictum goes to this : that if any security be omitted although of no importance or value, any order or proceeding on the petition is bad. If the learned Master of the Rolls meant his statement to extend to that, I think, with the greatest respect that one must always have for any dictum of Sir George Jessel, that it went too far. But it seems to me that he never intended it to go so far. The question is, suppose there were an omission of something of no value, something not affecting the matter in any way, does that make the receiving order altogether bad ? I think that in a case like that Sir George Jessel would himself have said "No, my dictum was never intended to go so far as that."

I respectfully adopt all that Lord Sterndale said, and I agree that if the position was that the petitioning creditor inadvertently, and not deliberately, omitted to include or mention a security it might not be right that the proceedings should be wholly set aside. In the present case however no application has been made before us for the amendment of the petition. On the contrary, Mr. Banerjee says that the petition is correct as it stands. It is either correct or it is very much incorrect. It may well be that the petitioning creditor, as landlord, has a security which covers the whole of the debts due to him. On the other hand he may have lost that security, either as regards all the decrees or as regards some of them as he has not made all the persons concerned, parties to the proceedings. The main question for us is whether or not the entire order should be set aside. There is no doubt that the question of whether there is a debt has been left open by Panckridge, J., and up to now there is no definite finding upon it.

We have come to the conclusion therefore that we should set aside the order in its entirety, not only because it was never contemplated by sub-S. (6), S. 13, Presidency-towns Insolvency Act, that a conditional adjudication order should be added, by way of sanction, to an order for furnishing security in connexion with the postponement of the determination of the question as to whether or not there was a debt but also because we think that the whole of these proceedings may be bad from the start by reason of the statement in the petition as to the petitioner's position touching the matter of security for the debts due. Having set aside the order, we direct that the matter go back to the Judge exercising the Insolvency Jurisdiction, so that he may come to a finding first of all as to whether the petition is in proper shape, particularly having regard to the statements contained in para. 3 and, secondly, as to whether there are any existing debts upon which an application for adjudication can properly be based. The learned Judge will, of course, at the same time, come to a finding as to whether the acts of insolvency as alleged are sufficient. It will then be for him either to make an order for adjudication or to dismiss the petition. There was a cross-objection on the part of the petitioning creditor asking that this order should be set aside and an order of adjudication should be made forthwith by this Court. As regards that, the petitioning creditor has failed to satisfy us and the cross-objection is dismissed

We think therefore that the right order to make as to costs is that each party should bear his own costs throughout.

Lort-Williams, J.—I agree.

K.S. *Order accordingly.*

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GUHA AND M. C. CHOSE, JJ.

Parthasarathi Ray—Auction-purchaser—Appellant.

v.

Ahindra Nath Ray and *others* — Respondents.

Appeal No. 498 of 1930, Decided on 29th June 1932, from appellate order of Dist. Judge, Midnapore, D/- 3rd July 1930.

(a) Bengal Tenancy Act (1885), S. 173 — Application to set aside sale under S. 173 involves question relating to execution and S. 47, Civil P. C., applies—Civil P. C. (1908), S. 47.

An application by judgment-debtor to set aside a sale under S. 173, Ben. Ten. Act, involves a question relating to the execution and satisfaction of the decree, as between the parties to the suit. S. 47, Civil P. C., is applicable in such a case and an appeal and second appeal are competent. [P 89 C 2]

(b) Bengal Tenancy Act (1885), S. 173 — Application under — Applicant is entitled to benefit of Limitation Act, S. 18.

Where the auction purchaser, against whom the application for setting aside the sale under S. 173 is directed, along with some of the judgment-debtors, is guilty of fraud, the applicants can avail themselves of the provisions contained in S. 18, Limitation Act. 17 *Cal* 769, *Rel on.* [P 90 C 1]

Manmathanath Ray and *Surjya Kumar Aich*—for Appellant.

Amarendra Nath Bose and *Pulin Behary Das*—for Respondents.

Judgment.—This appeal is directed against the decision of the learned District Judge of Midnapore, dated 3rd July 1930, allowing an application for setting aside a sale. The decision arrived at by the learned District Judge was passed in an appeal from an order made by the Munsif of Garbetha, on 29th April 1929, dismissing the application for setting aside a sale. The trial Court on the materials before it, held that the application so far as it purported to be one under S. 173 (3), Ben. Ten. Act, was barred by limitation. According to the Munsif, the applicants for setting aside the sale could not be allowed to avail themselves of the provisions contained in S. 18, Limitation Act, because the decree-holder was not a party to the fraud alleged in the application for setting aside the sale. As indicated above, the learned Judge in the Court of appeal below has differed from the decision arrived at by the trial Court. According to the learned District Judge, the applicants were in a position to avail themselves of the benefit of S. 18, Limitation Act, although the decree holder was not a party to the fraud alleged in the application. The application was accordingly held by the learned District Judge not to be barred by limitation, and he has, accordingly, given the applicants the relief they prayed for in the application. The auction-purchaser has appealed to this Court, and there is also an application on his behalf under S. 115, Civil P. C., for revision of the order passed by the learned District Judge, on appeal.

It has, at the outset, been represented to us that in view of the admitted facts of the case, there was no appeal to this Court allowed by law ; but it was contended in support of the application for revision that no appeal lay under the law to the learned District Judge in this case ; the decision given by the learned Judge in appeal, was wholly without jurisdiction and must therefore be set aside, and the decision of the trial Court dismissing the application for setting aside the sale restored. So far as the question whether any appeal lay to the learned District Judge or not, is concerned, we are of opinion that the question before the Court to be decided in the application for setting aside the sale, was a question relating to the execution and satisfaction of the decree, as between the parties to the suit. In this view of the matter the learned District Judge was right in holding that S. 47, Civil P. C., was applicable in a case like the present and therefore an appeal as presented before him was maintainable under the law. Reference has been made to certain decisions of this Court to substantiate the position that S. 47 was not applicable to a case like the one before us ; it is impossible however to hold that any of the decisions to which reference has been made goes so far as to lay down the general proposition that S. 47 would not be held to be applicable to the facts and circumstances of a case like the present. In our judgment there was an appeal to the learned District Judge, and the decision arrived at by the learned Judge is not in any way without jurisdiction. If there was an appeal to the District Judge, as we hold there was, an appeal lay to this Court, and we propose to deal with the appeal preferred by the appellant.

In support of the appeal, it has been urged in the first place that S. 18, Limitation Act, would have no application whatsoever in a case of this description, unless the decree-holder was a party to the fraud. It is not possible for us to give effect to this contention advanced on behalf of the appellant. Upon a proper reading of S. 18, Limitation Act, as it stands, and upon the view taken by a Full Bench of this Court in the case of 17 Cal. 769 (1), where it was expressly noticed in one of the judgments delivered by the Full Bench, that :

"under S. 18, Limitation Act, where irregularities affecting the validity of the sale have, by the fraud of the judgment-creditor or other parties to the sale, been kept concealed from the judgment-debtor, he is entitled whether the sale has been confirmed or not, to make, as against the person guilty of the fraud or necessary thereto, such application, if any, under S. 311 as he may be entitled to make, his time for making it being computed from the time when the fraud first became known to him."

In the case before us, there are concurrent findings of fact that the auction-purchaser against whom the application for setting aside the sale was directed, along with some of the judgment-debtors, was guilty of fraud. In that view of the case, it could not be maintained, as a point of law, that the applicants for setting aside the sale were not in a position to avail themselves of the provisions contained in S. 18, Limitation Act

The last contention urged on behalf of the appellant is that S. 173, Ben. Ten. Act, was not applicable at all to the facts and circumstances of the case before us, and no relief could be granted to the applicant under the provisions contained in S. 173, Ben. Ten. Act. The point thus raised in second appeal for the first time, was not raised before any of the Courts below ; and we are unable to say upon the materials before us that the question raised before us as to the non-applicability of S. 173, Ben. Ten. Act, has any substance in it.

In the result, the appeal fails and is dismissed. The application under S. 115, Civil P. C., for revision of the order passed by the learned District Judge, is rejected. We make no order as to costs either in the appeal or in the application.

K.S. *Appeal dismissed.*

1. Mohendra Narayan v. Gopal Mondal, (1890) 17 Cal 769.

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MUKERJI AND S. K. GHOSE, JJ.

Sufal Chandra Golui and *another*—Appellants.

v.

Surendra Nath Dhara—Respondent.

Appeal No. 199 of 1933, Decided on 29th June 1934, against appellate order of Addl. Dist. Judge, Howrah, D/- 15th December 1932.

Civil P. C. (1908), Ss. 144 and 151—S. 144 is not exhaustive—Court has inherent power to pass such order as to do effective and complete justice between parties.

The provisions of S. 144 are by no means exhaustive as they do not pretend to cover all cases in which it becomes the duty of the Court to order restitution. The power of a Court to grant restitution is not confined to cases covered by the provisions of S. 144 of the Code. The power extends also to other cases because the Court has an inherent right irrespective of the section to order restitution. Such inherent right has been recognised by S. 151 of the Code. The result of applying the principle of the said section to a case which comes before the Court is that the Court has to make such order as would enable it to do effective and complete justice between the parties: 14 *I C* 456, *Rel on.* [P 90 C 2]

Rishindra Nath Sarcar and *Subodh Chandra Dutt* for *Narayan Chandra Kar*—for Appellants.

Mohendra Kumar Ghose—for Respondent.

Judgment.—It is too late now to dispute the proposition that the provisions of S. 144, Civil P. C., are by no means exhaustive as they do not pretend to cover all cases in which it becomes the duty of the Court to order restitution. In a long series of cases which were noticed by Mookerjee, J., in the case of 14 I. C. 456 (1) it has been settled that the power of a Court to grant restitution is not confined to cases covered by the provisions of S. 144 of the Code. The power extends also to other cases because the Court has an inherent right irrespective of the section to order restitution. Such inherent right has been recognised by S. 151 of the Code. The result of applying the principle of the said section to a case which comes before the Court is that the Court has to make such order as would enable it to do effective and complete justice between the parties. It is not necessary therefore to support the order from which this appeal has been preferred by reference only to the provisions of S. 144 of the Code. It cannot be disputed that

1. Boni Madhab Singh v. Pran Singh, (1912) 14 I C 456.

the amount for which the restitution has been so ordered was paid by the opposite party as a consequence, indirect though it may be, of an erroneous decree which the appellant had obtained against the respondent. We are of opinion therefore that there is no reason to interfere with the order from which the appeal has been preferred. The appeal accordingly is dismissed. There will be no order as to costs in this appeal.

K.S. *Appeal dismissed.*

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MUKERJI, AG. C. J. AND S. K. GHOSE, J.

Kuloda Prasad Majumdar and *another*—Appellants.

v.

Kumar Prativa Nath Roy and *others*—Respondents.

Appeal No. 27 of 1933, Decided on 24th July 1934, from appellate order of Sub-Judge, First Court, Patna, D/- 30th May 1931.

(a) Bengal Tenancy Act (1885), S. 174 (5)—Order of dismissal of appeal for not making deposit—Second Appeal does not lie.

No second appeal lies from an order dismissing an appeal for not making the required deposit under S. 174 (5). [P 91 C 2]

(b) Bengal Tenancy Act (as amended in 1928), S. 174 (5)—Restrospective effect.

Clause (5), S. 174 as amended in 1928 has no retrospective effect. [P 92 C 1]

(c) Bengal Tenancy Act (1885), S. 174 (3)—"Allowed" means entertained – Deposit must be made at time of application for setting aside sale : (*Obiter*).

The word "allowed" in S. 174 (3) should be read in the sense of "entertained" and the deposit should be made at the time of filing of the application for setting aside the sale and not before the hearing of the application : 1934 *Cal* 491, *Doubted*. [P 92 C 1,2]

Dinesh Chandra Roy—for Appellants.

Abinash Chandra Ghose for *Girija Prosonna Roy Chowdhury*—for Respondents.

Judgment.—This is an appeal by some judgment-debtors in execution of a decree against whom the jama in arrears was sold and who applied for setting aside the sale. The decree-holder obtained the decree on 21st Dacember 1925. The sale at which the decree-holder himself made the purchase took place on 18th March 1929. The application to set the sale aside was made on 27th March 1929 under O. 21, R. 90, Civil P. C. On 4th May 1929, the judgment-debtors were ordered under S. 174, Cl. (3), Ben. Ten. Act, to deposit the decretal amount by the 27th of that month. On the date last mentioned, the time for the deposit was extended to 1st June 1929, on which date an application was made by them for further extension of time but was refused. The case was then taken up, but the judgment-debtors did not appear. On that, the application under O. 21, R. 90 was dismissed for default. There was then an application filed by them for review which was ultimately dismissed. They then preferred an appeal from the order dismissing their application under O. 21, R. 90 of the Code. At the hearing of the appeal it was found that the deposit contemplated by Cl. (5), S. 174, Ben. Ten. Act, had not been made. The decree-holder took a preliminary objection as to the maintainability of the appeal on the ground that the required deposit had not been made. The objection prevailed and the appeal was dismissed. From this order the present appeal has been preferred.

It is not disputed that the appeal does not lie. What is contended is that on revision it should be held that the order of the Court of first instance as well as of the Court of appeal below were orders made without jurisdiction. The first ground taken is that the decree was not a rent-decree, nor the sale a a rent-sale, and that consequently Chap. XIV, Ben. Ten. Act, was inapplicable. On this contention, one argument advanced is that Cl. (5), S. 174 of that Act having no application the appeal could not be dismissed for omission to make the deposit required by that clause ; and another contention urged is that no deposit could be called for under Cl. (3) of that section nor could any order of dismissal be made of the application under O. 21, R. 90 of the Code for failure to make the deposit. The Subordinate Judge has given some reasons for overruling the aforesaid contention. But we are not inclined to examine the correctness or otherwise of his reasons, because we find that the present contention of the appellants is contrary to what they stated in some of their own petitions in the Court of first instance.

It is not disputed that if Chap. XIV, Ben. Ten. Act, applied, Cl. (5), S. 174 of the Act would apply to the appeal in

the Court below. That appeal was filed after the amendments of the Bengal Tenancy Act of 1928 came into force and the provision of Cl. (5), S. 174 of the Act began to operate as soon as the amendments came into force, there being nothing in the language of the provision indicating the contrary. On the question whether the clause can operate retrospectively, it has been held that in cases of applications under O. 21, R. 90 lodged before the amendments came into force, the provision had no application, because there was nothing to indicate that it was made retrospective either expressly or by necessary intendment and that as the matter involved is one affecting the right of appeal which is a substantive right, according to the ordinary canons of construction no retrospective operation can be given to it: 1931 Cal. 100 (1) and 1931 Cal. 92 (2). These decisions however do not help the appellants in the present case, because their application to set aside the sale under O. 21, R. 90 itself was filed, and even the sale itself had taken place, after the amendments came into operation. The appellants have urged that inasmuch as the execution proceedings had been started prior to when the amendment came into force, the amendments should not be operative. With this contention we cannot agree, because the right that is affected by the amendments accrued only on the sale and not before.

We have been asked to hold that the order of the Court of first instance calling for the deposit was made without jurisdiction and in this behalf reliance has been placed on the decision of this Court in 1934 Cal. 491 (3). In that case it has been held that such deposit under Cl. (3), S. 174, Ben. Ten. Act, can be called for by the Court after and not before the hearing of the application. The learned Judges have in that case pointed out the enormous difficulties that are experienced in construing the clause. We are very doubtful if it was not the intention of the legislature that the word 'allowed' in the clause should be read in the sense of 'entertained,' because we are unable to hold that unless it is so read the difficulties can be solved : the solution suggested in the aforesaid decision, in our opinion, is not a satisfactory solution of the difficulties. On the whole, we are not prepared to hold that a case for revision has been made out. The appeal is dismissed, so also the application. There will be no order for costs.

K.S. *Appeal dismissed.*

1. Nagendra Nath Bose v. Manmohan Singha, 1931 Cal 100=129 I C 849.
2. Asikannissa v. Dwijendra Krishna, 1931 Cal 92=120 I C 878=58 Cal 167.
3. Mofizuddin v. Mofizuddin, 1934 Cal 491=151 I C 94=61 Cal 338.

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NASIM ALI AND KHUNDKAR, JJ.

Bindu Bashini Debi—Petitioner.

v.

Provat Chandra Sarkel and *others*—Opposite Parties.

Civil Rule No. 96 of 1934, Decided on 18th July 1934, from order of Dist. Judge, Backergunj, in Misc. Appeal No. 40 of 1933.

(a) Bengal Tenancy Act (1885), S. 153-Explanation—Sale set aside by Munsif on ground of non-survice of process—No appeal lies to District Judge.

Where a Munsif sets aside a sale on the ground of non-service of processes but there is no other ground of fraud independent of this, no appeal lies to the District Judge. [P 93 C 1]

(b) Bengal Tenancy Act (1885), S. 174—Fraud antecedent to decree cannot be ground for setting aside sale.

Any fraud antecedent to the decree cannot be a ground for setting aside a sale instituted under S. 174. [P 93 C 2]

Jatindra Mohan Sanyal—for Petitioners.

Abinash Chandra Guha and *Bireswar Bagchi*—for Opposite Parties.

Order.—This rule is directed against an order of the District Judge of Backergunj dated 6th September 1933, reversing the order of the first Court Munsif at Barisal by which the learned Munsif set aside a sale under the provisions of S. 174, Ben. Ten. Act. The learned Munsif on a consideration of the evidence came to the conclusion that the processes were not served and that if there would have been any service, the petitioner would never have allowed the property to be sold for arrears of rent. The learned Munsif has observed that in the facts and circumstances of the case it cannot be for a moment believed that the processes of sale were served. The learned Munsif further found that it was highly probable that the processes were intentionally suppressed by the decree-holder in collusion with the judg-

ment-debtor with a view to frustrate the claim of the petitioner. In this view of the matter the learned Munsif set aside the sale. An appeal then was taken by the auction-purchaser to the District Judge and the District Judge on a consideration of the evidence came to the conclusion that the processes were served and that the property had not been sold at a very adequate price and in that view he confirmed the sale. Hence the present rule was obtained by the petitioner.

The only ground urged in support of the rule is that the District Judge had no jurisdiction to entertain the appeal inasmuch as the Munsif who set aside the sale was vested with powers under S. 153 (b), Ben. Ten. Act. From the findings of the learned Munsif it is clear that he did not believe the evidence about the service of processes. Under S. 153, Ben. Ten. Act, the order passed by the Munsif who is invested with special powers under S. 153 (b), Ben. Ten. Act, is final and cannot be challenged in appeal, unless the order decided a question relating to title to land. In the explanation to the section which was added in the year 1907 in Bengal and in 1908 in East Bengal it was laid down that a question of irregularity of proceeding in publishing or conducting a sale is not a question relating to title to land. The irregularity in publishing or conducting the sale includes non-service of the process. This non-service may be due to the negligence of the process server. It may also be due to a collusion between the decree-holder as well as the process server. In the case before us the learned Munsif did not believe the evidence which was given by the auction purchaser to prove that the notices were actually served. It is true that he observed that it might have been due to fraud on the part of the decree-holder. The effect of the learned Munsif's finding however is that he did not find any fraud which could be said to be independent of the irregularity in the proceedings in publishing or conducting the sale. In this view of the matter we are of opinion that the irregularity found in this case is one which is covered by the explanation to S. 153, Ben. Ten. Act.

It was however argued by the learned advocate for the opposite pary that as there is a finding by the learned Munsif to the effect that the decree itself was abtained by fraud, and that as this fraud is antecedent to the sale an appeal to the lower appellate Court was competent. It is clear from the judgment of the learned Munsif that he did not set aside the sale on any fraud antecedent to the publishing or conducting of the sale. In fact any fraud antecedent to the decree cannot be a ground for setting aside a sale instituted under S. 174, Ben. Ten. Act.

We are therefore of opinion that the appeal by the decree-holder auction-purchaser to the lower appellate Court was incompetent and that the District Judge had no jurisdiction to set aside the order of the learned Munsif. We accordingly make the rule absolute, set aside the order of the District Judge and restore that of the Munsif. The application for setting aside the sale is allowed. As however this objection to the competency of this appeal was not taken before the learned District Judge we make no order as to costs in this rule.

K.S. *Rule made absolute.*

A. I. R. 1935 Calcutta 93

HENDERSON, J.

Nalini Kumar Ray—Defendant—Appellant.

v.

Kamini Kumar Ray—Plaintiff—Respondent.

Appeal No. 1865 of 1931, Decided on 25th May 1934, from appellate decree of Addl. Sub-Judge, 1st Court, Sylhet, D/- 9th March 1931.

Co-sharer—Two proprietors having share in separate account in Taluk—Lease by them and sale by lessee to one of them—Suit for khas possession by other—Other proprietors are not necessary parties and he is entitled to khas possession.

Where two proprietors having a share in a certain separate account in certain taluk had leased it and the lessee sold it to one of them, in a suit by the other proprietor for khas possession:

Held: that the other co-sharers were not necessary parties to the suit as they have no interest in the matter until a partition suit was instituted.

Held also: that the result of the sale was that the tenancy had ceased to exist and the appellant and the respondent were now entitled to hold the land in khas possession. [P 94 C 1]

Gopendra Nath Das for *Satindra Nath Mukherjee* and *Siddheswar Chakraburty*—for Appellant.

Birendra Kumar De—for Respondent.

Judgment.—This appeal is by defendant 1. The plaintiff and this defendant had a share in a certain separate account in a certain taluk. They leased the land in question to pro forma defendants 2 to 6 who sold it to defendant 1 in 1328. The plaintiff then instituted the present suit to establish his title and to get joint possession with defendant 1. The munsif decreed the suit. There was an appeal to the District Court and the learned Subordinate Judge who heard the appeal dismissed it. Defendant 1 has therefore appealed to this Court. The chief point taken on behalf of the appellant is that the plaintiff cannot get any relief unless he makes all the proprietors of the Taluk parties to the suit. On behalf of the respondent Mr. De has contended that this argument really confuses joint owners with joint landlords. I am clearly of opinion that this is correct. The only persons among the owners with whom there was any relationship of landlord and tenant on the part of defendants 2 to 6 were the appellant and the respondent. The proprietors of the taluk may for their own convenience possess the joint land as they please. They may either cultivate themselves or through their servants or they may let it to tenants. In this case the appellant and the respondent let it to tenants. The result of the sale, by defendants 2 to 6 is that the tenancy has ceased to exist and the appellant and the respondent are now entitled to hold the land in khas possession. It is perfectly true that any of their cosharers may institute a suit for partition and it is also quite possible that as a result of such a suit this particular land would be allotted to the share of some other proprietors; but until a suit for partition is instituted the cosharers of the appellant and respondent have no interest in the matter and are not necessary parties to the suit.

It is also contended that the suit must fail because the plaintiff has failed to prove that this land was included in the separate account. At the request of the appellant the lower appellate Court directed a local investigation in order to find out whether this land was included in the separate account. The investigation proved fruitless, as it was bound to do. Unless there was a partition amongst all the proprietors of the taluk by which this land was allotted to this particular separate account and unless the Collector assented to it, the question could not arise. The real question is not whether this land belongs to the separate account but whether some of the proprietors who have an interest in that account are in possession of it by agreement amongst the cosharers. The appellant and the respondent leased it on that footing and the appellant purchased it on that footing. There is therefore nothing in this objection. It was jointly suggested that the learned Subordinate Judge dealt in a rather summary manner with the appellant's suggestion that the holding was transferable by custom. He failed to adduce any real evidence whatever of the existence of any such custom and it would have been a waste of the learned Subordinate Judge's time if he had enlarged upon what had been said by the learned Munsif. The result is that the appeal fails and must be dismissed with costs.

K.S. *Appeal dismissed.*

A. I. R. 1935 Calcutta 94

HENDERSON, J.

Nagendra Nath Biswas — Plaintiff — Appellant.

v.

Kripanath Bhattacharjee and *others*— Respondents.

Appeal No. 1909 of 1931, Decided on 6th June 1934, from appellate decree of Sub-Judge, Fourth Addl. Court, Sylhet, D/- 15th January 1931.

Hindu Law—Alienation—Widow — Legal necessity — Representation of existence of debt at the time of kobala is not sufficient proof.

A representation as to the existence of debts, alleged to have been incurred at the time of Sradh, made at the time of execution of the kobala is not enough proof of legal necessity as to validate an absolute sale by a Hindu widow to defeat the claim of reversioners: 1916 *Cal* 110, *Ref to.* [P 95 C 2]

Priya Nath Dutt—for Appellant.

Hira Lal Chakrabarty—for Respondents.

Judgment.—This appeal is by plaintiff 2 and is concerned with the validity of a sale by one Jogtara Debi, widow of Kali Nath Sarma who was the owner of one-sixth of the property which was the subject-matter of the suit. The kobala was executed in favour of plaintiff 3; but she did not dispute that the purchase was really made by all the plain-

tiffs. The plaintiffs supported the sale on two grounds (1) that Jogtara obtained an absolute interest in the property by her husband's will (2) that in any event the sale was for legal necessity. Both these points were decided in favour of the plaintiffs by the Munsif. This decision was reversed by the Subordinate Judge. It is now contended that the decision of the learned Munsif on both points was correct. On the first point the learned Subordinate Judge appears to have applied the correct principles. He points out that if the will conveys an absolute interest, the subsequent provisions cutting it down would have no effect. But he points out that there is no clause in the will which confers any absolute interest. This is undoubtedly correct and is sufficient to dispose of this point.

On the second point it is contended on behalf of the appellant that the case is covered by the principles enunciated in the case reported in 1916 P. C. 110 (1). The necessity for the sale alleged in the payment of debts contracted is connexion with the sradh of Kali Nath and the probate proceedings. The learned Subordinate Judge's judgment on this part of the case is not very clear. But I have no doubt that he intended to find that the existence of these debts has not been proved. The difficulty in the way of the appellant is that no real attempt was made in the Court of first instance to establish facts, which would bring the case within the rule laid down in the decision referred to above. The time that elapsed between the execution of the kobala and the institution of the suit was about 22 years. It could not be assumed that after the elapse of this time, it is not possible to establish the existence of the debts by evidence. No attempt was made to show that the persons who might prove this are no longer alive. Then again no attempt was made to establish any bona fide inquiry. On this point the plaintiffs themselves were certainly in a position to give evidence. But there was never even a suggestion that any inquiry was made. In fact at the trial the plaintiffs were content to rest their case on a proof of the actual existence of the debts by evidence which has not satisfied the learned Subordinate Judge. The result of his finding is that the only thing proved by the plaintiffs is that a representation as to the existence of the debts was made at the time of the execution of the kobala. This is clearly not enough to defeat the claim of the reversioners. The appeal is accordingly dismissed with costs. The appellant asks for leave to appeal. As the other plaintiffs did not even join in the appeal, this is refused.

R.K. *Appeal dismissed.*

1. Banga Chandra Dhur Biswas v. Jagat Kishore, 1916 P C 110=36 I C 420=43 I A 249=44 Cal 186.

A. I. R. 1935 Calcutta 95

M. C. GHOSE, J.

Abbasali Bhuiya and *others* — Defendants—Appellants.

v.

Ram Kanai Majumdar and *others* — Plaintiffs—Respondents.

Appeal No. 55 of 1932, Decided on 27th July 1934, against appellate decree of Sub-Judge, 2nd Court, Tippera, D/- 27th April 1931.

Limitation Act (1908), Art. 95 — Proof of non-service of summons is not sufficient to set aside decree—Fraudulent suppression of summons and fraud of defendant must be proved.

In a suit instituted under Art. 95 to set aside a decree obtained by fraud or for relief on the ground of fraud, the plaintiff must show that the summons was fraudulently suppressed and by fraud of the defendant he was kept ignorant of the decree. Mere non-service of summons is not sufficient. [P 96 C 1]

Kalikinkar Chakravarty for *Hemanta Kumar Biswas*—for Appellants.

Rajendra Chandra Guha and *Mahendra Kumar Ghose*—for Respondents.

Judgment.—This is an appeal by the defendants in a suit to set aside an ex parte decree on the ground of fraud. The trial Court dismissed the suit. The Court of appeal below has decreed the plaintiff's suit with costs and set aside the ex parte decree in the Rent Suit No. 3 of 1927 and directed the re-trial of that rent suit.

Upon hearing the learned advocates on both sides and upon perusal of the papers it appears that the learned Subordinate Judge has misdirected himself on the question of law. It appears that the Rent Suit No. 3 of 1927 was instituted in Chandpur Munsif's Court on 10th January 1927. The plaintiffs in that suit who are the defendants-appel-

lants here claimed rent at Rs. 3-8-0 per annum against the principal defendant Abdul Karim and they also made the present plaintiff Ram Kanai a pro forma defendant on the ground that he was claiming the rent from the defendant tenant. The summons upon the plaintiff Ram Kanai Mazumdar was served twice. The first summons was served on 26th January 1927. Both the Courts have found that the service of that summons had not been proved. The second summons was served on 23rd May 1927. The trial Court .found that that service was effected and was a legal service. The Subordinate Judge has found that that service was not a service according to law. Accepting the finding of the learned Subordinate Judge that there was no service upon the present plaintiff the question is whether for mere non-service of summons he can succeed in the present suit. The suit was instituted under Art. 95, Limitation Act, to set aside a decree obtained by fraud or for relief on the ground of fraud. If it was a case merely to set aside the decree under O. 9, R. 13 the plaintiff would have to come within 30 days of the ex parte decree, but he came long after that date. When he claims the limitation of three years under Art. 95 he must show that the decree was obtained by fraud. He must show that the summons was fraudulently suppressed and by fraud of the plaintiff he was kept ignorant of the decree.

There is no finding at all in the judgment of the Court of appeal below that there was any such fraud. On the other hand from the judgment of the trial Court facts appear which have not at all been touched upon by the Court of appeal below and those facts are proved not by oral evidence but by documentary evidence. The facts are as follows. The Rent Suit No. 3 of 1927 was instituted on 10th January 1927 and the first date of hearing was fixed for 8th February 1927. On 9th February 1927 the present plaintiff Ram Kanai instituted a Rent Suit No. 12 in the very same Court at Chandpur against the very same tenant, whom the appellants were suing, for the very same holding and in that Rent Suit No. 12 the tenant filed a written statement in which he mentioned the rent suit instituted on 10th January by the appellants and the Rent Suit No. 12 instituted by the present plaintiff against the tenant was decreed on compromise between the parties and the copy of that compromise decree was filed as a piece of evidence by the tenant in contesting the suit No. 3 of 1927. He hotly contested the suit denying the right of the appellant to get rent from him and stating that the present plaintiff was his landlord. If he had won that suit the plaintiff would have been completely benefited. He would then have no interest to institute the present auit. Upon contest the tenant lost the suit. He made an appeal and lost the appeal also. Thereafter the appellant instituted a suit for ejection against the tenant and the present plaintiff's son deposed as a witness for the tenant in that suit.

It was after that ejection suit that the present suit was instituted to set aside the ex parte decree. From these facts the Munsif drew the conclusion that there was no fraud practised upon the present plaintiff. It appears clear that the present plaintiff was aware of the suit No. 3 of 1927 very soon after its institution and whether the summons was served on him or not he became fully cognizant of the suit so early that he might have filed a written statement and contested the suit himself. He preferred to have the suit defended by the tenant Abdul Karim. If Abdul Karim had won the suit that would have been a sufficient relief and that was why probably he did not choose to file a written statement himself. But in this case he can have no valid ground to set aside the decree which was passed on contest against the tenant and ex parte against him for he was fully cognisant of the suit in all its stages and he has failed to prove fraud.

The result is that the appeal is allowed, the decree of the lower appellate Court is set aside and that of the Munsif restored. The appellants will get the costs of the Court of appeal below. The parties will bear their own costs in this Court.

R.K. *Appeal allowed.*

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A. I. R. 1935 Calcutta 97

MALLIK AND M. C. GHOSE, JJ.

Badri Narayan Chetlangia—Defendant—Appellant.

v.

Abdul Mandal and *others* — Respondents.

Appeals Nos. 1116 to 1118 of 1931, Decided on 12th March 1934, from appellate decrees of Dist. Judge, Nadia, D/- 3rd December 1930.

(a) Bengal Tenancy Act (1885), S. 115-C—No second appeal lies from decision settling rent — Mere decision as to how many years utbandi tenants had been occupancy raiyats will not make decision appealable.

No second appeal lies from decision settling rent and a mere decision of the question for how many years the utbandi tenants had been occupancy raiyats will not make the decision an appealable decision : 1922 *Cal* 152; 1923 *Cal* 141 and 1931 *Cal* 550, *Dist.* [P 97 C 2]

(b) Bengal Tenancy Act (1885), S. 180-A (9)—Court is bound to calculate average rent for last six years.

Under S. 180-A (9) it is obligatory on the trial Court to calculate the average of the rent that was paid for the previous six years. Sub-S. (9), S. 180-A, is explicit in the matter. [P 98 C 1]

Ramprasad Mukherji—for Appellant.

Bijalibhusan Sanyal — for Respondents.

Ramendra Mohon Mazumdar — for Deputy Registrar.

M. C. Ghose, J.—These are three appeals by the defendant landlord in three suits which were instituted by three sets of utbandi tenants for fixing a uniform annual money-rent under S. 180-A, Ben. Ten. Act. In the trial Court the three suits were tried together. In the lower appellate Court the appeals arising out of the three suits were heard together and they have been argued together in this Court. The trial Court upon consideration of all the evidence fixed the anuual rent at Re. 1-4-0 per bigha. The District Judge in appeal affirmed the decree of the trial Court. The defendant landlord appeals to this Court and the main ground is that the Courts below were wrong to fix the annual rent at Re. 1-4-0 per bigha and that on a proper consideration of the facts and circumstances they should have fixed the rent at a higher sum per bigha. A preliminary objection has been taken by the learned advocate on behalf of the tenants respondents that no appeal lies in this Court inasmuch as the decision of the Courts below was merely a decision settling rent. S. 115-C, Ben. Ten. Act, provides that an appeal shall lie to the High Court from a decision of a Special Judge in any case (not being a decision settling rent) which is a Court subordinate to the High Court within the meaning of S. 100, Civil P. C. It is clear from the wording of that section that no appeal lies to this Court from a decision settling rent. The rulings in 1922 Cal. 152 (1), 1923 Cal. 141 (2) and 1931 Cal. 550 (3) have been quoted by the learned advocate for the appellant to show that under certain circumstances there is an appeal from a decision settling rent.

The decisions in the cases cited show that where the fundamental question involved in a case is as to the status of a tenant whether he holds the land at a fixed rent or at a rent liable to enhancement or where there is a dispute between the parties as to the question of area upon which the rate of rent is to be calculated it is only in such cases that an appeal lies. The learned advocate for the landlord appellant has argued that in this case though there is no dispute as to area or whether the tenant is a mokurari tenant or his rent is liable to enhancement yet in deciding the question of rent the Courts considered for how long the tenants who were recorded in the cadastral survey settlement records as occupancy-raiyats had in fact held their tenancy as occupancy-raiyats. I am of opinion that a mere decision of the question for how many years these utbandi tenants had been occupancy-raiyats will not make the decision an appealable decision. In my opinion, the preliminary objection prevails and no appeal lies in this case. Having however heard the learned advocates in detail we think that we should express our opinion on the merits of the case.

It was argued in the first place that the Courts below were wrong in holding that the increases of rents made in 1311, 1312 and 1313 were illegal enhancements. It is urged that under S. 180 an utbandi tenant is liable to pay such rents for his holding as may be agreed on between him and his landlord. From this it may be held that though the

1. Midnapore Zamindary Co., Ltd. v. Sridhar Mahata, 1922 Cal 152=67 I C 775=49 Cal 866.
2. Sarat Chandra v. Taraprasanna, 1923 Cal 141 =70 I C 437.
3. Nafar Chandra v. Bhiku Sheikh, 1931 Cal 550 =132 I C 249.

tenant was paying rent at Re. 1-1-0 per bigha in one year it is not illegal if he agrees to pay at Re. 1-7-0 per bigha in the second year and at Re. 1-14-0 per bigha in the third year. It appears that the learned District Judge was aware of the provisions of S. 180 and as a judge of facts he came to the conclusion that these increases of rent within two years from Re. 1-1-0 to Re. 1-14-0 per bigha were unfair and inequitable and ought not to be taken into consideration in fixing the fair and equitable rent.

The next question urged was that the primary Court committed an error of law in not calculating the average amount of rent that was actually paid for the previous six years by the tenants. The argument is that in making a determination of the sum paid as rent it was obligatory on the trial Court to calculate the average of the rent that was paid for the previous six years. Sub-S. 9, S. 180-A is explicit in the matter and the Courts below committed an error in thinking that this matter of calculating the average rent for the last six years was left to the discretion of the Court. The point however has been conceded by the learned advocate for the respondents and it is stated that the average payment of rent will appear from the settlement Record of Rights which was finally published in 1922 about nine years before the institution of the suits. The rates recorded in the settlement Record of Rights vary in the same villages from Re. 1-1-0 to Re. 1-14-0 per bigha. It appears that the learned District Judge took an account of the rates in the Record of Rights in coming to the conclusion as to fair rent in these cases.

It was urged that the Courts below did not pay proper consideration to the kabuliats filed on behalf of the landlord. It is urged that many kabuliats were filed showing rents which the occupancy-raiyats had agreed to pay but that the Court only took into account a few of them. It appears that the trial Judge visited the locality and saw some of the lands in respect of which the landlord had got the kabuliats from different tenants. His conclusion was that the kabuliat rate at Re. 1-8-0 per bigha had been agreed to by the tenants who held lands mostly consisting of beel lands and better class of land with a sprinkling of average land here and there. The lower appellate Court accepted the view that the tenants who gave kabuliat rate probably did so because the lands were better lands or that they had other considerations for agreeing to pay rent at Re. 1-8-0 per bigha.

The next point urged is that the learned District Judge should have taken into consideration that no less than 31 of the tenants compromised their cases in the lower appellate Court agreeing to pay rent at the rate of Re. 1-8-0 per bigha. The learned Judge did not think fit to base his judgment on the ground that the tenants who volantarily compromised with the landlord might have had their special ground for doing so. It was argued that the Courts below committed an error in paying attention to a village-note and to a certified copy of a compromise-decree Ex. 6. The village-note which has been shown to us appears to be a statistical note showing the average jamai rate of the mouza. The document is unsigned and though it was officially prepared it has little evidentiary value. Ex. 6 which is a copy of the solenama is of little evidentiary value inasmuch as we do not know what were the motives for the compromise. But it appears from the judgment of the learned District Judge that he did not pay much attention to these two documents in coming to his conclusion.

One of the grounds which carried weight with the Courts below was that though the tenants called for the old records of the landlord the landlord failed to produce them. For the non-production of these documents the Courts below came to the conclusion that the tenants who were recorded in the settlement records of 1922 as having acquired occupancy rights had possessed such occupancy rights in the years 1903 and 1904. It is urged that the Courts below were wrong to draw such an inference from the mere non-production of the landlord's papers of those early years. Specially when an account is taken of the fact that when the tenants were called upon to produce their rent-receipts they failed to produce them. These are matters for consideration of the Court of facts. The inference drawn by the Courts below was an inference from facts and it cannot be said that that inference was illegal. We should not quarrel with the decision. If these

tenants were occupancy-raiyats in 1903 and 1904 then S. 29, Ben. Ten. Act., protected them against the enhancement which was made in 1903, 1904 and 1905. If these tenants were in fact occupancy-raiyats in 1903 then though utbandi tenants they would have the protection as occupancy-raiyats. See in this connexion the case in 1929 Cal. 614 (4).

On the whole I am of opinion that the Courts below were within their discretion in fixing the annual rent at Re. 1-4-0 per bigha and that in doing this they were mainly carried by consideration of what appeared to them to be fair and equitable, and we do not see sufficient reason to disagree with them. In the result the appeals are dismissed with costs the hearing-fee being assessed at one gold mohur in each appeal. The cross-objections are not pressed and they are accordingly dismissed. The applications filed under S. 115, Civil P. C., are rejected.

Mallik, J.—I agree.

K.S. *Appeals dismissed.*

4. Nafar Chandra v. Jatindra Nath, 1929 Cal 614=125 I C 285.

A. I. R. 1935 Calcutta 99

MUKERJI, AG. C. J. AND GUHA, J.

Rajani Kanta Pattadar—Judgment-debtor—Appellant.

v.

Kazi Saiyed Golam Mahiuddin and *others*—Respondents.

Appeal No. 227 of 1934, Decided on 22nd August 1934, from original order of Sub-Judge, 1st Court, 24-Parganas, D/- 23rd April 1934.

Limitation Act (1908), Art. 182—Decree passed by Court *A* transmitted for execution to Court *B*—Execution dismissed on part satisfaction on 30th April 1930—Execution application in Court *A* on 5th April 1933—Court *A* enquiring from Court *b* about execution—On receipt of certificate execution registered—Execution held not barred by time as date of certificate and not of its arrival was relevant.

The decree was passed on 17th February 1926 by the Court of Alipur. On 21st January 1929 it was transmitted to the Court at Ranchi and was executed. The execution case was dismissed on part satisfaction on 30th April 1930. On 5th April 1933 an application was filed by the decree-holders in the Court of Alipur. On 12th April 1933 the Court of Alipnr wrote to the Court of Ranchi enquiring about the decree. On 19th June 1933, the Alipur Court received a reply dated 17th June 1933 in which it was stated that Execution Case had been dismissed on part satisfaction on 30th April 1930 and then the execution was registered.

Held: that it was the date of the certificate, 30th April 1930, and not the date on which the certificate arrived in the Alipore Court which was relevant. On the date of the application, it was no doubt true that the Court was not in a position to grant the prayers in the absence of the certificate of non-satisfaction, but there was no justification to treat the application as not made or made to a Court without jurisdiction: 1933 *Cal* 906 *Diss from* and 1916 *P C* 16, *Rel on*. [P 100 C 2]

Bejan Behari Das Gupta—for Appellant.

Bijan Kumar Mukherjee and *Gour Hari Mitra*—for Respondents.

Judgment.—The facts of this case are quite simple. The appeal is by a judgment-debtor who alleges that a decree which is being sought to be executed against him is barred. The decree was passed on 17th February 1926 by the Court of the Additional Sub-Judge of Alipur. On 21st January 1929 it was transmitted to the District Court at Ranchi and was executed in Execution Case No. 2 of 1929 in the Court of the Subordinate Judge of Ranchi. Thereafter the said execution case was dismissed on part satisfaction on 30th April 1930. On 5th April 1933 the present application was filed by the decree-holders in the Court of the Subordinate Judge of Alipur. On 12th April 1933 the Subordinate Judge of Alipur wrote to the District Court at Ranchi enquiring about the decree, but got a reply which was wrong; and thereafter wrote again, and then on 19th June 1933 received a reply dated 17th June 1933 in which it was stated that Execution Case No. 2 of 1929 had been dismissed on part satisfaction on 30th April 1930. On the said 19th June 1933, on receipt of the said reply, the present execution was registered. The judgment-debtor's contention was that the execution was barred. That contention having been overruled, he has preferred the present appeal.

The appellant relies on the decision of this Court in the case of 1933 Cal. 906 (1). The appellant's contention is that the application of 5th April 1933 was not an application made to a proper Court, since on that date the position was that the decree and the certificate of non-satisfaction had not been sent by the Ranchi Court to the Alipore Court where the application was made. The

1. Jatindra Kumar Das v. Mohendra Chandra, 1933 Cal 906=60 Cal 1176.

decision no doubt supports the appellant's contention. But with the utmost respect to Mitter, J. whose decision it is, we are unable to agree in his appreciation of the true effect of the decision of the Judicial Committee in the case of 1916 P. C. 16 (2) on which he has proceeded. In our opinion, the point upon which Their Lordships rested their decision was that the decree-holder wished to attach and sell certain land which was within the jurisdiction, not of the decreeing District Court but of the Court of the Munsif to which the decree had been transferred on his application, and the application relied upon to save limitation was an application made to the District Court, after such transfer, for an order for sale of the said land, which as already stated was not within its jurisdiction but within the jurisdiction of the Court of the Munsif, and therefore for an order which the District Court was not competent to make. We are in agreement with the view taken of the decision in 1916 P. C. 16 (2) in 1929 Bom. 418 (3) and 1927 Rang. 258 (4). It has been pointed out to us that a passage in the decision of this Court in 35 C. W. N. 77 (5), at p. 84, Col. 2, suggests the contrary interpretation accepted by Mitter, J. in 1933 Cal. 906 (1). The passage, in our opinion, was intended to mean that after a decree has been transferred by the Court which passed it to another Court for execution, and after execution proceedings have been started in the transferee Court, any further application in furtherance of the same execution proceedings would not lie, in the Court which passed the decree, but would lie in the transferee Court. To adopt Mitter, J's. view in 1933 Cal. 906 (1) would land us in this difficulty: that we shall have to hold that simultaneous executions are not possible, a proposition which would be contrary to a number of authoritative decisions: vide the cases cited in 1927 Cal. 581 (6).

Though we are not in agreement with the view taken in the case of 1933 Cal. 906 (1) we do not consider it necessary in the present case to make a reference to a Full Bench because we find that in that case the question which directly called for decision is not the same as has to be decided in the present case. In that case the application was relied upon for the purpose of saving limitation in respect of a subsequent application for execution and therefore the question was whether that previous application was made in accordance with law to the proper Court for execution or to take some step-in-aid of execution of the decree within the meaning of Cl. 5 of Art. 182, Limitation Act; and it may be that having regard to the definition of "proper Court" contained in Expln. 2 to that Article the Court in which the application was made had at that moment no duty to perform in the matter of execution of the decree. But we are not expressing any opinion on this question and are only noticing a point of distinction. The question in the present case is whether the application of 5th April 1933, which in form as well as in substance was an application made to the Court which passed the decree with a prayer to transmit the decree to the Ranchi Court and to order execution in that Court, was not a good application as on the date on which it was filed. The execution which had been taken in the Ranchi Court had terminated on 30th April 1930 with an order dismissing the execution proceedings thereon part satisfaction. The decree-holder was evidently ignorant of the fact that the decree and the certificate of non-satisfaction had not arrived in the Alipur Court. It is the date of the certificate, 30th April 1930, and not the date on which the certificate arrived in the Alipore Court which is of any relevancy. At a time when no other execution proceedings in respect of the decree was pending any where, but only the certificate of non-satisfaction had not arrived, the present application was made with prayers which are competent. On the date of the application, it is true, the Court was not in a position to grant the prayers in the absence of the certificate of non-satisfaction. But we do not think there is any justification to treat the appiication as not made or made to a Court without jurisdiction.

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2. Maharaja of Bobilli v, Narasaraj, 1916 P C 16 =36 I C 682=43 I A 238=39 Mad 640 (PC).
3. Fateh Chand v. Jitmul, 1929 Bom 418=123 I C 507=53 Bom 844.
4. K. K. Deb v. N. L. Choudhury, 1927 Rang 258 =104 I C 133=5 Rang 397.
5. Sreenath v. Priyanath, 1931 Cal 312=132 I C 149=58 Cal 832=35 C W N 77.
6. Galstaun v. Dinshaw, 1927 Cal 581=102 I C 513.

We accordingly see no reason to hold that the application was barred. The appeal is dismissed. But we make no order as to costs.

R.K. *Appeal dismissed.*

A. I. R. 1935 Calcutta 101

CUNLIFFE, J.

Sudha Sindhu Dey—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 189 of 1934, Decided on 13th November 1934.

(a) Criminal Trial—Accused is entitled to be considered innocent both during preparation of trial and during hearing of case.

An accused person is entitled to be considered innocent until he is actually found to be guilty both during the preparation of his trial and during the hearing of his case, although it may be that for the purpose of bringing the trial about and bringing the accused person before the Court, he must be forcibly placed under restraint. [P 101 C 2]

(b) Criminal Trial—Advocate of accused is entitled to have confidential talk with accused however great crime may be — No police officer should be present within hearing—But advocate should not act as go-between to facilitate improper communications with other undetected criminal associates of accused.

All communications between an accused person, or indeed any litigant and his legal advisors are privileged and confidential. It is impossible for the accused to have anything confidential about communication with his lawyer if he and his lawyer are surrounded by police officers. But the professional privilege of advocates can only be upheld if they honourably bear in mind that they are officers of the Court and do not lend themselves in any way to act as "go-between to facilitate improper communications with other undetected criminal associates of the accused. [P 102 C 2]

A. C. Banerjee and *Profulla Kumar Banerjee*—for Petitioner.

Khundkar and *Anil Chandra Roy Choudhury*—for the Crown.

Order.— This is an application relating to an interview with an accused person which was originally made to me in chambers sitting as a vacation Judge on the Criminal Side of this Court. It was then coupled with another application for bail. After an adjournment the bail application was dismissed. According to the report which has reached me from the District Magistrate the petitioner is in custody accused of a very serious crime. He is charged with the crime of dacoity with double murder. This dacoity is said to have been undertaken for the purpose of obtaining funds for revolutionary or terrorist purposes.

I was particularly anxious to obtain in full the explanation of the learned District Magistrate of Hooghly, who made the order, because I felt that possibly a very serious principle was involved. The order to which exception is taken was in regard to an interview between the accused and his counsel. It was to the following effect:

"This (the interview) may be allowed in the presence and hearing of a police officer as the case is still under investigation."

It is interesting to note that the original order was written without the words "and hearing" forming a part of it. These words were interpolated above the line. I am told by the petitioner's counsel this was done at the request of the police representing the prosecution, but the learned Magistrate in his report has not dealt with this point. What actually happened appears to have been this: When counsel went to see his client in custody there were a number of police officers in the room and it was impossible to take the accused's instructions or advise him without the police officers hearing every word that was said. Now it seems to me that, due no doubt to overzeal, the Magistrate in making this order infringed two elementary but cardinal principles of British Criminal Jurisprudence. They are these;

Firstly, an accused person is entitled to be considered innocent until he is actually found to be guilty both during the preparation of his trial and during the hearing of his case: although it may be that for the purpose of bringing the trial about and bringing the accused person before the Court, he must be forcibly placed under restraint. Owing to the recognition of this Rule in the British Empire, a person in custody charged with an offence is now always permitted reasonable facilities to consult his professional legal advisers.

Secondly, all communications between an accused person (or indeed any litigant) and his legal advisors are privileged and confidential. It is impossible to have anything confidential about communications with your lawyer if you and he are surrounded by police officers. It would be equally impossible to have anything confidential, I should think, even if there was only one police officer

sitting on a chair within earshot. I should imagine that after the interview the officer would go off and recount to his superiors everything of importance that had been said; and it would, probably, in the circumstances, be his duty to do so. The question of a prisoner's right of defence is, of course, enshrined in the Criminal Procedure Code; but it is also a well known principle of common law. The principle of the confidential nature of communications between the litigant or an accused person and his legal advisers is also dealt with in an India Statute, namely, in the Evidence Act. Again however this is merely a statutory enactment of another well-known common law right. It may here be observed that the custom in England of depriving a treason felon of a full defence—so noticeable in the reports contained in the State Trial Series—has long fallen into desuetude.

The learned Magistrate in his explanation has laid stress on what induced him to make the order in such strict terms. It seems to have been solely that it had been reported to him that the accused's advocate, instead of advising his client that he should be cautious in making a statement to the police, or that he should consult him before he made it, or something to that effect, advised quite roundly that the accused should in no circumstances make any statement at all. It is very difficult for me to say that however serious a crime a person may be accused of, advice like this should not be given by an advocate. There might conceivably be circumstances in which it would be improper for a lawyer with special knowledge of the guilt of his client to advise him not to make a confession; but for the moment I am unable to visualize them.

It seems to me that the learned Magistrate has entirely overlooked the two principles tnat I have mentioned—the principles of the presumption of the innocence of all accused persons and their right to confidential communications with their legal advisors. I have mentioned the serious nature of this alleged crime, as one knows that a very serious crime or a very serious movement of crime may, and often does, necessitate the tightening up of procedure, the institution of special tribunals and so on. But it seems to me that unless in certain offences persons are directed by the Government to be tried by drumhead Court martial, it is of paramount importance that advocates should have free access to their clients and should obtain all the support they are entitled to look for in seeking such success. The more serious the offence the greater the need of the advocate's help and more especially where persons are charged with taking part in what I may term "group" crime. But I need hardly say that the professional privilege of advocates can only be upheld if they honourably bear in mind that they are officers of the Court and do not lend themselves in any way to act as go-betweens to facilitate improper communications with other undetected criminal associates of the accused. I should stress however that I have no evidence whatever before me to show that anything of this kind is going on in this case.

In these circumstances I shall in part set aside the order of the learned Magistrate and substitute an order that the accused person's legal adviser shall have access to him at times which are reasonable and convenient to the prison authorities, but that, although the interview may take place in the presence of a police officer, he must be stationed out of ear-shot.

K.S. *Order accordingly.*

A. I. R. 1935 Calcutta 102

NASIM ALI AND KHUNDKAR, JJ.

Indu Bala Dassi and *another*--Plaintiffs—Petitioners.

v.

Lakshmi Narayan Ganguly and *others* —Defendants—Opposite Parties.

Civil Rules Nos. 768, 769, 892 and 893 of 1934, Decided on 20th July 1934, from orders of Sub-Judge, Nadia, D/- 1st June 1934.

(a) Hindu Law—Debt — Promissory notes executed by manager in their own names for edbts incurred for purposes of joint family —Suit on promissory notes—Other members impleaded and debt alleged to be for benefit of joint family business—Suit held to be not merely on promissory notes but on original consideration as well—Promissory note.

Plaintiffs' case in substance was that though the managers of the joint family and joint business executed the promissory notes in their own names, the loans were taken by the joint family through their managers for the purposes of the joint family and joint family business :

Held : that it could not be said that the suits were simple suits for recovery of money on promissory notes only but were on the original consideration also : 1918 *P C* 146 *Rel on* and 1914 *P C* 4, *Ref.* [P 104 C 1, 2]

(b) Promissory note—Loans independently of note—Creditor is not debarred from suing on original cause of action which arose out of same transaction as execution of note.

Where there is a loan independently of the note, the creditor is not debarred from suing on the original cause of action by the fact that the cause of action arose out of the same transaction in the course of which the promissory note was "executed ": 128 *I C* 194, *Rel on.* [P 105 C 2]

(c) Civil P. C. (1908), S. 115 (c)—Cl. (c) is left advisedly indefinite so that High Court may interfere to correct gross and palpable errors of Subordinate Courts.

Clause (c) has been advisedly left in indefinite language in order to empower the High Court to interfere to correct gross and palpable errors of Subordinate Courts for the ends of justice : 1 *C W N* 626 ; 1 *C W N* 633 and 1924 *Cal* 633, *Ref.* [P 106 C 2]

(d) Civil P. C. (1908), S. 115—High Court will not interfere with interlocutory orders unless irreparable injury and inevitable miscarriage of justice will result.

So far as the Calcutta High Court is concerned it will not interfere with interlocutory orders, unless an irreparable injury will be done and a miscarriage will inevitably issue if the High Court holds its hand. If however irreparable injury would be caused to one of the litigants if the matter was not set right, this Court ought to intervene in the current litigation and disturb the normal progress of a case by revising an interlocutory order that has been passed by a Subordinate Court : 1926 *Cal* 1149, *Rel on.* [P 106 C 2; P 107 C 1]

(e) Civil P. C. (1908), S. 115 and O. 6, R. 17 — Ordinarily discretion exercised by lower Court will not be reviewed unless irreparable injury and failure of justice will be caused.

Ordinarily the discretion of a judicial officer will not be reviewed by the High Court in revision. But it is impossible to lay down a hard and fast rule, that in no instance will the discretion exercised by the judicial officer be reviewed either under S. 115 of the Code or S. 107, Government of India Act, or under the combined operation of the two sections. Under S. 107, Government of India Act (S. 15 of the Charter), the High Court can interfere where irreparable injury will be done to one of the litigants or where there will be a failure of justice if the matter is not set right : 4 *I C* 380 ; 6 *I C* 574; 8 *I C* 87 and 1934 *Cal* 102, *Ref.* [P 107 C 1]

A. N. Bose, Hiralal Chakravarti, Panchanan Ghose, Surendra Nath Bose, Saurindra Narayan Ghose and *Paresh Nath Mukherjee*—for Petitioners.

Pugh, Arun Sen, Sudhansu Sekhar Mukherjee and *Chandra Sekhandar Sen*—for Opposite Parties.

Order.—The facts which give rise to these rules are as follows : One Indu Bala instituted Suit No. 86 of 1933 in the Court of the Subordinate Judge of Nadia for recovery of a certain amount of money on certain promissory notes. Another suit, viz., Suit No. 85 of 1933, was instituted by one Gurudasi against the same defendants for recovery of another sum of money on the basis of certain other promissory notes. The two suits were consolidated. It appears that both the suits were instituted on 29th May 1933. Written statements were filed by the defendants on 19th August 1933. Certain issues were settled by the Court on those pleadings on 30th August 1933. The issues which are relevant for the purposes of the present rules are as follows :

" Issue 7. Is the business an ancestral joint Hindu family business ? Was it inherited by the sons of Ananda Ganguly ? If so, did the business go by the name of Ganguly Brothers ?"

" Issue 8. Did the father of defendants 7 to 14 inherit along with the brotbers the karbar of Ananda Ganguly ? Did they and thereafter the present defendants form a joint Hindu family ? Was their karbar a joint family karbar and carried on in the name of Ganguly Brothers ?" and

" Issue 9. Did Ganesh and Rakhal and on Ganesh's death Lakshmi Narayan and Rakhal and Rakhal's death Lakshmi Narayan act jointly and severally as the karta of the joint family and of the joint family karbar ? Did they raise the loans for carrying on the joint family business or for the benefit of the joint family."

The hearing of the suit commenced on 7th May 1934. On 10th May 1934 the plaintiff wanted to adduce evidence on these issues. The learned Judge by his order dated 31st May 1934 refused to take evidence on these issues on the objections of the defendants to the reception of this evidence. On the same day the plaintiffs in the two suits filed applications for amendment of the plaints. On 7th June 1934 the learned Judge rejected the plaintiffs' applications for amendment. The Rules Nos. 768 and 769 are directed against the orders of the Subordinate Judge, dated 31st May 1934, in the two suits, and Rules Nos. 192 and 193 are for the revision of the orders of the Subordinate Judge dated 7th June 1934 in the two suits.

The learned Subordinate Judge refused to allow the plaintiffs to adduce evidence on the aforesaid issues on the ground that the suits were based on the hand notes only on the allegation that the makers thereof were the kartas of a joint Hindu family and manager of a joint family business and that the loans

were taken by the hand notes executed personally in their names for the purpose of their joint family and joint business and that the plaintiffs in their plaints did not make an alternative case for recovery of money lent on the basis of an agreement independently of the promissory notes. It may be stated here that the promissory note dated 24th December 1930 which is included in Sch. (kha) of the plaint in Sutt No. 86 of 1933 is not admissible in evidence as it is not properly stamped and that the promissory notes which are mentioned in Schedule (ka) of the plaint in Suit No. 86 and the promissory notes mentioned in the plaint in Suit No. 85 of 1933 were executed by Rakhal Das Ganguli, the predecessor of opposite parties 7-14 and Lakshmi Narayan Ganguli opposite party 1 in their own names and not as kartas of a joint Hindu family or as manager of a joint family business. We are concerned with these promissory notes only in the present rules. The plaints in the two suits have been placed before us by the learned advocates appearing for the petitioner in this case. It seems to us that the plaintiffs' case in substance is that though the managers of the joint family and the joint business executed the promissory notes in their own names, the loans were taken by the joint family through their managers for the purposes of the joint family and joint family business. It is no doubt true that it is not specifically stated in the plaint that the promissory notes were taken as securities for the loans advanced to the joint family.

From the allegations in the plaint it cannot be said that by the execution of the promissory notes the debt was entirely extinguished. Taking the plaint in each suit as a whole we are not in a position to say that the suits were simple suits for recovery of money on promissory notes only. If that were so the allegations about the joint family, family necessity for the purposes of business would be meaningless. The impleading of the members of the family other than the executants of the promissory notes, or their heirs would be also meaningless. The statement in para. 10 of the plaint, namely, that the defendants being members of a joint Hindu family and the debts having been incurred tc meet the necessity of the said joint family karbar and the joint Hindu family the defendants are liable for the said debts, would be meaningless. We are therefore of opinion that the suits are not simple suits on the promissory notes alone. On the other hand we are inclined to hold that the plaintiffs' suits must be taken as suits on the promissory notes as well as on the original consideration, that is, the debts which are alleged to have been incurred by the managers of the joint family for the purposes of joint family and joint business. In our opinion such a course is open to the plaintiffs. This view is supported by the decision of Their Lordships of the Judicial Committee in the case of 1918 P. C. 146 (1). The promissory notes in question were no doubt signed by the kartas of the joint family in their own names and not as kartas of the joint family or as manager of joint family business. But the promissory notes being signed by the kartas in their own names is equally consistent either with a borrowing by the kartas for their own individual purpose or a borrowing for the purposes of the joint family and the joint family business: see 1934 P. C. 4 (2). This view of ours is further confirmed by the fact that the defendants did not raise any objection when the issues mentioned above were framed by the Court. The issues show the real nature of controversy between the parties, as indicated in the pleadings. It is not disputed that those issues relate to the plaintiffs' alternative claim on the original consideration, i. e., the debts for which the promissory notes are alleged to have been taken. It cannot therefore be said that when the plaintiff wanted to adduce evidence relating to those issues, the defendants were taken by surprise. It is not disputed before us that the evidence which the plaintiff wanted to adduce and which the learned Judge has rejected is relevant to the said issues. We are therefore of opinion that the learned Subordinate Jddge was not justified in rejecting the evidence which was offered by the plaintiffs. We are further of opinion that in this case the learned Judge was not justified in reject-

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1. Sadasuk Janki Das v. Sir Kishan Pershad, 1918 P C 146=50 I C 216=46 I A 33=46 Cal 663 (P C).
2. Abdul Majid Khan v. Saraswatbai, 1934 P C 4 =147 I C 1=61 I A 90=30 N L R 60 (P C).

ing the applications for amendment of the plaints: (1) The reasons given by the the learned Judge in support of his order are: (a) that

"the plaints are nothing but on the foot of the pro-notes and the suits are only for recovery of money borrowed by executing those pro-notes."

(b) that

"the descriptions of the makers of the hand-notes as kartas and the recitals or the purpose of the loan are immaterial and cannot make the suits other than suits on hand-notes."

(c) That there is no allegation of any obligation in the plaint apart from the obligation created by the hand-note.

Under O. 6, R. 17, Civil P. C., the Court may at any stage of the proceedings allow either party to amend his pleadings in such a manner and on such terms as may be just and all such amendments shall be made as may be necessary for the purposes of determining the real question in controversy between the parties. The learned Judge has observed that the issues mentioned above "were wrongly framed for want of discussion of the whole law on the subject." Therefore it is clear that plaintiffs' claim on the original consideration, i. e., debts for which the promissory notes were taken was already put into issue. Plaintiffs are therefore justified in thinking that the original plaints contained the alternative claim on the original consideration. When objection was taken by the defendants to the trial of those issues at the hearing the plaintiffs applied for amendment of the plaint in order that there might not be any dispute in future as regards the real nature of plaintiffs' claim in the suits, i. e., as regards the real nature of controversy between the parties. If the learned Judge's view of the matter, namely that the suits are only suits on the promissory notes be correct, then this is a fit case, in which the learned Subordinate Judge should have given leave to the plaintiff's to amend the plaints as prayed for by them.

It was however contended by the learned counsel for the opposite parties that the implied promise to pay the original debts was merged in the express promise to pay as contained in the promissory notes and consequently the alternative claim, namely, the claim on the original debt alleged to have been contracted by the kartas of the joint family for the purposes of joint family and joint business, is not sustainable in law. In the present proceeding it is not necessary to determine whether this contention is valid or not. It is enough to point out at the stage that

"where there is a loan independently of the note the creditor is not debarred from suing on the original cause of action by the fact that the cause of action arose out of the same transaction in the course of which the promissory note was "executed": see 128 I. C. 194 (3).

We are at the present stage of the case concerned only with the question whether the application for amendment should be allowed or not. It has been already pointed out that it is open to the plaintiffs to sue on the promissory notes and alternatively upon the consideration 1918 P C 146 (1), and that the promissory notes being signed by the Kartas in their own names is not inconsistent with borrowing for the purposes of the joint family and the joint family business 1934 P C 4 (2). Whether the plaintiffs will ultimately succeed on the amended plaint or not is entirely a different matter and the learned Subordinate Judge will have to come to a decision on the matter after taking the evidence which the parties may think proper to adduce before him. For the purposes of the present Rule it is enough to say that the entire controversy between the parties regarding plaintiffs' claim on the transactions in question should be adjudicated upon in the present litigation. It is also urged by the learned counsel for the opposite parties that if the amendment be allowed, the opposite parties will be deprived of a valuable right which they have acquired by virtue of the operation of the law of limitation. If we are right in our view that the alternative claim on the original debt, that is, the original consideration, was already included in the plaints the question of limitation does not arise. If however by the amendment a new claim is being added, the amendment in this case should be allowed in view of the exceptional circumstances of this case, which we have already mentioned. It is however contended by the learned counsel for the opposite parties that even if the learned Subordinate Judge is wrong this Court has no power to revise his orders under S. 115, Civil P. C. There has been a

3. Abdul Rabbani v. Shyamlal, (1930) 128 I C 194.

good deal of controversy as to the exact meaning of the words "acted in the exercise of its jurisdiction illegally or with material irregularity" as used in S. 115, Cl. (c) of the Code. In the case of 11 Cal 6 (4), their Lordships of the Judicial Committee have observed as follows :

" It appears that they (i. e., the Judges of the lower Courts) had perfect jurisdiction to decide the question which was before them and they did decide it. Whether they decided it rightly or wrongly, they had jurisdiction to decide the case; and even if they decided wrongly, they did not exercise their jurisdiction illegally or with material irregularity."

Again in the case of 1917 P C 71 (5), their Lordships of the Judicial Committee have observed that :

Section 115 applies to jurisdiction alone, the irregular exercise or non-exercise of it, or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved."

In the case of 1926 P C 142 (6), the Judicial Committee has however held that if a Court decide a case in the absence of a necessary party, that is material irregularity within the meaning of S. 115, Civil P. C. Now if the third clause of S. 115 of the Code is not intended to have a meaning distinct from that of the other two clauses it would not have been added to S. 622 of the Code of 1877 by the Amending Act of 1879. 11 Cal 6 (4), simply decided what "illegally" or "material irregularity" is not. From 1917 P C 71 (5) it is not also easy to deduce any clear rule of construction of the third clause of S. 115 except the negative one that wrong conclusions of law or fact in which the question of jurisdiction is not involved are not included in it :

" All cases of 'acting illegally' are cases of error of law, though the converse is far from true. Any error in law which amounts to a usurpation of authority in the act done by the Court comes within Cl. (c) if it is not already within Cl. (a). In the broad sense of the word no Court has ever jurisdiction to make an order what in fact in law is wrong : see 1920 Cal 305 (7), 1926 P C 142 (6),"

seems to imply that Cl. (c) may be applied when failure of justice is due to one or other defects of procedure. But does the said clause refer only to defects of procedure ? Is it confined to error in the method or manner of trial only ?

"Jurisdiction to try a suit does not mean jurisdiction to do anything whatever by order made in that suit; if it did an exception for material error in procedure strictly so-called would be almost ludicrous: 1920 Cal 305 (7)."

Again the words "illegally" and "material irregularity" cannot have the same meaning. If the words "acted with material irregularity" refer to irregularity in procedure what meaning is to be attached to the words "acted illegally"? In view of these difficulties it has been laid down in some cases by this Court that Cl. (c) has been advisedly left in indefinite language in order to empower this Court to interfere and correct gross and palpable errors of Subordinate Courts for the ends of justice : see 1 C W N 626 (8), 1 C W N 633 (9), 1924 Cal 633 (10). Another branch of the argument of the learned counsel for the opposite party in this connexion is that even if this Court has power under S. 115 to revise the orders of the Subordinate Judge, the orders under discussion in these Rules are merely interlecutory orders and consequently they cannot be revised by this Court at this stage. It is argued that S. 115 of the Code is confined to a case which has been decided; in other words to a case where the rights of the parties have been determined. It is contended by the learned counsel that as the rights of the parties have not yet been determined this Court cannot interfere at this stage. Reliance was placed in support of this contention on the observations of Woodroffe, J., in the case of 10 I C 308 (11). So far as this Court is concerned it can be said to be now fairly established that this Court will not interfere with interlocutory orders unless an irreparable injury will be done and a miscarriage will inevitably issue if this Court holds its hand. If however irreparable injury would be caused to one of the litigants if the matter was not set right,

4. Rajah Amir Hossain Khan v. Sheo Baksh Singh, (1885) 11 Cal 6=11 I A 237 (PC).
5. Balkrishna Udayar v. Vasudeva Aiyar, 1917 P C 71=40 I C 650=44 I A 261=40 Mad 793 (PC).
6. Umed Mal v. Chand Mal, 1926 P C 142=99 I C 749=53 I A 271 (PC).
7. Hindley v. Joy Narayan, 1920 Cal 305=54 I C 439=46 Cal 962.
8. Mathura Nath Sarkar v. Umesh Chandra, (1897) 1 C W N 626.
9. Raghu Nath Gujrati v. Rai Chatraput Singh (1897) 1 C W N 633.
10. Jogunnessa Bibi v. Satish Chandra, 1924 Cal 633=83 I C 438=51 Cal 690.
11. Chandi v. Kripal, (1911) 10 I C 308.

"this Court ought to intervene in the current litigation and disturb the normal progress of a case by revising an interlocutory order that has been passed by a Subordinate Court, see 1926 Cal 1149 (12)."

It was however contended on behalf of the opposite parties that as these orders can be challenged in the appeal from the decree which may be passed in that suit, this Court should not interfere at this stage. Reliance was placed for this contention also on the decision of this Court in the case of 10 I C 308 (11) cited above. It is true that in that case Woodroffe, J., observed that interlocutory orders did not come within the scope of S. 115 but the learned Judges who decided that case were of opinion that this Court would have power under S. 15, Charter Act, to interfere and to set aside the order of the Subordinate Courts. It is however argued that O. 6, R. 17 of the Code gives a discretion to the Court either to allow or reject the prayer for amendment and that the Court is not bound to allow the amendment. But it has been pointed out by this Court in the case of 1934 Cal 102 (13) that

"ordinarily the discretion of a judicial officer will not be reviewed by this Court in revision. But it is impossible to lay down a hard and fast rule. That in no instances will the discretion exercised by the judicial officer be reviewed either under S. 115 of the Code or S. 107, Government of India Act, is under the combined operation of the two sections".

Again there is a respectable body of authority at any rate in this Court in support of the view that under S. 107, Government of India Act (S. 15 of the Charter), this Court can interfere where irreparable injury will be done to one of the litigants or where there will be a failure of justice if the matter is not set right : 4 I C 380 (14), 6 I C 574 (15), 8 I C 87 (16), 1934 Cal 102 (13).

The point for determination therefore is whether in this particular case any irreparable loss will be caused to the plaintiff if we do not interfere at this stage. It appears from para. 22 of the petition of the plaintiffs to this Court that one Pran Krishna Mallik, who is aged about 70 and who was the principal officer of the defendants and is therefore in a position to prove the account books which have now been produced in Court in spite of the objection of the opposite parties, has recovered recently from a serious attack of double pneumonia and that if his evidence be not taken now, it may be that, if the Court of appeal ultimately be of opinion that the plaintiffs were entitled to proceed with their claim on the original consideration in this litigation, the plaintiffs may not then get the benefit of the evidence of this witness having regard to his old age and the precarious condition of his health. In the counter-affidavit which was filed by the opposite party the statement that the said witness is aged about 70 was not denied and the answer to the plaintiffs' allegation that the witness had recently suffered from double pneumonia and was in a precarious condition of health is only evasive. In these circumstances we are of opinion that if this evidence be not taken now and if the witness dies in the meantime, the plaintiff will suffer irreparable loss. Further if the order of the learned Subordinate Judge be now allowed to stand and if the Court of appeal ultimately comes to the conclusion that the orders of the learned Judge are wrong, the suits will have to be remanded again to the trial Court for evidence and litigation will be protracted. If, on the other hand, this evidence be taken now and the Court of appeal ultimately holds that the evidence is irrelevant, the appeal Court would reject that evidence and proceed to hear the cases on the remaining portion of the evidence. It is therefore in our opinion desirable in the interest of the parties that this evidence should be taken at this stage so that there may not be any risk of a remand in future by the appellate Court. We are therefore of opinion that in view of the peculiar facts and circumstances of this case we should interfere in this matter.

We accordingly make the rules absolute, and set aside the orders of the learned Subordinate Judge against which these rules were directed. The learned Subordinate Judge is directed to amend the plaints as prayed for by the petitioners, to treat the suits not only as suits for

12. Salam Chand v. Bhagwan Das 1926 Cal 1149=98 I C 615=53 Cal 767.
13 Loke Nath Mukherjee v. Abani Nath Mukherjee 1934 Cal 102=149 I C 923.
14. Gobind Mohun Doss v. Kunja Behary Doss (1909) 4 I C 380.
15. Amjad Ali v. Ali Hossain Johar (1910) 6 I C 574.
16. Charu Chunder Dutt v. Sarat Chunder Singh (1910) 8 I C 87.

recovery of money on promissory notes but also as suits for recovery of money on the original consideration and then to proceed to take evidence and decide the suits on that footing. The defendants will have an opportunity of filing additional written statement and raising additional issues, if they so like. Costs in these rules will abide the result, hearing-fee being assessed at ten gold mohurs.

K.S. *Rule made absolute.*

A. I. R. 1935 Calcutta 108 (1)

NASIM ALI AND KHUNDKAR, JJ.

Prithwi Chand Lall Choudhury — Petitioner.

v.

Elahi Buksh Mohamed — Opposite Party.

Civil Rule No. 1371 of 1933, Decided on 29th June 1934, from order of Sub-Judge, Dinajpur, D/- 21st July 1933.

Bengal Tenancy Act (1885), S. 26-J — Order in proceeding under, is not appealable.

An order in a proceeding under S. 26-J is not appealable. [P 108 C 1]

Sudhansu Sekhar Mukherjee and *Shoilendra Nath Majumdar* — for Petitioner.

Subodh Chandra Dutta—for Opposite Party.

Order.—This is an application in revision against the order of the Subordinate Judge of Dinajpur, dated 20th July 1933, reversing the order of the munsiff of Raigunj in a proceeding under S. 26-J, Beng. Ten. Act. The only ground on which the Rule was issued is that the learned Judge had no jurisdiction to interfere with the order of the Munsiff in appeal as the order of the Munsiff was not at all appealable. It appears from the judgment of the learned Subordinate Judge that he is also of opinion that the order in a proceeding under S. 26-J, Ben. Ten. Act is not appealable, but he treated the order as one under S. 158, Beng. Ten. Act. We have looked into the petition which was filed by the landlord on the basis of which the proceeding out of which the present Rule has arisen was started. It is clear from the said petition that it was only under S. 26-J, Ben. Ten. Act. The learned Judge was therefore in error in holding that it could be treated as a proceeding under S. 158, Ben. Ten. Act. The result therefore is that this Rule is made absolute, the order of the learned Subordinate Judge is set aside and that of the Munsiff restored. There will be no order for costs in this Rule.

K.S. *Rule made absolute.*

A. I. R. 1935 Calcutta 108 (2)

GUHA AND BARTLEY, JJ.

Jogendra Lal Pal and *others* — Petitioners.

v.

Sheikh Anju—Opposite Party.

Criminal Revn. No. 226 of 1934, Decided on 11th July 1934.

Criminal P. C. (1898), S. 143—Order without drawing up proceeding, without taking evidence and without giving opportunity to opposite party to substantiate his case is illegal.

An order passed by a Magistrate under S. 143 without drawing up a proceeding, without taking evidence and without giving an opportunity to the petitioners to substantiate their case and without an adjudication about the existence of the public nuisance as contemplated in the section by the competent Court is wholly without jurisdiction, bad in law and illegal. [P 108 C 2]

Suresh Chandra Taluqdar—for Petitioners.

Birendra Kumar De — for Opposite Party.

Order.—This Rule was issued on the District Magistrate of Dacca and upon the opposite party, Sheik Anju, to show cause why the order passed by the Deputy Magistrate of Munshigunge, on 14th December 1933, purported to be made under S. 143, Criminal P.C., should not be set aside. On the materials placed before us, we have no hesitation in coming to the conclusion that the Rule should be made absolute on the grounds on which it was issued, viz., that the order passed by the Magistrate under S. 143, Criminal P. C., without drawing up a proceeding, without taking evidence, and without giving an opportunity to the petitioners to substantiate their case, is wholly without jurisdiction and illegal ; and further that the order made by the Magistrate under S. 143, Criminal P. C., without an adjudication about the existence of the public nuisance as contemplated in the section by a competent Court is bad in law and illegal. It does not appear to us, from the judgment recorded by the Magistrate in this case or from any materials placed before us that the proper procedure to be followed in a

case of this description was followed by the Magistrate before passing final orders in the case. In the above view of the case, the Rule is made absolute, and the order passed by the Magistrate under S. 143, Criminal P. C., on 14th December 1933 is set aside.

K.S. *Rule made absolute.*

A. I. R. 1935 Calcutta 109

REMFRY, J.

Hormus Ardeshar Kandawala—Plaintiff.

v.

Ardeshar Cowashji Dustoor — Defendant.

Original Suit No. 603 of 1933, Decided on 13th March 1934.

Trade name—Passing off—Rights in respect of name of business are different from those of trade mark—Name common to trade likely to deceive public—Injunction should be granted restraining defendant from using name likely to deceive public — Damages should be awarded on difference between usual gross earnings and actual earning and lump sum for expected profit by increase of business.

The right of a person to a distinct name in respect of his business arises immediately on the user of that name. Unlike the case relating to trade marks, the rule as to anything being common to the trade, does not apply in such a case and a person first using a business name entirely consisting of words common to the trade can restrain the use of a colourable similar name by a rival business. In awarding damages the Court should assess it and allow the plaintiff's usual percentage of profit on the difference between the plaintiff's usual gross trade earnings before the unfair competition began and his actual earning thereafter with a lump sum for any expected increase of business: 1929 *P C* 11, *Foll.*

[P 113 C 1]

H, for over 25 years carried on a business of dyers and cleaners under the name of "Bombay Dyeing and Cleaning Co." at 1, Lindsay Street in Calcutta before shifting to another shop in the locality. *A*, then started a similar business at *H's* old place of business under the name of "Bombay Art Dyers and Cleaners." *H* sued for injunction and damages:

Held (1): that as, apart from any motive of the defendant, the name itself, the distribution and contents of the signboards in which the word "Bombay" occurred prominently as in *H's* case and the locality chosen by *A*, make it likely that the public would be deceived, *H* was entitled to an injunction and damages: *North Cheshire and Manchester Brewery Co.* v. *Manchester Brewery Co.*, (1898) *A C* 83, *Foll.*

(2) that injunction should be in the usual from restraining *A*, his servants and agents from using the name "Bombay Art Dyers and Cleaners" or any other name calculated to induce the belief that *A's* business was that of *H*: *Lloyd's* v, *Lloyd's (Southampton) Ltd.* (1912) 29 *R P C* 433 and *Montgomery* v. *Thompson*, (1891) *A C* 217, *Foll.*: 1934 *Cal* 600, *Dist.* [P 113 C 1,2]

J. C. Hazra and *S. P. Chaudhuri*—for Plaintiff.

Pugh, *J. N. Mazumdar* and *M. N. Ghose*—for Defendant.

Judgment.—In this suit the plaintiff, who carries on business as "Bombay Dyeing and Cleaning Company," seeks to restrain the defendant from carrying on business as "Bombay Art Dyers and Cleaners," and claims damages. The following issues were raised:

(1) Is the plaintiff's business the "Bombay Dyeing and Cleaning Company" known to the public as the "Bombay Art Dyers and Cleaners?

(2) Has the plaintiff acquired the sole right to the use of the word "Bombay" in connexion with the dyeing and cleaning business or is it common in the trade?

(3) Has the defendant lawfully adopted the name of the "Bombay Art Dyers and Cleaners" and is he entitled to use the name?

(4) Has the plaintiff suffered any damages as alleged in para. 7 of the piaint? Is he entitled to any account of the profits made by the defendant?

The undisputed facts are that, in 1907, the plaintiff started a business as a dyer and cleaner at No. 1, Lindsay Street, on the ground floor, under the name of H. Ardeshar & Co. In 1908, he changed the name of the business to "Bombay Dyeing and Cleaning Co." At first the defendant financed the business to some extent. In 1912 the plaintiff went to England for special training as a dyer and cleaner. In May 1932 the plaintiff removed his business to No. 10, Chowringhee, and, for some five years before that date, he had occupied the first floor of No. 1, Linesay Street, as his business premises. In June 1932, the defendant filed a suit against the plaintiff for partnership accounts and obtained the appointment of a receiver. On 8th June 1932, this suit was settled and a consent decree passed, according to which the defendant was to receive Rs. 4,000 and the plaintiff was declared to be entitled to the goodwill and other assets of the business of the "Bombay Dyeing and Cleaning Co."

In August 1932, the defendant became a tenant of the first floor of No. 1, Lindsay Street, and started a business of dyers and cleaners under the style of "Bombay Art Dyers and Cleaners." This suit was filed on 17th March 1933, and, on an application for an ad interim injunction, an order was passed restraining the defendant from representing himself as a late partner in the plaintiff's

business and the defendant was ordered to keep an account of his profits. I was informed that the question as to the ad interim injunction in respect of the use of the name "Bombay Art Dyers and Cleaners" was not considered, as the defendant said that he would be ready for the hearing of a suit in seven days' time. In the plaint, the plaintiff claimed that his business was known to the public by six different names. This was based on the fact that he had received letters addressed in these six different names.

In my opinion, in cases of this nature, the material points for consideration are: (1) Whether the defendant intended to attract the customers of the plaintiff by using a name likely to cause such customers to think that they were dealing with the plaintiff, and in this connexion the general "get up" of the premises and of the bills or receipts may be material. (2) Whether intention or no intention, the name, and, so to speak the "get up" of the business were likely to deceive the public and not merely old customers of the plaintiff's business into a belief that the defendant's business was the plaintiff's business. (3) Whether in fact any persons were so deceived. Of these, if No. 2 is established, that is sufficient to entitle the plaintiff to an injunction.

It was contended, on behalf of the plaintiff, that, if it was established that letters were misdelivered in consequence of the similarity in the name used by the defendant, that was also a material point. But in 26 R P C 775 (1), it was held by a Scotch Court on appeal that the mere misdelivery of letters, more especially if they were misdirected, gave no cause of action. If I may say so, I entirely agree with that decision. At the same time, I decided to admit the letters, not as evidence of their contents, for that was within the rule as to hearsay evidence and none the less so because they were in writing, but because the plaintiff's case was that, on certain occasions, he received letters of instructions and the defendant received the relative parcels—and it was proved that there were four or five instances of this sort and, in my opinion, that affords some evidence, though distinctly feeble evidence by itself, that the defendant's choice of names resulted in some confusion, but, on the evidence, I find it impossible to decide how far that confusion was attributable to the errors of the writers, and how far to the fact that the defendant was occupying the plaintiff's old premises. The evidence as to how the letters were directed was, in my opinion, also admissible in connexion with the plaintiff's claim to six different names, and is material on the question as to the form of the injunction.

The undisputed evidence is that the defendant secured the premises, which he knew had been formerly, and then but recently, occupied by the plaintiff. He put up signboards like the plaintiff's old signboards in size and shape. On those signboards—or some of them—the prominent word is "Bombay"—and his case is that, although some of the plaintiff's signboards contained the words "Art Dyers," it was sufficient for him to call his business "Bombay Art Dyers and Cleaners," to render it unlikely that it would be taken by the public to be the old business carried on under the name of "Bombay Dyeing and Cleaning Company." It is suggested that Bombay has a reputation for dyeing and cleaning, and that was one reason for selecting the word "Bombay" and another reason was because the defendant admitted that the local reputation of "Bombay" was earned by the old firm, of which he claimed to have been a partner, and that he himself had the reputation of good work—so people would extend the same patronage which they did previously—see Q. 349. As there is no suggestion that the defendant had any reputation for dyeing and cleaning apart from his alleged connexion with the old business, clearly his idea was that he would use a name that would convey a reputation for good work—in other words he was very much minded to secure the old firm's customers by using a name that would deceive them into the belief that his business was the old business—the old business with the good reputation. There is no evidence of the slightest value that the public associated the word "Bombay" with good work or thought that a man from Bombay would be likely to do good work apart from the reputation earned by the plaintiff's business.

The defendant had no reputation at all apart from the old business. It is unnecessary to decide if, in fact, he ever

1. Maikle v. Williamson (1909) 26 R P C 775.

was a partner in that firm. He had by the consent decree conceded that that firm and its goodwill belonged to the plaintiff and, it appears to me, that he wanted to obtain the benefit of that goodwill. The only distinctive part of the two business names is the word "Bombay," the rest was but a description of the nature of the business. The defendant made "Bombay" the prominent part of some of his signboards. From the photograph exhibited, it appears that the words "Art Dyers" were also on some of the plaintiff's signboards. The defendant did not advertise in any newspapers, the plaintiff had done so, but to what extent does not appear, but in some of his advertisements he used the words "Art Dyers." The defendant, in my opinion, was scheming to secure the local customers of the old business. As I have said, I can attach little value to the evidence as to correspondence, especially as there is no evidence to show that the writers of the letters had ever heard of the defendant's business or its name, save that it goes to show that there was some confusion.

The only other evidence, apart from the evidence of the parties, was that of an assistant in Messrs. Hall and Anderson's and a man called Loulie, and evidence of other businesses with the word "Bombay" as part of their names. The assistant's evidence was that he went to arrange for some dyeing works for his firm and entered the defendant's shop and asked for favourable terms as he came for Messrs. Hall and Anderson, who were, as he told the man in the shop, old customers. Apparently, he obtained the desired terms. He then sent goods to be dyed and those goods were delivered to the plaintiff. The plaintiff telephoned and finally secured the order. Now it is quite clear that the assistant, an intelligent looking man and certainly an intelligent witness, took the defendant's shop to be the shop with which his firm had previous transactions. It may be that the position of the shop contributed to his error, in fact that is quite likely, but, in my opinion, the name used by the defendant was the chief contributory cause of the error. From what he said to the defendant or whoever was in the shop, there could have been no doubt about it in the mind of the person in the shop that the witness thought it was the same old shop. Advantage was taken of his error. I see no reason whatsoever for doubting the accuracy or truthfulness of this witness. In my opinion, his evidence not only shows that a reasonable man took the defendant's shop to be the plaintiff's but that the defendant tried to secure an order which he knew was intended for the plaintiff. As for the other witness, I very much suspect that he was employed to see if the defendant was accepting orders addressed to "Bombay Dyeing and Cleaning Company." At the same time I think his evidence as to the address on the order is true. It follows that this is another instance in which the defendant took an order which he knew was meant for the plaintiff. It was argued that two instances did not prove a habit, or an intention, and stress was laid upon the fact that more witnesses were not produced. In my opinion, there is not much substance in this argument. It does not appear that it is easy to obtain such evidence and two instances show very clearly what the defendant's attitude was and the defendant's own evidence really amounts to an admission, that that was his idea in setting up his business.

It was held in (1899) A. C. 83 (2) by Lord Halsbury that the Court must decide as a question of law whether the name used by the defendant was likely to deceive the public into a belief that the defendant's business was the plaintiff's, but Lord Shaw said that this was a mixed question of fact and law. In my opinion, the fact that the defendant was setting up a similar business in the premises occupied some few months before by the plaintiff was calculated to make any similarity in the name adopted likely to lead to that result, and that, even apart from that, the name adopted was so similar that it was in itself likely to make old customers and the public think that the defendant's shop was the old shop. Mr. Pugh for the defendant, in reply, relied on a photograph. This photograph is pinned to a petition filed by the plaintiff in which he prayed for an ad interim injunction. I can find no mark on it—it does not appear to have

2. North Cheshire and Manchester Brewery Co. v. Manchester Brewery Co., (1899) A C 83=68 L J Ch 74=15 T L R 110=79 L T 645.

been exhibited—at any rate formally. It depicts apparently a notice used by the defendant in which it is stated that he is the proprietor of the business of Bombay Art Dyers and Cleaners, and late partner 'Bombay Dyeing and Cleaning Company.' There is no evidence about it at all—nothing to show when or where it was used, how it was used or how much of it was in a conspicious position. In my opinion it is not evidence at all and even if it were, its value is a matter of guess work. Mr. Pugh in his very able argument contended that the defendant was entitled to occupy the premises vacated by the plaintiff, and none the less because there was a likelihood of old customers coming to those premises. That is obviously correct. He then argued that the defendant was entitled to try to attract the customers of his rivals. That also is correct—provided it was not done by representing his business to be the plaintiff's business.

The next point was that the fact that letters were misdelivered or misdirected gave no cause of action. For this proposition he cited 36 R. P. C. 775 (1), where however their Lordships pointed out that there was no proof that the defendant retained the plaintiff's letters and no suggestion that the defendant intended to mislead the plaintiff's customers into a belief that his business was the plaintiff's. Reliance was also placed on the fact that the defendant han sent circular to the old customers in which he clearly stated that his was a new business. That was a material point, in my opinion, in a case of this nature, though it has been held to be immaterial in the case of a trade-mark. Then it was argued that the plaintiff based his claim to five designations set out in para. 1 of the plaint, on the fact that some of his customers had addressed letters intended for him in those various names. In my opinion, the plaintiff has not estabished that he used those five names. The fact that some of his would-be customers had not taken the trouble to astain the correct name of his business is no ground for claiming that their carelessness, inadvertence or lapse of memory gave the plaintiff any rights in addition to his common law right to a distinct name.

It seems to me that these claims were put forward not with any hope of success, but merely to introduce evidence suggesting that some of the customers would remember that Bombay was part of the name of the plaintiff's business, but would not and did not remember the rest of it, and to support the claim for an injunctien in a wide form. Great stress wss laid for the defendant on the fact that the plaintiff wrote to the postal authorities claiming that only letters sent addressed to "Bombay Art Dyers and Cleaners, 1, Lindsay Street," should be delivered to the defendant and thereby admitted the defendant's right to that name, and on the fact that he admitted that he had no objection to that name before he went to his solicitors. But he stated that he wrote a letter protesting as soon as he heard of the name—a fact which the defendant did not challenge; and as far as the post office was concerned, it was not its province to decide a right to a name. Obviously, the plaintiff could claim no more than he did from the post office. In my opinion, it did not amount in the circumstances to an admission of the defendant's right to style his business in the way complained of, and in any case the defendant has not alleged or shown that he acted on any such or any such supposed admission.

For the defendant, reliance was placed on the fact that there was a business called "Parsee Bombay Dyeing and Cleaning Works" at 40, Bowbazar Street, with three branches, which started in 1916. It is established that this was a dyeing and cleaning business, though its business largely consists in ordinary washing. This business issued handbills, price lists and calendars. The plaintiff knew of this business from 1916 and sent one or more letters of protest but took no further steps. Apparently, it is a business as its proprietor said content with a profit of 10 per cent. There was another business called " Bombay Laundry." That was started in 1914. It issued handbills, cards and price lists. It carries on business at 93, Wellesley Street and has five branches. Apparently this also catered for poorer persons than the plaintiff's customers, but it also undertook dyeing and cleaning work. It was suggested that there was also a business in Harrison Road called " New Bombay Dyeing and Cleaning," but it does not appear that it exists. It

was argued that the word "Bombay" was common to the trade. But this is not a case in which a trade mark is claimed. The fact that two other firms used "Bombay" in that trade as part of their business names in my opinion has little bearing on whether the defendant's use of the name "Bombay Art Dyers and Cleaners" is likely to lead to his business being taken to be the plaintiff's business. As was said in (1907) A. C. 430 (3) the locality in which the two firms did business and the articles which they sold are material points. In fact, the more common the name, the more necessary it is for a new rival to select a distinctive name.

In my opinion, apart from the motive of the defendant in selecting the name, the name itself, and the distribution and contents of the notice boards, make it likely that old customers of the plaintiff's would take the defendant's shop to be the plaintiff's and selecting the premises formerly occupied by the plaintiff certainly made it all the more incumbent on the defendant to distinguish his business from that of the plaintiff. In my opinion, one of the few distinctions between the principles applicable to this class of case and cases relating to trade marks is that the rule as to anything being common to the trade does not apply to the former class of case, except when it claimed that the business name or part of it connotes the plaintiff's goods or work. At the same time any word descriptive or otherwise, which is common to the trade is not sufficiently distinctive to found a title to an exclusive right thereto, although the man, who is the first who uses a business name entirely consisting of words common to the trade, is entitled to restrain the use of a new name which is likely to deceive the public into a belief that a rival business is his.

There are two distinct classes of rights in respect of the name of a business: one only arises when that name or some part of it, whether it be what is known as a fancy word, an ordinary word or a geographical name, has come to mean the goods of, or to connote the skill, probity or excellence of the particular business. The other class of right is to a distinct name, that is the right to prevent others from adopting a name which is likely to lead the public to mistake another new business for the plaintiff's business. This right arises immediately on the user of the name by the first person who uses it, provided that the name used does not infringe the rights of another person. After the name has acquired a reputation the adoption of a similar name by a rival may arouse suspicion that the real object is to get the benefit of that reputation. All the circumstances must be considered and if the conclusion arrived at is that the new name is likely to lead the public to mistake the new business for the former business, that gives a right of action.

That conclusion is far more readily reached if there is evidence of an intent to create or foster a mistake. On the evidence in this case, in my opinion, the plaintiff has entirely failed to establish any right within the first class. That would be an extremely difficult matter especially in the case of a geographical name, and that the name of a presidency and of its chief city. What he has established, and the defendant has practically admitted, is that he had a business with a reputation. The next point that he had to establish was that the name, adopted by the defendant, was likely to lead the public to mistake the defendant's business for the plaintiff's. It would not suffice to show that thoughtless persons might, or did unwarrantably, jump to the conclusion that the defendant's shop was the plaintiff's. The curious part of this case was that both sides wanted to establish that "Bombay" had a secondary meaning and connoted skilful dyeing and cleaning, the plaintiff, claiming that his efforts had led to that result, and the resulting reputation was attached to his business; the defendant claiming that the city or the presidency of Bombay had earned that reputation. The defendant supported his contention with his own far from trustworthy evidence, and all the plaintiff could establish, in my opinion, was that his business had a reputation. Doubtless the reputation was attached to the name of his business and doubtless "Bombay" is the only part of the name of his business that can be called distinctive. But he chose a geographi-

3. Dunlop Pneumatic Tyre Co., Ltd. v. Dunlop Motor Co., (1907) A C 430=76 L J P C 102=23 T L R 717=24 R P C 572=51 S J 715=97 L T 259.

cal name, and, in my opinion, has failed to establish any exclusive right to that word, his right is merely that no other person may use a name which in the circumstances is likely to make the plaintiff's would be customers believe that the new business is the plaintiff's old business. As, in my opinion, the plaintiff has established that the name used by the defendant is likely to lead the public to believe that the defendant's business is the plaintiff's it follows that he is entitled to an injunction.

It was strenuously argued that such injunction should restrain the use of the word "Bombay" in connexion with any business of art dyeing and cleaning. The usual form of injunction does not prohibit the use of even what may be called the key word in the objectionable name, for instance in 29 R P C 433 (4) where there had been a particularly impudent attempt to exploit the reputation of Lloyds, for a branch of that world famous institution had been in Southampton for a 100 years, the injunction prohibited the use of the name Lloyds (Southampton), Ltd., or any other name calculated to induce the belief that the defendant's business is the business of or an agency branch or department of the plaintiff's business, but when counsel asked for the addition of " or any name of which the word 'Lloyds' forms a part" the Court of appeal refused his application. I must confess that I would have had no doubt that the injunction should have contained those words, but for that decision. Then in (1891) A C 217 (5) although it was held that "Stone", which is the name of a town, meant the plaintiff's ale and the injunction restrained the use of the word " Stone" in connexion with ale by the defendant, the injunction as far as the name of the business was concerned which included the word " Stone" was in the usual form. In that case Lord Macnaghten reluctantly agreed to the form of the injunction (that is the part of it restraining the use of the word "Stone" as descriptive of ale) on the ground that it was better to make it comprehensive and not to leave anything in doubt to be decided in proceedings for contempt. That impressed me but at the same time all the Lords present were satisfied with the form of the injunction as to the firm's name.

Only one case was cited where the injunction, in respect of a business name, was in the form desired by the plaintiff—15 R P C 65 (6), where the defendants were found to have exploited the plaintiff's reputation. The unreported decision of Page, J., as he then was, in 1930 Cal 678 (7), was relied on by the plaintiff, but it was a case about a trade mark and in fact the injunction was in the usual form. In 1934 Cal 600 (8), the injunction restrained the use of the word "Lotus" altogether in connexion with boots and shoes, but that was a case of a trade mark and of a fancy word used as a trade mark. I am not suggesting that a different principle applies to trade marks, but, in my opinion, it is easier to obtain an injunction in the desired form in the case of a fancy word which is a trade mark, and it is to be observed that in the case about to be cited on the question of damages the Judicial Committee expressly approved of the form of the injunction granted which restrained the use of the plaintiff's trade marks or any colourable imitation thereof and not the use of the word "Lotus" altogether, which, curiously enough, was one of the words and emblems used as a trade mark in that case. It therefore appears that it requires very exceptional circumstances to justify an injunction in the desired form.

In the case before me the words "dyeing and cleaning" or "dyers and cleaners" and those words with the prefix "Art" are merely descriptive of the business and common to the trade. The word "Bombay" has been used in conjunction with two somewhat similar businesses in Calcutta. This does not prevent the plaintiff from every reasonable protection for what I may call the right to a distinct and distinguishable name, but is very material on the point as to the form of the injunction. It shows that some uses of the word "Bombay" in connexion with art dyeing

4. Lloyd's v. Lloyd's (Southampton) Ltd., (1912) 29 R P C 433.
5. Montgomery v. Thompson (1891) A C 217=60 L J Ch 757=55 J P 756=64 L T 748.
6. Pinet case, (1897) 15 R P C 65.
7. Moolji Sicca v. Ramjan Ali, 1930 Cal 678=129 I C 612.
8. Lotus Limited v. Nasimunessaba Begum, 1934 Cal 600=151 I C 5.

and cleaning do not owing to the locality and class of work of those businesses interferere with the plaintiff's business or give rise to mistakes. I think therefore his right must be confined to the usual form of injunction—which sufficiently protects the common law right of a business to, so to speak, an individuality. The question then arises whether it is necessary or desirable to include in the injunction itself the names or any of the names set out in para. 1 of the plaint. On the one hand, in my opinion, an injunction should be clear and comprehensive; on the other hand, it is undesirable to suggest that the usual form fails in those respects. Obviously the use of names such as those set out in that paragraph would be within the usual form. Even in the peculiar circumstances of this case, I think the form should be the usual one. The defendant, his servants and agents will be restrained from using the name "Bombay Art Dyers and Cleaners," or any other name calculated to induce the belief that the defendant's business is the business of or an agency, branch, or department of the plaintiff's business.

The question of damages is a difficult one. But for the decision 1929 P C 11 (9), I would have ordered a reference with a direction that the total of all sums received by the defendant from persons who had been at any time customers of the plaintiff while he was at 10, Chowringhee or at 1, Lindsay Street should be ascertained and 40 per cent of that sum awarded to the plaintiff—40 per cent being the percentage of profit made by the plaintiff—on the ground that every reasonable presumption should be made against a man who traded under another's reputation. But having regard to that decision that would be an erroneous application of the principle on which I relied, and it seems, that I should accede to the request of counsel and assess the damages. The Judicial Committee allowed the plaintiff's usual percentage of profit on the difference between the plaintiff's usual gross trade earning before the unfair competition began and his actual earnings thereafter, with a lump sum for expected increase of business. I must endeavour to apply this method. The first difficulty is that the plaintiff admits that trade depression affected his business; that seems to eliminate any increase of business; and he admits that he cut down his advertising and it is also contended that his business was affected by removing from 1, Lindsay Street to 10, Chowringhee. That was said to be an inferior position for a shop of this description, but there was very little evidence to support that. However, I think some allowance should be made both for the change of address and some inferiority in the admittedly cheaper premises. The first point was left vague and no details given about the second point. The plaintiff was in his new premises for nearly four months before the defendant started his business—his average takings were Rs. 621 a month. During the previous year—from the chart he drew up—the average had dwindled to Rs. 1,050 a month, which appears from the chart to reflect the depression in trade. The suit was filed some six months after the defendant started his business; the average for those months was Rs. 813. The plaintiff issued 10,000 circulars about his change of address, employed a "sandwich" man with a notice in Lindsay Street, and for some time had a notice on the old premises. For the year 1933 the average was Rs. 536. In that year the average was 115 orders a month. In Lindsay Street he used to get about 300 orders a month, and the defendant obtained about that number when his business had fully started. It is difficult to draw any inference as to any figure, but it certainly looks as if the defendant was flourshing under his false colours.

I think the plaintiff's loss of business in 1933 was Rs. 6,276 taking his normal rate at Rs. 1,050 a month and the actual at Rs. 536. In the last four months of 1932—after the competition started—he made Rs. 3,055 against a normal Rs. 4,200, the loss being Rs. 1,145. That makes a total of Rs. 7,421. Forty per cent is the profit he claims, and that was not challenged—that makes the loss about Rs. 3,000. From that, I think, something must be deducted for trade depression, change of address, and curtailed advertising — I think the six months before suit gives a fairer indica-

9. Juggi Lal Kamalapat v. Swadeshi Mills Co. Ltd., 1929 P C 11=114 I C 30=56 I A 1=51 All 182.

tion of that amount than the first months at the new address—the average was Rs. 813 for those months or roughly a loss of 30 per cent; but the defendant's competition was in being. I think that taking it very roughly 15 per cent is enough to allow for all causes except the defendant's unfair trading. I therefore assess the damages at Rs. 2,550. I have assessed the damages on the supposed loss of the plaintiff up to the end of 1933—no evidence of damages after that date was given. In my opinion as the defendant by agreeing to be ready for the hearing in a few days and to keep accounts of his profits, obtained, as it so happens, a longer time in which his business flourished, the damages should be assessed up to the hearing—but no evidence was given of damages in 1934. There will be a decree for Rs. 2,550 with six per cent interest and an injunction as stated. Costs on scale No. 2.

R.K. *Suit decreed.*

A. I. R. 1935 Calcutta 116 (1)

S. K. GHOSE, J.

Hemodhar Sarmah — Accused—Petitioner.

v

Anandiram Ram Saikia and *another*—Complainant—Opposite Parties.

Criminal Revn. No. 268 of 1934, Decided on 6th June 1934.

Cattle Trespass Act (1871), S. 20—Complaint filed after 10 days of seizure is time-barred.

Where the occurrence was alleged to have taken place on 29th September 1933 but the complaint was not filed until 10th October 1933.

Held: it was time-barred under S. 20 of the Act. [P 116 C 1]

Sudhanshu Sekhar Mukerji and *Himanshu Chandra Choudhury* — for Petitioner.

Order.—The petitioner in this rule has been convicted under S. 22 of Act 1 of 1871, Cattle Trespass Act. One of the grounds on which the rule was issued is that although the occurrence is alleged to have taken place on 29th September 1933, the complaint was not filed until 10th October 1933 and that therefore was time-barred under S. 20 of the Act. The learned Magistrate in showing cause admits the correctness of this ground which does not appear to have been taken in the Court below. I accordingly make the rule absolute. The petitioner is acquitted and directed to be set at liberty. The fine, if paid, must be refunded.

K.S. *Rule made absolute.*

A. I. R. 1935 Calcutta 116 (2)

GUHA AND BARTLEY, JJ.

Purna Chandra Bagchi, Nabadwip Municipality—Petitioner.

v.

Satish Chandra Modak and *others*—Opposite Parties.

Criminal Revn. No. 306 of 1934, Decided on 13th July 1934.

Bengal Municipal Act (15 of 1932), Ss. 240 and 241—Entire shop being encroachment on Municipal road—S. 241 and not S. 240 applies.

Where practically the entire shop and not a part of it is an encroachment on the Municipal road, the encroachment is one to which S. 241 and not S. 240 applies. [P 117 C 1]

Probodh Chandra Chatterji and *Kumud Bandhu Bagchi*—for Petitioner.

Jitendra Mohun Banerjee—for Opposite Parties.

Order.—This Rule is directed against an order passed by a Deputy Magistrate at Krishnagar, on 21st November 1933, under S. 240 (3) and S. 241 (3), Bengal Municipal Act. It appears that the petitioner the Chairman of the Nabadwip Municipality complained to the District Magistrate of Nadia, of an encroachment or obstruction upon a municipal road by the opposite party which the opposite party failed to remove on requisition by the Municipality. The Chairman of the Municipality prayed for an order authorizing him to remove the encroachment or obstruction; notice was thereupon issued on the opposite party by the Deputy Magistrate to whom the case was made over to show cause why they should not remove the encroachment: on an inquiry held by the Deputy Magistrate the application of the Chairman to the District Magistrate was dismissed, and the proceedings were dropped by the Deputy Magistrate, on the ground that neither S. 240 (1) (b) nor S. 241, Bengal Municipal Act, was applicable to this case, and that the notice issued by the Chairman of the Municipality on the opposite party for removal of obstruction was irregular, and that the proceedings started before the Magistrate at the instance of the Chairman were ab initio void.

On the materials before us, we have no hesitation in holding that the Magis-

trate is right in his decision that S. 240, Bengal Municipal Act, had no application to the case before him. The Magistrate's decision however on the question of applicability of S. 241 to the facts of this case is in our judgment not sustainable. On the finding arrived at by the Magistrate as the result of an inquiry held by him that "practically the entire shop of the Satis Chandra Modak and not a part of it" was an encroachment on Municipal road, the encroachment or obstruction complained of, in the case before us, by the Municipality, was undoubtedly one to which the provisions contained in S. 241, Bengal Municipal Act, were applicable. The contention urged in support of this Rule that the Magistrate is wrong in holding that the same did not come within the purview of S. 241, Bengal Municipal Act has therefore to be given effect to; and we hold that it was within the competency of the Magistrate to make an order in favour of the Municipality, so far as the encroachment or obstruction complained of by the Chairman of the Municipality was concerned. The learned Sessions Judge of Nadia, it appears, was moved against the order passed by the Deputy Magistrate on 21st November 1933, which is according to our decision erroneous and unsustainable. The Judge rejected the application of motion before him, on 16th February 1934, affirming the view taken by the Deputy Magistrate so far as the application of S. 240, Bengal Municipal Act, was concerned. No opinion was expressed by the Judge on the applicability or otherwise of S. 241.

The result of the decision we have arrived at is that the order of the Deputy Magistrate passed on 21st November 1933, is set aside. The Magistrate will now deal with the application of the Chairman of the Municipality, the petitioner in this Court, to the District Magistrate of Nadia, on the footing that S. 241, Bengal Municipal Act, is applicable to the case, and pass appropriate orders in consonance with that provision of the law.

K.S. *Rule made absolute.*

A. I. R. 1935 Calcutta 117

BUCKLAND, Ag. C. J.

In the matter of *Dewangunj Bank & Industry, Ltd.*

Appln. decided on 5th March 1934.

Companies Act (1913), S. 153—Depositor obtaining decree against Company prior to embarking on scheme ceases to be depositor and is not bound by such scheme—Court cannot modify scheme sanctioned by Court which affects prior decree-holder.

A depositor who obtains decree against the company ceases to be depositor and becomes decree holder against the company. Where subsequent to passing of such decrees, the company embarks upon a scheme and a meeting is called for and notice is sent to all depositors, the decree-holder creditors are not bound to attend the meeting and any scheme framed is not binding on them. The meeting, though sanctioned by the Court, has no right by a mere definition to include the decree-holders within the scope of depositors. Where the meeting so includes the decree-holders also as depositors and the Court sanctions it per incuriam or because the circumstances are not sufficiently explained to the Judge, the decree holders can get the scheme modified by the Court, by having such portion of scheme which affects them expunged from the scheme: 1919 *P C* 9 *Dist.* [P 118 C 2]

Page—for Applicants.

Sushil Sen—for the Bank.

Order.—This is an application on behalf two persons who have obtained decrees against the Dewangunj Bank & Industry Ltd., for an order modifying a scheme sanctioned by this Court under S. 153, Companies Act, by an order made on 17th July 1933.

The circumstances were that the present petitioners ware depositors in the company and on 3rd January 1933 they obtained a decree against the company for Rs. 2,561 being the amount of their claim. They thereupon, as it has been submitted and in my judgment rightly, ceased to be depositors 'and became decree-holders against the company. The decree provided for payment by instalments extending over six years. The decree has been recognised by the bank, a payment having been made on 13th April 1933. Subsequently thereto the company embarked upon a scheme to which the sanction of the Court would be required under S. 153, Companies Act, and the usual orders were made, firstiy, that of 23rd May 1933, by Panckridge, J., directing a meeting of the depositors of the company for the purpose of considering the scheme, and on a subsequent date the meeting was held. The petitioners had notice of the meet-

ing but did not attend as they had already obtained decrees. The scheme of arrangement between the depositors and the company provided, broadly speaking, that depositors should not be entitled to demand payment of their deposits but would be paid over a period extending to 15 years. The scheme was duly adopted but with a very important modification which provided as follows :

"Those who have instituted suits and obtained decrees in respect of his or her deposits including costs, if any, shall also be deemed as creditors and the scheme shall be binding on them as well."

The object of this modification was transparently clear, to include among depositors the petitioners who had already obtained decrees. Sanction of this Court was in due course given to the scheme with that modification, but there is nothing to show that the attention of the learned Judge who gave the sanction was ever drawn to this modification or to its effect, nor does it appear that the petitioners had any opportunity of appearing on that application. Application is now made to have the words which were added to Cl. 2 of the scheme expunged. The effect of the order sought would be to maintain the sanctiou given by the order of 17th July 1933 to the scheme but without such modification.

It is contended on behalf of the company that the agreement was binding upon the petitioners inspite of the fact that they had obtained decree, and in support of this contention I have been referred to 1919 P. C. 9 (1). Their Lordships of the Privy Council in that case laid down a rule which has no applicability whatever to the circumstances of this case. It was there decided that a depositor who had obtained a decree between the time when the agreement to a scheme was arrived at general meeting and the time when the Court gave its sanction to the scheme was bound by the scheme on the ground that the agreement became binding from the date when it was arrived at subject to the subsequent sanction of the Court. Here the position is entirely different. The decree had been obtained long before there was any question of a scheme or the meeting or the sanction of the Court being obtained to the scheme, and the authority cited is of no assistance to the company in support of the contention that the applicants are bound by the agreement to the scheme at the meeting on 2nd July 1933.

A further point is taken whether I have jurisdiction to entertain this application and make the order. It is suggested that the proper course to be followed is for the decree-holder to execute their decrees, which I am told would be at Rungpur, when they could contend before the local Court that they were not bound by the scheme. Not only would it be embarrassing to throw the burden of deciding the point upon the local subordinate Court but I see no reason for justice being done in this matter by an extremely roundabout method. At the time when the notice of the scheme of the proposed meeting was given the petitioners had ceased to be depositors. They were fully justified in not attending the meeting. The meeting, I conceive, though sanctioned by the Court, had no right by a mere definition to include the petitioners within the scope of depositors, any more than a company would have the right by definition to include its general trade creditors, and in my opinion the petitioners are not bound by the scheme. The scheme having been sanctioned by the Court doubtless per in curiam or because the circumstances were not sufficiently explained to the learned Judge, the applicants' only remedy in my judgment is to come to this Court to have the scheme modified

There will be an order in the alternative form set out in the summons, expunging from the scheme the words:

"those who have instituted suits and obtained decrees in respect of his or her deposits including costs if any shall also be deemed as creditors and the scheme shall be binding on them as well."

Costs of this application will be paid by the company. Certified for counsel.

K.S. *Application allowed.*

1. Raghubar Dayal v. Bank of Upper India Ltd. Lucknow, 1919 P C 9=50 I C 429=46 I A 135 =41 All 566 (P C).

A. I. R. 1935 Calcutta 118

NASIM ALI AND KHUNDKAR, JJ.

Kusum Kamini Debi — Decree-holder —Appellant.

v.

Sailesh Chandra Chakravarty and *others*—Respondents.

Appeal No. 504 of 1932, Decided on 21st June 1934.

Civil P. C. (1908), S. 39 — Entire decree and not part of it should be sent for execution to other Court.

Section 39 contemplates that the entire decree and not a part of it is to be sent for execution to other Court or Courts. There is no provision in the Civil Procedure Code under which a decree-holder who has obtained a decree can divide a decree into several parts and execute them piece meal in different Courts or in the same Court : *Forster* v. *Baker*, (1910) 2 *K B* 636 ; 1917 *Pat* 70, *Rel on.* [P 119 C 1]

Satindra Nath Roy Chaudhury — for Appellant.

Girija Prasanna Sanyal and *Madan Mohan Malhotra* and *Sourindra Nath Ghose*—for Respondents.

Judgment.—This is an appeal by the decree-holder in an execution case. It appears that the appellant obtained a decree for Rs. 6,399-9-6 and costs Rupees 4-1-3 against the judgment-debtors. It further appears that on the application of the decree-holder the decree was split up into two parts and a certificate for the execution of one part of the decree, namely Rs. 1,500, was sent to the Subordinate Judge's Court at Dinajpur. The objection of the judgment-debtors was that the execution case was not maintainable inasmuch as the decree-holder had no right to split up the decree in this way. This objection of the judgment-debtors has been given effect to by the learned Subordinate Judge and the execution case has been dismissed. Hence the present appeal by the decree-holder.

Section 39, Civil P. C., lays down that the Court which passed a decree may, on the application of the decree-holder send it for execution to another Court. Evidently the section contemplates that the entire decree and not a part of it is to be sent for execution to other Court or Courts. There is no provision in the Civil Procedure Code under which a decree-holder who has obtained a decree can divide a decree into several parts and execute them piece-meal in different Courts or in the same Court. This view is supported by the decisions in (1910) 2 K B 636 (1) and in 1917 Pat 70 (2). We are therefore of opinion that the learned Subordinate Judge was right in dismissing the application for execution. The effect of this order is that the executing Court is to inform the Court which passed the decree that it has failed to execute it inasmuch as the certificate which was sent to it was irregular. The result therefore is that this appeal is dismissed with costs hearing fee being assessed at two gold mohurs.

K.S. *Appeal dismissed.*

1. Forster v. Baker, (1910) 2 K B 636=79 L J K B 664=26 T L R 421=102 L T 522.
2. Prakash Chandra v. Ramnarain, 1917 Pat 70=43 I C 186.

A. I. R. 1935 Calcutta 119

GUHA AND BARTLEY, JJ.

Sm. Charan Manjari Dasi—Petitioner.

v.

Land Acquisition Collector—Opposite Party.

Civil Rule No. 1261 of 1934, Decided on 29th November 1934, from order of Special Land Acquisition Judge, 24-Parganas, D/- 18th June 1934.

Land Acquisition Act (1894), S. 32 (2)—Person incompetent to alienate — Expenses incidental to purchasing of property by way of investment of money deposited in respect of acquired land are payable by Collector.

Charges and expenses incidental to the purchase of property by way of investment of money deposited in respect of acquired lands belonging to a person incompetent to alienate property are reasonable charges and expenses as contemplated by S. 32 (2) and are payable by the Collector. [P 120 C 1]

Rama Prasad Mukhopadyay and *Mihir M. Mukerji*—for Petitioner.

Sarat Chandra Basak—for Opposite Party.

Order.—This Rule was directed against an order of the learned Special Land Acquisition Judge at Alipore, passed on 18th June 1934, purported to have been made under S. 32, Land Acquisition Act, disallowing certain charges and expenses as contemplated by sub-S. (2) of S. 32, incidental to the purchase of property by way of investment of money deposited in respect of acquired lands belonging to a person incompetent to alienate property.

It appears that it was necessary to engage the services of an Attorney for the purchase of the property which had been advertised for sale by the Registrar of this Court in the Original Side. The Attorney engaged with the approval of the Special Land Acquisition Judge, made necessary investigations regarding the suitability, market value and title of the property in question; and did other things incidental to the completion of the purchase as made at the Court sale. The Attorney submitted his bill, to which objection was taken by

the Land Acquisition Collector on the ground that certain amounts charged were excessive. The Judge referred the bill to the Taxing Officer in the Original Side of this Court for checking the bill and for a report. The Taxing Officer was not in a position to comply with the requisition of the Special Land Judge, as the rules of this Court did not permit the adoption of such a course, as proposed by the Judge. The Attorney's bill was checked by Mr. E. C. Esson of the Firm of Messrs. Sanderson and Morgans, Government Solicitors, who certified that the charges contained in the bill of costs submitted by the Attorney were fair and reasonable for work done, except Rs. 75-14-6. The matter then came before tne Judge for final decision, and on objections raised on behalf of the Land Acquisition Collector it was held by the Judge that the Attorney was entitled only to remuneration for work done from 2nd May 1932 to 14th September 1932, and also to the payment of Rs. 924-8-0, for stamp only for the conveyance and Rs. 57 for registration fee. The Attorney's bill "for other works" was disallowed by the Judge.

In view of the previous order passed by the learned Judge on 26th February 1934, by virtue of which the Attorney was entitled to get reasonable remuneration, and regard being had to the fact that the charges in the Attorney's bill were considered to be fair and reasonable by a competent person, by whom it was checked, we are unable to agree with the learned Judge in the Court below that the Attorney's bill relating to work done by him before 2nd May 1932 was to be disallowed. On the materials before us we have no hesitation in coming to the conclusion that the work done by the Attorney as evidenced by his bill of charges were acts essential and necessary for purchasing property, and as such were reasonable charges and expenses as contemplated by S. 32 (2), Land Acquisition Act. In the above view of the case before us, the order of the learned Judge cannot be allowed to stand. A question was raised before us by the learned Senior Government pleader, representing the Land Acquisition Collector, the opposite party in this Rule, that no part of the charges and expenses covered by the Attorney's bill was payable by the Collector. It was argued before us that regard being had to the position, that the acquisition money in the case was not invested in land, immediately after the same was deposited by the Collector in Court. The charges and expenses incurred for purchase of property at a subsequent stage were not payable by the Collector; and this argument was sought to be supported by provisions contained in S. 32, Land Acquisition Act. It may be mentioned that the argument thus advanced before us was not raised in any form before the Special and Acquisition Judge, and on a plain reading of the provisions contained in S. 32, taking those provisions together, we are wholly unable to appreciate and give effect to the contention raised on behalf of the Collector that none of the charges and expenses mentioned in the Attorney's bill was payable by the Collector under the law.

The result of the decisions we have arrived at in the case before us is that the Rule issued by this Court must be made absolute; and we direct accordingly. The order passed by the learned Judge in the Court below is discharged, and we direct that the Attorney's bill as certified by Mr. Esson be paid by the Collector as reasonable charges and expenses as contemplated by S. 32, Land Acquisition Act. The Rule is made absolute. There is no order as to costs in the Rule.

K.S. *Rule made absolute.*

A. I. R. 1935 Calcutta 120

GUHA AND BARTLEY, JJ.

Nitya Gopal Sadhu and *another* —Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 11 of 1934, Decided on 8th June 1934.

Criminal P. C. (1898), S. 423 — Assistant Sessions Judge finding accused guilty of one charge but acquitting them on other charges in accordance with opinion of jury—Sessions Judge on appeal setting aside conviction but ordering retrial on all charges — Retrial cannot be ordered in respect of charges of which accused were acquitted.

The petitioners were on the unanimous verdict of the jury before whom their trial was held convicted by the learned Assistant Sessions Judge under one charge. The jury found the petitioners not guilty under two other charges for which the petitioners were tried and the Judge accepting the verdict of the jury acquitted the petitioners of those charges. The sentences

passed on the petitioners were appealable ones, and as such there was an appeal by the petitioners to the Sessions Judge. The Sessions Judge allowed the appeal but ordered that the effect of the order setting aside verdict of jury and ordering retrial was to order retrial of accused under all the charges including those for which accused had been acquitted by the Assistant Sessions Judge.

Held : that the Sessions Judge could not direct a retrial of the petitioners under the law in respect of the offences of which they were acquitted by the Assistant Sessions Judge.

[P 121 C 2]

S. C. Taluqdar and *Sailendranath Banerji*—for Petitioners.

Order.—The petitioners were on the unanimous verdict of the jury before whom their trial was held convicted by the learned Assistant Sessions Judge of Burdwan, under S. 120-B, I. P. C., and were sentenced to rigorous imprisonment for one year each. The jury found the petitioners not guilty under two other charges for which the petitioners were tried under S. 379 and S. 477, I. P. C., and the Judge accepting the verdict of jury, acquitted the petitioners of these charges. The sentences passed on the petitioners were appealable ones, and as such there was an appeal by the petitioners to the learned Sessions Judge of Burdwan. The Sessions Judge by his judgment dated 2nd December 1933, allowed the appeal before him accepting the argument for the defence that if the jury disbelieved that the petitioners committed theft, there was no remaining evidence on which a verdict of conspiracy to commit theft could possibly be based. The Sessions Judge held definitely that the verdict returned by the jury under the separate section of the Indian Penal Code "were entirely incompatible." The Sessions Judge's judgment however contained a direction for retrial of the petitioners, the appellants before him "if the Crown desire to proceed the charges." There was after the delivery of the judgment of the Sessions Judge, an order recorded by him on 8th December 1933, containing direction as to the effect of the order for retrial passed on 2nd December 1933. In that order the Sessions Judge gave the direction that the effect of his order setting aside the verdict of the jury and ordering a retrial was to order a retrial of the appellants before him, on all the charges which were before the jury, including the charges in regard to which there was an order of acquittal by the Assistant Sessions Judge, in accordance with the unanimous verdict of the jury.

The rule issued by this Court in the case was directed against the order of retrial of the petitioners as passed by the Sessions Judge, and it must, in our judgment, be made absolute on the grounds on which it was issued. In our opinion the Sessions Judge could not direct a retrial of the petitioners, under the law, in respect of the offences of which they were acquitted by the Assistant Sessions Judge. The Sessions Judge came to the definite conclusion in his judgment dated 2nd December 1933, that after the acquittal of the petitioners under S. 379 and S. 477, I. P. C., their remained no material on the record to connect them with an agreement to commit those offences; on the conclusion arrived at by the Sessions Judge the order for retrial of the petitioners as passed by the Judge could not be justified under the law. The rule is made absolute. The orders for retrial of the petitioners, passed by the Sessions Judge on 2nd December and 8th December 1933, are set aside, and the petitioners are acquitted. If on bail, let the petitioners be discharged from bail bond and set at liberty.

K.S. *Rule made absolute.*

A. I. R. 1935 Calcutta 121

S. K. GHOSE, J.

Tarak Nath Chakravarti—Petitioner.

v.

Gangadhar De and *another*—Opposite Parties.

Civil Rule No. 222 of 1934, Decided on 13th June 1934, from decision of Munsif 1st Court, Bagerhat, in Misc. Case No. 237 of 1933.

Bengal Tenancy Act (1885), Ss. 182 and 26-J—Raiyat holding his homestead otherwise than as part of his holding—Landlord tenure holder—Tenant is raiyat as regards homestead—Transfer of part of homestead—Application under S. 26-J by landlord is maintainable.

Where a tenant is a raiyat holding his homestead otherwise than as part of his holding and his landlord is a tenure-holder with regard to the homestead, the tenant becomes a raiyat under the Bengal Tenancy Act, and if the tenant transfers part of the homestead the landlord can maintain an application under S. 26-J: 1932 *Cal* 857, *Ref.*

[P 122 C 2]

Hemendra Chandra Sen — for Petitioner.

Nriprendra Chandra Das and *Rajendra Nath Das*—for Opposite Parties.

Order.—The petitioner in this rule is the landlord of a holding which is alleged by him to be an occupancy raiyati holding. The case made by him is that the opposite party 2 and his co-sharers hold an occupancy raiyati holding at a rent of Rs. 5 per annum. The opposite party 2 sold his share of the holding to the opposite party 1 by a registered Kobala dated 18th Baisakh 1340 B. S. In this Kobala the tenancy was described as a "Raiyati Kaimi Mukarari Jama" and according to the petitioner the term 'Mukarari' was wrongly used. He filed an application under S. 26-J, Ben. Ten. Act, for recovery of the proper landlord's fee, the fee having been already paid under S. 18 of the Act. The learned Munsif held that the tenancy of Rs. 5, of which a portion was sold by opposite party 2 was governed by the Transfer of Property Act and not by the Bengal Tenancy Act.

In this rule it is contended that the learned Munsif overlooked the provisions of S. 182, Ben. Ten. Act, and that he did not determine the main question, namely, whether the tenancy was 'Mukarari' as alleged by the opposite party or 'occupancy' as alleged by the petitioner. In the Settlement record the holding in question is described as 'Dakhalkar Basat' although the petitioner's interest is described as 'Ganti.' The learned Munsif took this to mean that the holding was not a holding under the Bengal Tenancy Act. On the other hand, certain Khatians, vide Ex. 4 series, have been filed to show that the tenant in question was possessing other lands in the village as settled raiyat. It is therefore contended that the learned Munsif should have held under S. 182, Ben. Ten. Act, that the tenant is a raiyat under the provisions of the Act with regard to the holding in question.

On behalf of the opposite party, stress is laid on the finding of the Munsif that the origin of the tenancy is known. It is pointed out that the petitioner deposed that the tenancy was created some fifty years ago which would be about 1883 at which time the Transfer of Property Act, and not the Bengal Tenancy Act, was in operation. But this is quite besides the mark in view of the plain terms of S. 182. According to that section, when a raiyat holds his homestead otherwise than as part of his holding, two things follow: (1) His status in respect of his homestead shall be that of a raiyat or an under-raiyat according to the status of the landlord, and (2) the incidents of his tenancy shall be governed by the Bengal Tenancy Act. In 1932 Cal. 857 (1), the second point was not in issue because no question was raised whether the tenancy was governed by the Bengal Tenancy Act or by the Transfer of Property Act. In the present case there is no doubt that the tenant is a raiyat holding his homestead otherwise than as part of his holding and that his landlord is a tenure-holder. That being so, with regard to the homestead the tenant becomes a raiyat under the Bengal Tenancy Act. The only question remains whether he is a mokarari raiyat. On this point there has been no investigation. I must therefore reverse the order of the learned Munsif and remand the case to the lower Court for determination of the question as to whether the tenant has the status of a mokarari raiyat. On determining this question the learned Munsif will proceed to decide the case finally. The rule is made absolute. There will be no order as to costs.

K.S. *Rule made absolute.*

1. Raj Kumar Mandal v. Shib Chandra Mandal, 1932 Cal 857=139 I C 765.

A. I. R. 1935 Calcutta 122

S. K. GHOSE AND HENDERSON, JJ.

Santabir Lama and *another* — Petitioners.

v.

Emperor—Opposite Party,

Criminal Revn. No. 1064 of 1934, Decided on 26th November 1934.

(a) Extradition Act (1903)—Coustruction—Sections with reference to procedure must be construed strictly in favour of subject.

The provisions of the Extradition Act are meant to ensure that the arrest and the detention of persons, who are alleged to have committed an offence outside British territory, should be in accordance with a certain procedure and the sections of the Act, with reference to that procedure should be construed strictly in favour of the subject. [P 124 C 1]

(b) Extradition Act (15 of 1903), S. 10—Surrender of fugitive criminals—Warrant is necessary for procedure under S. 10.

When a warrant has been received in respect of an extradition offence, the procedure should be as under S. 7. When a requisition is received in respect of any offence, the procedure should be as under S. 9. But when neither a warrant nor a requisition has been received, the Magistrate is empowered to issue a warrant as

under S. 10. It is an essential ingrediant of this procedure that there should be warrant. [P 124 C 1]

(c) Extradition Act (15 of 1903), S. 23—S. 23 applies only where person has been arrested under S. 54, Criminal P. C., seventhly not only without warrant but also without Magistrate's order—Criminal P. C, (1898), S. 54 (7).

Section 23 refers to the case of persons arrested under S. 54, Cl. 7, Criminal P. C., that is to say, when a person has been arrested not only without a warrant but also without an order from a Magistrate. S. 54 is intended to cover those cases where the Police Officer acts on his own responsibility, that it to say, on suspicion or information as based on facts which the police officer has considered for himself. On the other hand where the arrest is made in pursuance of an order of Magistrate it is that order which must determine the legality or otherwise of the arrest: 1917 *Cal* 253, *Rel. on.* [P 124 C 1]

S. K. Sen, Dinesh Chandra Roy, T. C. Moore & Haridas Gupta—for Petitioners.

Probodh Chandra Chatterjee—for the Crown.

S. K. Ghose, J.—The two petitioners have filed an application under S. 491, Criminal P. C., and obtained a rule in their favour in terms of a writ of Habeas Corpus upon the authorities concerned to show cause why the petitioner should not be set at liberty. It appears that there is an allegation that these two petitioners together with three others forcibly seized within British territory a Sepoy of Pashupatinagore Court of Nepal territory, took him into Nepal territory and there assaulted him and took away some money and certain letters which he was carrying. On 2nd September 1934, an information was lodged at Sakiapokra Thana in British territory of an offence under S. 341, I. P. C., but in this matter a final report "true" was submitted for lack of evidence. Subsequently the lieutenant Hakim of Illam Amin, a Court in Nepal territory, addressed letter No. 16 and bearing the date 16th August 1934, to the Deputy Commissioner of Darjeeling to the effect that the five accused persons, including the present two petitioners, had come into Nepal territory, and assaulted and robbed the aforesaid Sepoy. The Hakim requested that the men should be arrested and put in jail pending action for their surrender. It also appears that the sepoy was brought to Victoria Hospital, Darjeeling, where he made a statement on 8th August, which was recorded by a Sub-Inspector and that the man died on 28th August. Subsequently another letter bearing the date 19th September 1934, was received from the Lieutenant Hakim of Illam Court intimating to the Deputy Commissioner that the accused were charged with robbery and murder. The Deputy Commissioner ordered the police on 27th August, to arrest the accused, and in pursuance of this order the present two petitioners were arrested in Calcutta on 17th September. They were produced before the Darjeeling Court on 19th September, and then remanded to jail custody. Their application for release was rejected by the Magistrate by his order dated 29th September.

In the course of that order the learned Deputy Commissioner stated that he, "as Deputy Commissioner ordered the police to arrest the accused on 27th August 1934, and his instructions were carried out." He considered that the action taken by him was "of a purely executive nature under S. 10 and S. 23, (Extradition) Act," and that he was "definitely debarred from allowing bail." He also doubted if the prisoners need be produced after fortnightly intervals, but he directed that the papers should be put up before him after such intervals or on receipt of the necessary requisition from the authorities of Nepal. It does not appear if the fact of the arrest was reported to the Nepal Court. A motion was taken before the learned Sessions Judge of Darjeeling and he, in the course of an order bearing the date 6th October, pointed out that the learned Deputy Commissioner, if he had purported to act under S. 10, Extradition Act, should have issued a warrant as contemplated in Cl. (1) and that he had overlooked the provisions of Cl. (4), with regard to the granting of bail. But on the merits the learned Judge held that no case had been made out for the release of the prisoners on bail. Thereupon the present petition was filed in this Court and on 10th October 1934, the present Rule was issued as mentioned above. In showing cause against the rule the learned Deputy Commissioner of Darjeeling wrote to say that he had moved the Legal Remembrancer to take steps to represent the Crown and to show cause why the prisoners not be set at liberty. I am constrained to mention that it would have been much better if the learned Deputy Commissioner

had followed the rule prescribed by this Court and furnished a proper explanation stating the facts and the grounds on which he relied, so that the petitioners could have the opportunity of examining them.

The contention in behalf of the petitioners and upon which the present rule was issued is to the effect that the arrest and the detention of the petitioners are not in accordance with law and in particular with the provisions of the Extradition Act—Act 15 of 1903. The question whether the petitioners are British Indians or Nepalese subjects is of no importance. The provisions of the Extradition Aot are meant to ensure that the arrest and the detention of persons, who are alleged to have committed an offence outside British territory, should be in accordance with a certain procedure, and it has been held that the sections of the Act, with reference to that procedure should be construed strictly in favour of the subject. Ch. 3 describes how the surrender of fugitive criminals in case of States other than Foreign States is to be effected. When a warrant has been received in respect of an extradition offence the procedure should be as under S. 7. When a requisition is received in respect of any offence the procedure should be as under S. 9. But when neither a warrant nor a requisition has been received, the Magistrate is empowered to issue a warrant as under S. 10.

It is an essential ingrediant to this procedure that there should be warrant, because the provision is that the issue of the warrant is to be reported forthwith and there is a time limit of two months for the detention of the persons arrested. In the present case the procedure was clearly not under S. 10. But it is contended that it is covered by S. 23. This argument cannot be supported because that section refers to the case of persons arrested under S. 54, Cl. 7, Criminal P. C., that is to say when a person has been arrested not only without a warrant but also without an order from a Magistrate. S. 54 is intended to cover those cases where the Police Officers acts on his own responsibility, that is to say, on suspicion or information as based on facts which the police officer has considered for himself. This was pointed out by Choudhuri, J., in 1917 Cal. 253 (1), and indeed it is apparent from the terms S. 54 itself. On the other hand where the arrest is made in pursuance of an order of a Magistrate it is that order which must determine the legality or otherwise of the arrest. Mr. Chatterjee for the Crown has contended that merely because the Magistrate has given an order, the case is not taken out of S. 54 where the police officer himself has received credible information or has conceived a reasonable suspicion. But this does not seem to be the case here. The learned Magistrate in his order of 29th September expressly says that he as Deputy Commissioner ordered the police to arrest the accused on 27th August and that he considered that the action taken by him was purely of executive nature. Mr. Chatterjee has drawn our attention to a certified copy of an application filed by one Syed Hossein on 18th September 1934, but we are not satisfied that the police in this case effected the arrest on anything except the order of the Deputy Commissioner. Nor does it appear that even if the arrest were by the police on their own responsibility the latter provision in S. 23, Extradition Act, was followed and the detention of the prisoner was made subject to the restrictions as under S. 10 of the Act. In these circumstances it seems to us that the arrest and the detention of petitioners were not in accordance with the provisions of the Extradition Act, and therefore we must direct that the prisoners be released.

It has been brought to our notice by Mr. Chatterjee that subsequent to the issue of this rule a warrant was received by the Deputy Commissioner on 13th October 1934, and another warrant was received by the Chief Presidency Magistrate on 24th October 1934. We understand that neither of these warrants has yet been executed. It is open to the Magistrate to take action with reference to S. 7 and to the subsequent sections, including S. 18 of the Act, and the treaty provisions relating to the surrender of prisoners. In so far as the present proceedings on which this Rule is based are concerned we direct that the petitioners be released.

Henderson, J.—I agree.

K.S. *Order accordingly.*

1. In re, Charu Ch. Majumdar, 1917 Cal 253=37 I C 57=18 Cr L J 73=44 Cal 76.

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MUKERJI AND S. K. GHOSE, JJ.

Jogesh Chandra Bandopadhya and *another*—Appellants.

v.

Mohini Mohan Ghose and *others*—Respondents.

Appeal No. 16 of 1933, Decided on 28th June 1934, against appellate order of Addl. Dist. Judge, Dacca, D/- 7th September 1932.

(a) Stamp Act (1899), S. 13 — Decree not drawn up on non-judicial stamp paper—Non-judicial paper subsequently annexed defaced and names of parties and cause title of case put down—Decree is in order and decree can be executed.

Where a decree is not drawn up on a non-judicial stamp-paper and on the order of the Court a non-judicial stamp paper is annexed and is defaced and the names of the parties and the cause title of the case is put down, the decree is entirely in order with retrospective effect from date when it was drawn up and can be executed: 7 *I C* 94, *Rel on* ; 37 *Cal* 399, *Ref* ; 32 and *Cal* 483, *Expl.*

(b) Civil P.C.(1908), O. 21 R. 22 Judgment-debtor appearing and objecting to first execution — No fresh notice is necessary.

A fresh notice can be dispensed with where judgment-debtor has appeared in the course of the first execution and objected to execution of the decree. [P 126 C 1,2]

Jogesh Chandra Roy and *Prakash Chandra Pakrashi*—for Appellants.

Bankim Chandra Mukherjee and *Nagendra Nath Bose*—for Respondents.

Phanindra Nath De and *Surajit Chandra Lahiri*—for Deputy Registrar.

Judgment.—This is an appeal by the decree-holders from an order passed by the Additional District Judge of Dacca reversing an order of the Subordinate Judge, First Court of that place, in an execution proceeding relating to a decree which is based on an award. The decree was put into execution in Execution Case No. 22 of 1931. An objection was taken on behalf of the judgment-debtors that the decree had not been drawn up on a non-judicial stamped paper as required by law. On 18th January 1932, this objection was upheld by the Subordinate Judge who ordered that the execution case should be dismissed and that the decree-holders would have liberty to have a fresh decree drawn up on a stamped paper according to law and then file a fresh application for execution. On 1st February 1932, a non-judicial stamp of 12 annas having been supplied by the decree-holder the Court which had made the decree, ordered the stamp to be annexed to the decree as originally drawn up and to have it defaced, the names of the parties and the cause title of the case being put down on it. It appears further that a note of this was made on the original decree and the Judge also put down his initials on it with the date 1st February 1932. The decree was thereafter put into execution again. Several objections were taken on behalf of the judgment-debtors to this execution. All of them have now been overruled by the Additional District Judge with the exception of one which he has allowed and which forms the subject-matter of this appeal. The objection which the Additional District Judge has upheld relates to the defect which, according to the judgment-debtors, there was in the decree on the ground that the decree was not drawn up on the non-judicial stamped paper itself but was drawn up upon separate sheets of paper to which, as already stated, the non-judicial stamp paper was subsequently annexed. The learned Judge has held that there is an express provision in the Stamp Act, namely, S. 13 that the document must be written so that the stamp would appear on the face of it and he has held that the omission to write on the stamped paper itself cannot be condoned and accordingly the decree under execution was invalid and incapable of execution. We are not concerned with the other objections of the judgment-debtors in this appeal. So far as this conclusion of the learned Judge is concerned, it has been assailed before us on the strength of the decision of this Court in 7 I C 94 (1). In that case, a final decree for partition had been drawn up on a court-fee stamp instead of a non-judicial stamp and it was not until the decree had been appealed from and was sought to be executed that the mistake was discovered. This Court held that :

"On the plaintiff depositing a non-judicial stamped paper in the appellate Court and on the proper entries being made thereupon, the decree would be validated with restrospective effect from the date when it was drawn up."

In giving their direction as to how the defect should be remedied the learned Judges said :

"We therefore direct the plaintiff petitioner to file a non-judicial stamp of the value of Rs. 100; this will be defaced, and the cause-title and names of the parties in the Conrt below will be written on it ; it will then be attached to the

1. Rafiuddin v. Latif Ahmed, (1910) 7 I C 94.

decree as already drawn up. This, in our opinion will be sufficient to validate the decree with retrospective effect from the date when it was drawn up on the principle explained by this Court in 37 Cal 399 (2)."

What has been done in this case is exactly what was required to be done in 7 I C 94 (1), to which we have just referred. We must therefore hold that the decree when it was subsequently put into execution in the second execution case was entirely in order. Our attention has been drawn by Mr. Mukherjee, appearing on behalf of the respondents, the judgment-debtors, to the decisions of this Court in 32 Cal 483 (3), in which it was held that:

" a decree for partition, to be operative, must be engrossed on stamped paper as required by the Stamp Act, and until the Judge signs the decree so engrossed, it cannot be said that the suit has terminated,"

The proposition laid down in the case last-mentioned cannot possibly be disputed, but it cannot be regarded as militating in any way against the decision in 7 I C 94 (1) to which reference has already been made. Mr. Mukherjee has then contended that if 7 I C 94 (1), is to be acted upon, then it must be held that the decree which was put into execution in this execution case was a decree which was dated as on the date on which it was first signed and on that footing it would be a decree which was more than a year old when the second execution case was started and that consequently notice would be necessary under O. 21, R. 22, Cl. (a) of the Code before the execution proceediugs could be started. Now, it is quite true that in the aforesaid case of 7 I C 94 (1), it was laid down that once the requirements which were noted in the order of this Court in that case were complied with, the decree should have retrospective effect as from the date which it originally bore. But if the Judge when affixing the non-judicial stamped paper to the decree as originally drawn up also cared to put down his initials and the date of such affixing of the same date itself, it could not, we think, be said that it was not a decree passed on the latter date. In any event the question as regards the date of the decree would be more material on the question as to whether an appeal could have been preferred from it as a decree of either of the dates. So far as the question of notice under O. 21, R. 22, Cl. (a) of the Code is concerned, we are of opinion that in view of the facts to which we have referred, namely, that in the course of first execution case, the judgment-debtors did appear and took exception to the execution of the decree in their presence and the order was then made to the effect that the decree as it then stood could not be executed but was to be validated by the affixing of a non-judicial stamp the provisions of Cl. (2), R. 22, O. 21 would well warrant the Court from dispensing with the issue of a notice in this particular case. We are accordingly of opinion that the view which the learned Additional District Judge has taken in this matter cannot be supported and that there was no valid objection to the execution.

In conclusion, we may point out that Mr. Mukherji has taken an objection, in the nature of a preliminary objection, to the hearing of this appeal. The objection is that one of the respondents, namely, respondent 3 Srimati Nandarani Devi was dead and that no substitution was made of her heirs and that accordingly the appeal had abated in so far as she was concerned. The objection is that by reason of such abatement the appeal is no longer maintainable. We find however that the learned Additional District Judge has in his judgment dealt with the question as to the real character of the decree and has recorded his conclusion to the effect that the subject-matter of this execution is the 15 annas and the 1 anna share of the properties which belong respectively to Sailabala Devi as decree-holder and Mohini Mohan Ghose as judgment-debtor and that the other judgment-debtors are not concerned in this matter. That being the position we are unable to say that the preliminary objection has got any substance. The appeal is allowed, the order of the learned Additional District Judge complained of is set aside and that of the learned Subordinate Judge restored. There will be no order for costs in this appeal.

K.S. *Appeal allowed.*

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2. Chhayemannessa Bibi v. Basirar Rahman, (1910) 37 Cal 399=5 I C 532.
3. Jotindra Mohan Tagore v. Bejoy Chand Mahtap, (1905) 32 Cal 483.

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MUKERJI AND S. K. GHOSE, JJ.

Mono Mohan—Judgment-debtor—Appellant.

v.

Upendra Mohan Pal and *others*—Respondents.

Appeal No. 116 of 1933, Decided on 27th June 1934, from original order of Sub-Judge, First Court, Chittagong, D/- 15th November 1932.

Civil P. C. (1908), S. 51—Execution of money decree—Court cannot in absence of special circmstances insist that decree-holder should proceed only against property—But under certain circumstances, Court must not allow decree-holder to have process for arrest and detention of judgment-debtors—Execution.

Where the holder of a decree for money comes before the Court and wants process against the person of a judgment-debtor for his arrest and, if there are no special circumstances present, it is not open to the Court to say that the decree-holder must proceed against the properties of the judgment-debtor before applying for warrant of arrest against him; but there may be circumstances present in a case which would not only justify a refusal to allow the decree-holder to have process for the arrest and detention of the judgment-debtor but that there may be circumstances which would demand such a refusal. In a case in which it is established that by reason of the fact that the properties are under attachment at the instance of a decree-holder or that properties form the subject-matter of a decree for mortgage at the instance of a decree-holder, the consequence of which is that although there may be a large amount of surplus left if the properties are put up to sale in execution of the decree obtained on the mortgage, the judgment-debtor is precluded from raising money on those properties in order to pay off the decree by reason of the action of the decree-holder, a refusal of such a prayer may be justifiable: 1926 *Lah* 110, *Ref.* [P 129 C 1]

Rupendra Kumar Mitter and *Benoyendra Nath Palit*—for Appellant.

Manmatha Nath Das Gupta—for Respondents.

Judgment.—This is an appeal by one Mono Mohan alias Panchkari Chowdhury, a judgment-debtor in a decree for money which was obtained against him by the decree-holders, Upendra Mohan Pal and others who are the respondents in this appeal. The facts necessary to be stated are the following: The suit decree was for a sum of Rs. 6,192 and the decree was passed in June 1931. The first application for execution was dismissed for default on 25th August 1931 under circumstances which do not appear in the papers before us. It appears however that on the same day, that is to say on 25th August 1931, a fresh application for execution was made on behalf of the decree-holders.

In the course of the proceedings started on this second application some properties belonging to the judgment-debtor were put up for sale and it also appears that the decree-holders obtained the permission of the Court to bid at the proposed sale. For reasons which do not appear in any of the papers before us the second application for execution was also allowed to be dismissed for default on 28th May 1932. Two days after, that is to say, on 30th May 1932, a third application for execution was made and the orders that were subsequently passed in the proceedings that followed are the orders which form the subject-matter of this appeal. The prayer that was made on behalf of the decree-holders in the third application for execution was that the decretal amount might be realised by the arrest and detention of the judgment-debtor in civil prison. On this application a notice was issued upon the judgment-debtor and he, on 20th June 1932, put in an objection purporting to be one under S. 47 and O. 21, R. 40 of the Code. Amongst other matters that were stated in the said petition of objection, there was a statement to the effect that properties of the value of a lac of rupees belonging to the judgment-debtor were held in mortgage by the decree-holders for a small sum of money and it was further stated that there was a prayer for the sale of the said properties in a certain execution case started at the instance of some other parties for realization of a sum of Rs. 16,000 and it was also stated that the decree-holders could very well attach those properties and apply for rateable distribution in order to have their claim satisfied.

It was further clearly stated in the said petition that the properties having been attached as aforesaid, he was unable to raise money by selling the same and he accordingly prayed that he might be released from the liability of being arrested. The matter remained pending for several months till on 12th November 1932 a further petition was filed on behalf of the judgment-debtor in which it was repeated that the judgment-debtors' property worth more than a lac of rupees was under mortgage to the decree-holder for a sum of Rs. 7,500

only and it was further asserted that at the instance of a certain creditor an insolvency proceeding had been started against the judgment-debtor in the Court of the District Judge of Chittagong and that on account of those proceedings he was entitled to protection under S. 55, Civil P. C. On 12th November 1932, on which date, as aforesaid, the latter petition was filed, the case was taken up by the Subordinate Judge, who, after dealing with another objection arising out of the fact that one of the decree-holders was dead, an objection with which we are not concerned at the present stage, proceeded to dispose of the judgment-debtor's objection as to his arrest and detention in these words:

"I see no reason to stay execution proceedings for the reasons stated in the judgment-debtor's petition. The latter has not yet applied for insolvency. The objections raised by the judgment-debtor are therefore disallowed"

Were it not for the fact that subsequent to the passing of the aforesaid order, the judgment-debtor himself objected to the adjudication order being passed against him on the petition of the creditor to which reference has been made above, it would have been necessary for us to consider whether the reason which the learned Subordinate Judge gave for refusing to accede to the judgment-debtor's request for exemption on the ground of S. 55, Provincial Insolvency Act, was valid or not. The only fact that need be mentioned at the present stage is that none of the other objections, taken in either of the aforesaid two petitions of objections put in on behalf of the judgment-debtor, were dealt with by the learned Subordinate Judge. One of those objection, as has been already stated, was to the effect that by reason of the fact that properties worth a lac of rupees were under mortgage to the decree-holder for a small sum of Rupees 7,500 it was not possible for the judgment-debtor to pay off the debt due under the present decree. We find then that on 12th November 1932, after disposing of the objection in the manner stated above, the learned Judge issued a warrant of arrest of the judgment-debtor fixing 12th December 1932 for necessary orders. On 15th November 1932 a further petition was filed on behalf of the judgment-debtor purporting to be under S 47 and under O. 21, R. 40, Civil P. C.

In this petition mention was made of the fact that the properties of the judgment-debtor worth a lac of rupees were mortgaged to the decree-holders for a sum of Rs. 7,500 and that the decree-holders had instituted a suit for the said amount on the basis of the said mortgage and that the said suit was pending. Reference was also made in this petition to the insolvency proceedings and to certain other facts which need not be specifically referred to. This petition was disposed of by the learned Subordinate Judge by an order passed on the same date in which he said that

"the judgment-debtor files a petition under S. 47 of the Code and under O. 21, R. 40 of the Code for stay of issue of warrant of arrest on the ground mentioned in the petition. The warrant arrest cannot be stayed. The application is rejected."

So far then we have the fact that the objection which the judgment-debtor has taken to the issue of warrant of arrest against him, an objection based on the ground that his properties were the subject-matter of a mortgage suit in which the plaintiffs were decree-holders, that those properties were valued at a lac of rupees and that the mortgage debt amounted to only Rs. 7,500 and that on account of this fact he was not in a position to pay off the decretal amount, is an objection which had not received any consideration from the learned Subordinate Judge. We may state here that subsequent to the orders which are complained of in the present appeal a mortgage decree has been obtained by the decree-holders in the said suit on 16th February 1933. It may be stated here that there was afterwards a proceeding in the nature of review under O. 47, R. 1 of the Code at the instance of the judgjudgment-debtor in which he had complained that his objection had not been properly considered and upon that evidence being taken on behalf of the parties a further order was made disallowing the review and refusing to withdraw the warrant of arrest.

On behalf of the judgment-debtor who is the appellant in this appeal, it has been contended that upon the facts and circumstances of the case which were recited in the petition of objection filed before the Court on behalf of the judgment-debtor a sufficient case was made out why the decree-holders should not have been allowed to proceed against the person of the judgment debtor but

should have been directed to take other steps which under the law they were competent to take in execution in order to realise the decree which they had obtained as against the judgment-debtor. It has been further stated on behalf of the appellant that the decree-holders themselves, in their evidence in the mortgage suit, had stated that the value of the mortgaged properties would be Rs. 75,000 or so and that the statement which they had subsequently made, to the effect that their value would be only Rs. 30,000, should not be accepted as correct.

On behalf of the decree-holders the position taken up in the first place is that it is entirely at the option of the decree-holders to select the means which they should adopt for the purpose of executing their decree and that it is not open to the Court in any case to refuse the decree-holder permission to proceed against the person of the judgment-debtor if the decree be such as would entitle him under the law to adopt that course. In support of this position, reliance has been placed on the decision of the Lahore High Court in 1926 Lah. 110 (1). In that case the learned Judges held that

"the law confers upon the decree-holder the right to decide whether he should execute the decree for the payment of money by the arrest of the judgment-debtor or by the attachment and sale of the property, or by both, and that while the Court has discretion (which should be exercised in a judicial manner) to refuse execution against the person and property simultaneously, it has not authority to refuse execution against the person of the judgment-debtor on the ground that the decree-holder must in the first instance proceed against the property of the judgment-debtor."

This decision has been placed before us as supporting the proposition that it is not open to the Court in any circumstances to refuse the application of a person who holds a decree for money to proceed against the person of the judgment-debtor. We are of opinion that if that is what was intended to be laid down in that decision, the decision must be taken as having taken too narrow a view of the law. It is quite true that in S. 51 of the Code the remedies open to a judgment-creditor are detailed in the five clauses (a) to (e) to that section and it is also true that where the holder of a decree for money comes before the Court and wants process against the person of a judgment-debtor for his arrest, and if there are no special circumstances present, it is not open to the Court to say that the decree-holder must proceed against the properties of the judgment-debtor before applying for warrant of arrest against him. To that extent we are entirely in accord with what the learned Judges of the Lahore High Court have said in the case to which we have just referred. But we are clearly of opinion that there may be circumstances present in a case which would not only justify a refusal to allow the decree-holder to have process for the arrest and detention of the judgment-debtor, but, we are prepared to go further and say that there may be circumstances which would demand such a refusal. It is not necessary for us, nor indeed is it possible, to lay down what exactly those circumstances may be, but we are clearly of opinion that in a case in which it is established that by reason of the fact that properties are under attachment at the instance of a decree-holder or that properties form the subject-matter of a decree for mortgage at the instance of a decree-holder, the consequence of which is that although there may be a large amount of surplus left if the properties are put up to sale in execution of the decree obtained on the mortgage, the judgment-debtor is precluded from raising money on those properties in order to pay off the decree by reason of the action of the decree-holder, a refusal of such a prayer may be justifiable. Whether in this particular case those circumstances are present or not is a matter which has not been seriously taken into consideration by the learned Subordinate Judge at any stage of the proceedings. From the orders to which we have referred it is perfectly clear that the learned Judge never applied his mind to this particular objection which was taken by the judgment-debtor.

We are therefore of opinion that the orders which from the subject-matter of this appeal should be set aside and that the case should be sent back to the Court of the learned Subordinate Judge in order that he may issue notice upon the judgment-debtor to appear before him to show cause why warrant of arrest should not issue against him, and on dealing with such objections as the

1. Hargobind Kishan Chand v. Hakim Singh, 1926 Lah 110=93 I C 54=6 Lah 548.

judgment-debtor may prefer to the issuing of a warrant and specially to the objection to which we have just referred he will pass the necessary orders. The result is that the appeal is allowed and the case is sent back to the Court of the Subordinate Judge to be dealt with in accordance with the observations made above. There will be no order for costs in this appeal.

The orders complained of in the appeal having been set aside, it is not necessary to deal with the application which relates to subsequent orders passed by the Subordinate Judge. Let the papers filed along with the application be returned to the learned advocate for the appellant.

K.S. *Appeal allowed.*

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MUKERJI, AG. C. J. AND S. K. GHOSE, J.

Kaharjannessa and *others*—Appellants.

v.

Saradindu Narayan Roy and *others*—Respondents.

Appeal No. 370 of 1933, Decided on 19th July 1934, against appellate order of Sub-Judge, Dinajpur, D/- 26th April 1933.

Civil P. C. (1908), S. 47—Legal representative of judgment-debtor can raise objection that decree was passed at a time when judgment-debtor was dead—Executing Court can go into such question—Execution — Decree binding.

The heirs and legal representatives of a deceased judgment-debtor are entitled, when they are sought to be brought on record, to point out to the executing Court that the decree as it stood, is not executable as against them on the ground that the decree was passed against a dead person by the fact that at the time when the decree was passed, the judgment-debtor was dead; and the executing Court is fully competent to enquire into such a question : 1932 *Cal* 380, *Dist.*

[P 131 C 1]

Dinesh Chandra Roy—for Appellants.

Asitaranjan Ghose—for Respondents.

Judgment. — Upon the findings arrived at by the Courts below the facts of this case, which cannot be disputed, seem to be the following that the decree-holders obtained a decree far rent in respect of a certain tenancy against a number of defendants amongst whom was one. namely, defendant 2. This defendant was dead, but the fact that he was dead was not brought to the notice of the Court, and on the other hand a false return was lodged through a peon alleging that there was proper service of summons on him. In such circumstances the decree was obtained on 26th November 1930. On 20th April 1932 the decree-holders put the decree into execution under the provisions of Ch. 14, Ben. Ten. Act, as a rent decree. They applied for substitution of the heirs of the said judgment-debtor 2 on 4th June 1932 and obtained from the Court an order substituting the appellants as his heirs and legal representatives. After the order was passed notice was issued on the appellants under O. 21, R. 22, Civil P. C. The appellant appeared after service of the said notice and eventually on 8th November 1932 filed an objection under S. 47 of the Code alleging that the decree had been passed against a dead man and therefore was a nullity so far as that person or his legal representatives were concerned.

The Court of first instance upheld the objection and ordered that the decree could only be executed as a money decree and against the other judgment-debtors and not against the present appellants. The Subordinate Judge on appeal has reversed the trial Court's decision and has held that the execution proceeding can go on under the provisions of Ch. 14, Ben. Ten. Act, because the executing Court is not competent to go behind the decree unless it appears on the face of the decree that there is something which makes it invalid. The learned Subordinate Judge has referred to the Full Bench .decision of this Court in 1925 Cal. 907 (1) and has taken the view that that decision has been modified by the decision in 1932 Cal. 380 (2) to this extent: that in all cases the Court will have to confine itself to the papers that are on the record and that it can in no case hold any investigation for the purpose of ascertaining whether there was jurisdiction in the Court to pass the decree. The observations contained in the last mentioned decision, in our opinion, must be taken along with the facts of that case which, it may be pointed out, was a case in which the territorial jurisdiction of the Court passing the decree was questioned.

1. Gora Chand Haldar v. Prafulla Kumar Roy, 1925 Cal 907=89 I C 685=53 Cal 166 (F B).
2. Amalabala Dasi v. Sarat Kumari Dasi, 1932 Cal 380=137 I C 375.

We are of opinion that the decree having been passed not against the appellants but agagainst a person whose heirs and legal representatives they are the appellants were perfectly entitled, when they were sought to be brought on the record, to point out to the executing Court that the decree as it stood was not executable as against them. The proposition that a decree passed against a dead person amounts to anullity is too well-settled to admit of any doubt in present day. The executing Court, in our judgment, was fully competent to inquire into the question which arose in the present case. The fact that the judgment-debtor 2 was dead before the decree was passed and the decree was obtained by concealing from the Court the fact that he was dead and getting a false return submitted by the peon cannot be challenged in this second appeal before us. We are of opinion therefore that this appeal ought to succeed. We accordingly set aside the order of the learned Subordinate Judge and restore that of the Court of first instance. The appellants are entitled to their costs in in this Court and in the Court of appeal below, the hearing fee of this appeal being assessed at two gold mohurs.

K.S. *Appeal allowed.*

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COSTELLO AND LORT-WILLIAMS, JJ.

Dhanabati Bibi—Appellant.

v.

Protapmull Agarwalla and *others*—Respondents.

Appeal No. 6 of 1934, Decided on 5th June 1934.

(a) Hindu Law — Mitakshara — Partition between husband and son—Wife is entitled to share though she herself cannot demand partition—On suit by son against husband for partition, wife gets right to claim her share and gets a beneficial interest in family property.

On partition between her husband and his son, the wife becomes entitled to a share in the joint property, equal to that of a son, and to hold and enjoy that share separately even from her husband, though she cannot herself demand a partition: 32 *Cal* 234 and 31 *Cal* 476, *Ref.* [P 134 C 1]

And where the son files a partition suit against husband and wife, the wife gets a right to claim her share and therefore has a beneficial interest in the property: *Case law referred.* [P 134 C 2]

(b) Hindu Law — Mitakshara—Institution of partition suit effects severance of status.

According to the Mitakshara School of law, 'partition' is a severance of joint status, and this is a matter of individual volition. All that is necessary is a difinite and unequivocal indication of his intention of a member of a joint family to separate himself from the family and enjoy his share in severalty. It is immaterial whether the other members consent. The intention to separate may be indicated either by explicit declaration or by conduct and the institution of a suit for partition is a sufficient indication. A decree may be necessary for working out the results of the severance and for allotting definite shares, but the status becomes separate by the assertion of a right to separate whether the suit proceeds to judgment or not. [P 134 C 1, 2]

(c) Hindu Law — Mitakshara—Partition—Mortgage by father and son—Partition suit by son against father, mother and other members—Consent decree in partition suit and mother allotted certain share in property—Suit by mortgagee against father and son before decree in partition suit but mother not made party—Decree on mortgage—Application by mortgagee to implead mother also as defendant in mortgage suit dismissed—Suit for declaration that mortgage decree is binding on her—Held it was not binding on her—Mortgage.

Father and son mortgaged the family property. Subsequently the son filed a suit for partition impleading the mother and other members. Before a decree was passed in the partition suit, the mortgagee sued to enforce the mortgage but the mother was not impleaded. By a consent decree in the partition suit, the mother was given a certain share in the property. A consent decree was passed in the mortgage suit also and seeing that the mother asserted her right in the property, the mortgagee applied to implead her as a defendant in the mortgage suit, but the application was dismissed whereupon the mortgagee sued for a declaration that the mortgage decree was binding on her also or in the alternative to pass a mortgage decree against her also.

Held: that as soon as the suit for partition was filed, there was a severance in status and as the mother was not a party to the mortgage suit, the decree was not binding on her. [P 134 C 2]

Paye and *N. C. Chatterjee*—for Appellant.

S. N. Banerjee, K. P. Khaitan and *C. L. Jhunjhunwalla*—for Respondents.

Lort-Williams, J.—This appeal raises some interesting and important points of Hindu Law. It concerns a joint Hindu family governed by the Mitakshara School of Law. Prior to 1927 the family consisted of Chunilal Johury, whose wife Dhanabati Bibi is the present appellant, and his son Motilal, whose wife Jasbati was a defendant in the suit, but has not appealed. Between 1927 and 1929 Chunilal and Motilal mortgaged the family property in order to raise money. In 1929 there was an addition to the family when Narendra Singh, Motilal's eldest son, was born. In 1930 Motilal filed a suit against Chunilal, Narendra and Dhanabati for partition.

In 1931 Basanta Singh was born to Motilal and he was added as a defendant in the partition suit. In 1931 the mortgagees instituted a suit against Chunilal, Motilal, Narendra and Basant Singh to enforce their mortgage. Dhanabati acted as guardian-ad-litem for the two infants, and in July 1931 a consent decree and an order for sale was made. In August 1931 a preliminary decree was passed by consent in the partition suit, and a declaration made that the plaintiff Motilal was entitled to one equal ninth part of the family property, Chunilal to three equal ninth parts, Dhanabati to three equal ninth parts and the infants Narendra and Basanta each to one equal ninth part. It was further ordered inter alia that the Commissioner should partition the property by metes and bounds and allot her share to Dhanabati to be held and enjoyed by her in severalty as a Hindu wife under the Mitakshara School of Hindu Law. But no further step has yet been taken in the suit. Soon after this Dhanabati began to assert that she had rights in the property adverse to the mortgagees and in May 1932 an order was made in the mortgage suit without prejudice to her alleged rights. In July 1932 Chunilal and Motilal were adjudged insolvents. In February 1933 the mortgagees applied inter alia to have Dhanabati and Jasbati added as parties in the mortgage suit; this they resisted, and that part of the application was dismissed with costs.

Thereupon the present suit was instituted in March 1933. In the plaint as originally filed, the plaintiffs simply set out the above facts and stated that they had no knowledge of the fact that Dhanabati was a party to the partition suit until after they had obtained their mortgage decree, and that they did not admit the validity of the alleged partition or that it concerned them as secured creditors. This was inaccurate because Dhanabati referred to the partition suit in an affidavit sworn in the mortgage suit in June 1931. Further, they said that they had been advised to institute the present suit in order to enable the female defendants to redeem the mortgages, if the Court was of opinion that the mortgage decree was not binding on them. They asked that the present suit be treated as supplementary to the mortgage suit, and for a declaration that the decree in that suit was binding on the defendants, and in the alternative for a mortgage decree.

As filed, the plaint does not appear to have disclosed any cause of action, but during the hearing it was by leave amended by adding a statement that the partition was made with the object of creating complications and of saving 1/3rd of the property by having the same allotted to Dhanabati. Further, the plaintiffs stated that Dhanabati and Jasbati were falsely asserting that the mortgages and the proceedings and decree in the mortgage suit were illegal and not binding on them, and that they were colluding with Chunilal and Motilal to defeat the plaintiffs' claims, and they asked in addition for a declaration that the mortgages and proceedings and decree were binding on all the defendants and in particular upon the defendants Dhanabati and Jasbati. In her written statement Dhanabati denied that the suit was maintainable, and that the Johuri defendants were members of a joint family after the date of the institution of the partition suit. Further she denied that the loans were for legal necessity, and asserted that the plaintiffs having already obtained a decree by consent on the alleged mortgages were precluded fron instituting the present suit or from obtaining any relief thereby.

Of the issues raised at the trial only the following need be considered: 1. Is the suit maintainable having regard to S. 42, Specific Relief Act? 2. Was there any joint family after the institution of the partition suit? 3. Had the plaintiff's knowledge that Dhanabati was a party to the partition suit?

The first issue is of minor importance. The learned Judge decided it in favour of the plaintiffs and made a declaration in the form claimed in the plaint. In my opinion such a declaration is not in accordance with the provisions of S. 42, Specfic Relief Act, which provides that any person entitled to any legal character or to any right as to any property, may institute a suit against any persons denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled. A declaration that the plaintiffs were entitled to sell the mortgaged property

free from any right of redemption would have been in accordance with the section, but not that the mortgages and proceedings and decree were binding upon the defendants; they had not been made parties to the mortgage suit, and as the learned Judge decided that the defendants had no interest in the property, such a declaration could hardly be justified. However it is only a matter of form, and this Court could make a decree in the proper form, if satisfied that the plaintiffs were entitled to it.

The learned Judge considered issues 2 and 3 together and decided, on the authority of the case of 9 W. R. 61 (1) and other cases such as 1918 Bom. 175 (2), which followed it, that though according to the Mitakshara-School of Law, the mother or grand-mother is entitled to a share when sons or grandsons divide the family estate, she cannot be recognized as the owner of such share until the division is actually made, that there is no authority for the suggestion that Dhanabati's position and status ar rights were altered by the mere fact of the institution of the partition suit, and that the authorities show that at the time when the mortgage suit was instituted she had no rights except a right to maintenance. Consequently, he held that the question whether or not the institution of the partition suit amounted to a severance affecting the status of the joint family was immaterial, because all persons who had any actual interest in the property were made parties to the mortgage suit, and Dhanabati was not a necessary party because she had no interest. The law upon this subject has been very ably and exhaustively discussed by counsel on both sides, and all the relevant cases have beed cited. These decisions cannot easily be reconciled, and on the view which I have formed, it would serve no useful purpose to discuss them seriatim: In my belief the discrepancies between them are due mainly to a failure to observe the distinctions and differences which exist between the Dayabhaga and Mitakshara Schools of law.

It will be enough to say that, in my opinion, the judgment of the late Dwarkanath Mitter, J., in 9 W. R. 61 (1) so far as he was of opinion that

> "division by metes and bounds was necessary to constitute partition under the Mitakshara and that under the Hindu law two things at least are necessary to constitute partition : the shares must be defined and there must be distinct and independent enjoyment of those shares,"

was contrary to the earlier view expressed in 8 W. R. 82 (3) and to the judgment of the Privy Council in 11 M. I. A. 75 (4) and was definitely overruled by the decision of the Privy Council in 30 Cal. 738 (5), and that the law upon this subject has been correctly, concisely and comprehensively stated by that learned Hindu lawyer, the late Sir Dinshaw Mulla in his "Principles of Hindu Law," Edn.7, Para. 322,at p. 390, and I cannot hope to improve upon the language of his statement.

It is founded upon the decisions in 11 M. I. A. 75 (4), 30 Cal. 231 (6), 1921 All. 337 (7) and 30 Cal. 738 (5) and especially upon the judgment of Lord Westbury in 11M.I.A.75 (4) and is as follows:

> "According to the true notion of an undivided Mitakshara family, no individual member of that family, whilst it remains undivided, can predicate of the joint property, that he, that particular member, has a certain definite share, one-third or one-fourth. Partition, according to that law, consists in a numerical division of the property, in other words, it consists in defining the shares of the coparceners in the joint property; an actual division of the property by metes aad bounds is not necessary. Once the shares are defined, whether by an agreement between the parties or otherwise, the partition is complete. After the shares are so defined, the parties may divide the property by metes and bounds, or they may continue to live together and enjoy the property in common as before. But whether they do the one or the other, it affects only the mode of enjoyment, but not the tenure of the property. The property ceases to be joint immediately the shares are defined, and thenceforth the parties hold the property as tenants-in-common."

The distinction between the Dayabhaga and Mitakshara Schools is stated in para. 347 and at p. 414 as follows :

> "According to the Dayabhaga law, on the other hand, each coparcener has, even whilst the family remains undivided, a certain definite share in the joint property, of which he is the absolute owner. The property is held in defined

1. Sheo Dyal v. Judoonath, (1868) 9 W R 61
2. Raoji Bhikali v. Anaunt Lakshman, 1918 Bom 175=46 I C 750=42 Bom 535.
3. Vato Koer v. Rowshum Singh, (1867) 8 W R 82.
4. Appovier v. Rama Subba Aiyan, (1866) 11 M I A 75=8 W R 1=2 Sar 218 (PC).
5. Balkishen Das v. Ram Narain Sahu, (1903) 30 Cal 738=30 I A 139=8 Sar 489 (PC).
6. Ram Pershad v. Lakhpati, (1903) 30 Cal 231=30 I A 1=8 Sar 380 (PC).
7. Sheodan v. Balkaran, 1921 All 337=59 I C 116 =43 All 193.

shares, though the possession is the joint possession of the whole family. Partition, according to that law, consists in separating the shares of the coparceners, and assigning to them specific portions of the property." As under the Mitakshara law, so under the Dayabhaga law, the true test of a partition lies in the intention of the parties to separate (S. 326). In the case of a joint Mitakshara family that intention may be manifested by a mere agreement between the coparceners to hold and enjoy the property in defined shares as separate owners without an actual division of the property by metes and bounds (S. 326). In the case however of a joint Dayabhaga family, such an agreement as aforesaid is not a sufficient manifestation of the intention to separate ; for according to the Dayabhaga law the joint property is held, even while the family remains joint, in defined and specific shares. To constitute a partition according to the Dayabhaga law, there must be something more than such an agreement. There must be a separation of the shares and the assignment to each coparcener of specific portions of the joint property."

In the present case, the question whether there has been a partition or not is of vital importance, because on partition between her husband and his son, the wife became entitled to a share in the joint property, equal to that of a son, and to hold and enjoy that share separately even from her husband, though she cannot herself demand a partition, 32 Cal. 234 (8) and 31 Cal. 476 (9).

That the dictum of Dwarkanath Mitter, J., in 9 W R 61 (1) has been overruled was recognized by Mookerjee, J., in 5 C L J 417 (10), and that this dictum and all decisions founded upon it are no longer good law is accepted unreservedly as the correct view in Gour's Hindu Code, Edn. 2, para. 1474, at p. 664 and in Sastris' Hindu Law, Edn. 7 at p. 523. According to the Mitakshara School of Law, "partition" is a severance of joint status, and thus is a matter of individual volition. All that is necessary is definite and unequivocal indication of his intention by a member of a joint family to separate himself from the family and enjoy his share in severalty. It is immaterial whether the other members consent. The intention to separate may be indicated either by explicit declaration or by conduct, and the institution of a suit for partition is a sufficient indication, 1917 P. C. 39 (11), 1927 Mad. 801 (12). A decree may be necessary for working out the results of the severance and for allotting definite shares, but the status becomes separate by the assertion of a right to separate whether the suit proceeds to judgment or not: 1916 P. C. 104 (13). The result is that Dhanabati, by reason of the institution of the partition suit, had a right to claim her share 1920 Lah 224 (14), and therefore had a beneficial interest in the property mortgaged and a right of redemption, (S. 9, T. P. Act, Ghose on "Mortgage" Edn. 5, Vol. 1, p. 254) and was a necessary party in the mortgage suit, (O. 34, R. 1, Civil P. C.). Still more so was this the position after the shares had been defined in the preliminary decree for partition. Up to now she has not had any opportunity of contesting either the validity of the mortgages or the terms of compromise, yet the plaintiff claims a declaration to the effect that she has lost her equity of redemption and her right to an account though no suit has been brought against her. In my opinion, the plaintiffs were not entitled to the declarations which they claimed and which were made in their favour. Consequently, the decree must be set aside, and this appeal must be allowed with costs both here and below.

Costello, J.—I agree.

K.S. *Appeal allowed.*

8 Dulav Koeri v. Dwarkanath, (1905), 32 Cal 234=1 C L J 283=9 C W N 270.
9. Purna Bibee v. Radha Kissen, (1904) 31 Cal 476.
10 Bata Krishna v. Gopal Krishna, (1907) 5 C L J 417.
11. Kawal Nain v. Budh Singh, 1917 P C 39=40 I C 286=44 I A 159=39 All 496 (P C).
12. Sri Ranga Thathachariar v. Srinivasa Thathachariar, 1927 Mad 801=104 I C 472=50 Mad 866.
13. Girja Bai v. Sadashiv, 1916 P C 104=37 I C 321=43 I A 151=43 Cal 1031=12 N L R 113 (P C).
14. Ganesh Devi v. Darshan Singh, 1920 Lah 224 =56 I C 478.

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MITTER AND PATTERSON, JJ.

Mahammad Ali Fakir—Defendant—Appellant.

v.

Karam Ali Taluqdar and *others*—Respondents.

Appeal No. 383 of 1932, Decided on 27th June 1934, from appellate order of Sub-Judge, Bogra, D/- 30th May 1932.

(a) Civil P. C. (1908), O. 41, R. 23 and O. 43, R. 1—Appellate Court remanding suit to lower Court and asking it to determine

suit finally—Appeal to High Court is permissible.

Although the provisions of O. 41, R. 23, might not strictly apply where the Court of appeal has remanded the suit to the first Court which has been asked to determine finally the suit by the order of remand, the appeal to the High Court is permissible under the provisions of O. 43. R. 1: 1920 *Cal* 569, 1920 Cal 124; 1925 *Cal* 1258 *Rel on*; 1927 *Cal* 642, *not Foll.* [P 136 C 1]

(b) Landlord and Tenant—Rents — Lump rental tenancy—Deliberate and forcible expulsion of tenant by landlord from part of demised premises—Tenant is entitled to entire suspension of rent till he is restored to possession.

Where the rent is a lump rental and the case is one of deliberate and forcible expulsion of tenant by the landlord from a part of the demised premises, no question of equity to an apportionment can possibly arise, and the tenant is entitled to entire suspension of rent till he is restored to possession of the dispossessed portion: *Case law reviewed.* [P 137 C 1]

Radhabenode Pal, Shamapada Mazumdar and *Holiram Deka*—for Appellant.

Syed Farhat Ali—for Respondents.

Mitter, J.—This is an appeal by the defendant against the decision of the Subordinate Judge of Bogra dated 30th May 1932 reversing the decision of the Munsiff of Bogra dated 31st March 1931. The suit in which this appeal has arisen is a suit brought by the plaintiffs now respondents for recovery of arrears of rent for the years 1333 to 1336 for two jamas one of Rs. 39-14-2 and the other of Rs. 3-12-0. The defence to the suit was that the landlord had dispossessed the defendant of a portion of the holding and that the rent should be suspended. The tenancy being one indivisible with a lump rental of Rs. 45 both the Courts below have come to a concurrent conclusion that the land now in possession of one Jahiruddin was at one time a part of the defendant's tenancy and further that it was abundantly clear from the evidence that the dispossession was by the landlord and that the dispossession was a forcible dispossession seeing that there was a regular fight at the time of the dispossession and the gomastha of the landlord was wounded. The Subordinate Judge says that he agrees with the learned Munsif that the defendant was dispossessed in the year 1324 B. S. of a portion of the tenancy. The tenancy was originally admittedly of Rs. 45. A portion of the land was found to be a Diara land and for this portion a separate khatian was made and the rent of Rs. 3-12-0 was settled for this khatian under S. 104, Ben. Ten. Act. In respect of the other land there has been one khatian with a rent of Rs. 39-14-2. Both the Courts proceeded on the footing that the rent is a lump rent and not at so much per bigha. The Munsif gave effect to the defence of the defendant and dismissed the plaintiff's suit. The Subordinate Judge on appeal was of opinion that no case had been made for suspension of the entire rent but that there should be a proportionate abatement; and for that purpose he remanded the suit to the trial Court for re-admitting it under its original number and for determining what rent should be abated for the land from which the defendant had been dispossessed and then passing a decree in accordance with the observations made in the judgment.

Against this order of remand the present appeal has been brought by the tenant defendant. A preliminary objection has been taken to the hearing of this appeal on the ground that the order could not have been passed properly under the provisions of O. 41, R. 23, Civil P. C., as the trial Court did not decide the suit on a preliminary point. Consequently no appeal from the order of remand lies to this Court. One decision has been cited which lays down that cases of this kind must be treated as cases in which a remand is made under the provisions of O. 41, R. 25, Civil P. C., as if the appeal was being kept in the file of an appellate Court and the appellate Court was merely setting aside the findings of the first Court on a particular issue which had been sent down. There is no doubt a decision of Page and Graham, JJ., to that effect in 1927 Cal. 642 (1). We have examined that decision and we find that on a review of all other authorities, viz., 1920 Cal. 569 (2), 1920 Cal. 124 (3) and 1925 Cal. 1258 (4) that that decision is one of the two cases which takes a view different from the view taken consistently by the several Benches of this Court which have held that although the provisions

1. Jagat Hari Saha v. Medun Bardhan, 1927 Cal 642=104 I C 422.
2. Basumati v. Taritbasini, 1920 Cal 569=57 I C. 929.
3. Prasanna v. Baidyanath, 1920 Cal 124=56 I C 516.
4. Kayem v. Bahadur Khan, 1925 Cal 1258=89 I C 744.

of O. 41, R. 23 might not strictly apply where the Court of appeal has remanded the suit to the first Court which has been asked to determine finally the suit by the order of remand, an appeal to this Court is permissible under the provisions of O. 43 R. 1, Civil P. C. We therefore do not think that there is any substance in the preliminary objection which must be overruled.

The real question in controversy before us is as to whether, when the rental is a lump rental as in the present case and the tenants have been dispossessed and forcibly dispossessed from a part of the demised premises—in this case about one-tenth of the demised area—there should be a total suspension of rent or a proportionate abatement. The appellant contends upon the authorities that there should be a total suspension. On the contrary the learned advocate for the respondents, supporting the judgment of the Subordinate Judge contend that there should be a proportionate abatement and not total suspension. The question as to whether in the case of a lump rental where there has been dispossession from a part of the demised premises there should be a total suspension of rent did come before their Lordships of the Judicial Committee of the Privy Council in 1925 P. C. 97 (5). Their Lordships observed thus :

"The doctrine of suspension of payment of rent, where the tenant has not been put in possession of part of the subject leased, has been applied where the rent was a lump rent for the whole land leased treated as an indivisible subject. It has no application to a case when the stipulated rent is so much per acre or bigha."

Reliance has been placed on behalf of the appellant in support of the contention that there should be a total suspension of rent not only on this deeision, but on several decisions of this Court which has interpreted the decision of their Lordships of the Judicial Committee to mean that in the case of lump rental where there is a dispossession of a part of the demised premises there should be a total suspension of rent until the tenant is restored to possession. To some of these decisions I was a party. Reference may be made to the case of 1929 Cal. 516 (6) which is a decision of mine sitting singly. In that decision the view contended for by the appellant was taken. There was an appeal in this case under S. 15, Letters Patent, from my decision and that appeal was dismissed by C. C. Ghose and Mallik, JJ., summarily. The next decision is that of Jack, J., and I was also a party to that decision. This is the decision in 1929 Cal. 568 (7) where cases both of the English and Indian Courts from the very earliest times were reviewed and it was pointed out that all the earlier cases with the exception of a single case to which reference has been made in the judgment of the appellate Court in the present case took the view that in the case of a tenancy with lump rental where there has been dispossession by a landlord of tenant from a part of a demised premises there should not be a proportionate abatement of rent but the entire rent should be suspended. The reasons for this view are given with greatfulness in my decision in 1929 Cal. 568 (7) and it is not necessary to reproduce these reasons here again. It is to be noticed that in 1927 Cal 773 (8) B. B. Ghose and Roy, JJ., expressed the opinion that the observations of their Lordships of the Judicial Committee in 1925 P. C. 97 (5) were no authority for the proposition that there should be any apportionment in every case of dispossession by the landlord of the tenant from a part of the demised premises where the rent was a lump rental. It was further pointed out in 1229 Cal. 568 (7) that it is difficult to read the decision of the Judicial Committee in the same way as the learned Judges in 1927 Cal. 737 (8) seem to have read it. The true rule is that which was laid down by the Sir George Claus Rankin, C. J., in 1928 Cal. 479 (9) referred to in 1929 Cal. 568 (7)

"that the doctrine of suspension of rent depends solely on this that the rent due is an entire sum in respect of the land demised. If therefore the tenant is not given occupation of the whole of the land demised, the landlord has no right to the entire rent, and unless he has a right or some equity to an apportionment, he can recover nothing on the contract. But the whole basis of the doctrine is that the rent due is one entire sum."

That there is no difference between the English and the Indian law on the

5. Katyayani Debi v. Udoy Kumar Das, 1925 P C 97=88 I C 110=52 I A 160=52 Cal 417 (P C).
6. Mahim Chandra v. Karamali, 1929 Cal 516=119 I C 132.
7. Abhoya Charan v. Hem Chandra, 1929 Cal 568=123 I C 653.
8. Susil Kumar v. Rajani Kanta, 1927 Cal 737=104 I C 775.
9. Sajjad Ahmad v. Trailakhya Nath, 1928 Cal 479=116 I C 375=55 Cal 464.

subject was pointed out in the earlier decisions of this Court to which reference has been made in my decision in 1929 Cal. 568 (7). B. B. Ghose, J., took a different view. But the observations of the learned Judge in that case were of the nature of obiter dictum. Apparently the view taken in 1929 Cal. 568 (7) is the view contended by the appellant. The decision in 1929 Cal. 568 (7) has been followed by Suhrawardy and Graham, JJ., in 1932 Cal. 385 (10). The learned Judges agreeing with the view taken in 1929 Cal. 568 (7) already referred to and dissenting from the view taken by B. B. Ghose, J., in 1927 Cal. 737 (8) observed

"that it is not profitable to discuss the question whether in some cases total suspension should not be allowed and effort should be made to apportion rent, for the consensus of authorities commencing almost from 12 W. R. 109 (11) is that where the lessor enters forcibly into part of the land, the lessee is discharged from payment of the whole rent till he is restored to possession of the whole, because it is the duty of the lessor to protect and defend the lessee and not to disturb him in his possession. It may be that where the lessor commits an honest mistake about the extent of the property leased, including in it some portion over which he had no disposing power, or was the innocent cause ofthe dispossession of the lease by a third party from a portion of the lease-hold or otherwise acts bona fide, he is entitled to some relief."

The case before us being a case of deliberate and forcible expulsion of a tenant from a part of the demised premises no question of equity to an apportionment can possibly arise, and the tenant is entitled to entire suspension of rent till he is restored to possession of the dispossessed portion.

The Subordinate Judge however inclines to the view that a later decision of their Lordships of the Judicial Committee of the Privy Council in 1932 P. C. 28 (12) has modified considerably the doctrine of total suspension of rent in case of dispossession by landlord from a part of the tenancy with a lump rent. It becomes necessary therefore to examine closely and critically the decision of their Lordships of the Judicial Committee of the Privy Council in this recent case. The facts, when examined, show that it was not a case of dispossession of the tenant by the landlord at all but it was a case of landlord not being able to put the tenant in possession of a part of the tenancy by reason of title paramount in a third person. Briefly stated the position was this: There was a tenancy of one Homer Ali under the appellant Jogesh Chandra Roy.

In 1910 the appellant before their Lordships instituted a suit for possession of Jote No. 83 against Hamer Ali's widow and the respondent before their Lordships Emdad Ali obtained a decree in his favour in 1912. He executed the decree in 1913. In 1916 the appellant brought a similar suit for possession of Jote No. 98 against not only the widow and the respondent before their Lordships, Emdad, but also against Hamer Ali's four daughters as well. In October 1917, this suit was compromised as between the appellant before their Lordships and Hamer Ali's widow and the respondent, the daughters being first excluded from the category of defendants on the petition of the appellant before their Lordships, Jogesh Chandra Roy; a solenama was then executed by the appellant, the widow and the respondent under which out of the 20 drones odd of which the holding consisted, the widow and the respondent Emdad were to hold 11 drones odd under the appellant at a rent thereby fixed and the appellant Jogesh Chandra Roy was to get Khas possession of the balance of 8 drones odd. The respondent Emdad further agreed to pay a sum of Rs. 1,400 in respect of the appellant's costs and mesne profits by instalments and executed a mortgage therefor. It was a part of the settlement of that suit, which related to Suit No. 98, that the respondent Emdad should execute the kabuliyat relative to Jote No. 83, dated 11th October 1917, which formed the basis of the suit in which the appeal before their Lordships had arisen. By that kabuliyat the respondent Emdad took a bekaemi or non-permanent settlement as a yearly tenant of 10 drones odd land out of 14 drones odd at a certain yearly rental. In January 1920, the respondent's sisters, that is the daughters of Hamer Ali brought a suit against Jogesh the landlord and Emdad for a declaration of their right and confirmation of their possession to the extent of their share as co-heirs of Hamer Ali in Jote

10. Krishna Chandra v. Surendra Nath, 1932 Cal 385=137 I C 696.
11. Gopanund Jha v. Govinda Persad, (1869) 12 W R 109.
12. Jogesh Chandra v. Emdad Meah, 1932 P C 28=136 I C 398=59 I A 29=59 Cal 1012.

No. 83. That suit was ultimatelp decreed and it was held that the sisters' share which amounted to 9 as 4 gds. in Jote No. 83 was not affected by the previous decrees and sales.

The result was that Jogesh the landlord had failed to put the respondent Emdad in possession of the entire subject which was the land covered by the kabuliyat of 11th October 1917. The Courts in India dismissed the suit of Jogesh Chandra Roy, but before their Lordships of the Judicial Committe a plea was taken for the first time that the suit should not have been dismissed in its entirety, but a decree for a proportionately abated rent should have been given it being taken into account that the respondent Emdad's sisters are entitled to 9 as. 4 p. share under the decree of 1928. This is not a case like the case before their Lordships of the Judicial Committee as the latter case was not a case of forcible dispossession by the landlord from a portion of the tenancy in which the tenant had already been put into possession. This case before their Lordships was a case where the landlord could not put the lessee in possession of a portion of the demised premises because the possession was not available to him by reason of the title to a certain share of the tenancy being not in the plaintiff landlord, but in some of the heirs of the original tenant, whose rights had not been extinguished by the sale by the landlord. The case we are considering is a very different case. The title of the landlord and his power to give possession to the tenant in the present case was undoubted. After granting a lease to the defendant in the present case the plaintiff put the defendant in possession and included a portion of the tenancy in a subsequent lease to one Jahiruddin and on the strength of that subsequent lease and with the assistance of the landlord Jahiruddin dispossessed the present defendant from a portion of the demised premises.

The case before the Privy Council was a case when the landlord by reason of a paramount title to a portion of the demised premises in the original tenancy could not get possession of a certain share of the said premises and could not put the tenant with whom he had leased the Jote No. 83 in 11th October 1917, in possession of that share. This decision in our view does not affect the principle laid down by their Lordships of the Judicial Committee in 1925 P. C. 97 (5) referred to above. A careful examination of the facts to which we have referred shows that the case of 1932 P. C. 28 (12) relates to a very different state of facts and circumstances which cannot affect the previous decision in Katyayani's case. And we are strengthened in our conclusion by the following further examination of the case. In support of the contention that the landlord Jogesh Chandra Roy should have been given a decree for proportionate part of rent Mr. Pringle who was appearing for the landlord appellant before the Privy Council referred to 21 Cal. 1005 (13) which was a case of the landlord not putting the lessee in possession by reason of eviction by title paramount and Mr. Pringle's contention succeeded. In 21 Cal. 1005 (13) their Lordships make the following observations which will make it clear that they were not dealing with a case of dispossession by the landlord after the tenant was put into possession, but was dealing with a case where the tenant could not obtain possession by reason of the landlord being evicted by title paramount. Their Lordships say: As Imambundi did not prove that she entered into possession under the leases and was then dispossessed there was not an eviction in the proper sense of the word. But when Imambundi was alleged to bring a suit to obtain possession and succeeded in obtaining a part of what was granted in mokarari and was precluded by the result of the suit from having possession of a substantial and a longer part she was in a similar position to having been evicted from that part and there is same equity to an apportionment as in the case of eviction. Here the eviction was not by landlord, but by title paramount. In such a case there must be proportionate abatement. For as Foa points out in his Law of Landlord and Tenant, Edn. 6, p. 195, where the eviction by title paramount is only from a part of the demised premises the effect (unlike that in the case of eviction by lessor himself) is not to suspend the whole rent, but to render the tenant liable to have it apportioned. 1932 P. C. 28 (12) cannot govern the

13. Imambundi v. Kamaleswar, (1894) 21 Cal 1005=21 I A 118=6 Sar 446 (P C).

case of forcible dispossession by the landlord where the tenant having been put into possession has been forcibly dispossessed from a part of demised premises after this. This Court almost unanimously with the single exception of the decision of B. B. Ghose, J., held in favour of the contention raised by the appellant.

The result therefore is that this appeal must be allowed. The judgment and decree of the Subordinate Judge must be set aside and those of the Munsif restored with costs in all Courts. It remains to notice the case which has been cited on behalf of the respondents. This is a decision of my learned brother Mukerji, J., in 1933 Cal. 566 (14) and requires serious consideration. The learned Judge observed this :

" My view is that the mere fact that the tenancy is governed by one lease and so in law may be regarded as one tenure is not enough ; what has to be seen is whether, in fact, the parcels are such that deprivation from one necessarily interferes with the due enjoyment of the others."

Previous to this remark the learned Judge referred to the decision of Page, J., in 1929 Cal. 395 (15) which took the view that there should be total suspension in case of dispossession from part. Mookerji, J., refers to the following observation of Page, J. :

" Was it one indivisible tenancy and was there interference by the landlord with the due enjoyment of the previous or any part of them ?"

I do not think however in order to decide the present case one need consider whether the tenancy consists of separate mouzas, that is properties rented separately or whether the tenancy in effect in law is indivisible or divisible. Towards the end of the judgment Mukherji, J., refers with approval to the following observation of Page, J., as he then was :

" It is not possible for the landlords to assert that any portion of the rent is payable in respect of any portion of the premises for in law every pice of rent is payable out of every portion of the premises demised."

Applying this principle to the present case there is no question of the tenancy consisting of several parcels of land separately assessed to rent and consequently total suspension must be the result. We are therefore of opinion that this decision does not help the respondent. On the other hand the remark just quoted goes against him.

Patterson, J.—I agree.

K.S. *Appeal allowed.*

14. Sakhisona Dasi v. Pran Krishna Das, 1933 Cal 566=146 I C 398.
15. Dhirendra Nath Roy v. Bhabatarini Debi. 1929 Cal 395=119 I C 297,

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A. I. R. 1935 Calcutta 139

NASIM ALI AND KHUNDKAR, JJ.

Jagat Chandra De—Defendant — Appellant.

v.

Abdul Rashid and *others* — Plaintiff and Defendants—Respondents.

Appeal No. 3206 of 1931, Decided on 12th July 1934, from appellate decree of Addl. Sub-Judge, 1st Court, Chittagong, D/- 11th August 1931.

(a) Mortgage—Decree obtained by subsequent mortgagee and property purchased by third party in execution of decree—Subsequent purchase by first mortgagee in execution of decree obtained by him in suit filed subsequent to second mortgagee's suit—Only mortgagor made party by first mortgagee—First mortgagee is not entitled to decree for possession on declaration of title as against third party in possession in suit filed against mortgagor and such third party nor can he get decree for possession subject to third party's right to redeem — He can fall back on his own mortgage and bring appropriate suit—This suit cannot be treated as suit to enforce his mortgage if 12 years have already lapsed from date when mortgage money became due.

Where a property is mortgaged to two persons and the second mortgagee brings a suit and obtains a decree in execution of it and a third party who purchases the property is put into possession and the prior mortgagee in a suit on his own mortgage instituted suit subsequent to the suit by the second mortgagee in which only the mortgagor is impleaded, obtains a decree and purchases the property himself and files a suit against the mortgagor and third party for recovery of possession of property, he cannot recover possession on declaration of title nor can he get a decree for possession subject to the third party's right to redeem.

The prior mortgagee on the basis of his purchase cannot claim the equity of redemption as against the third party in whom the rights of the second mortgagee as well as the rights of the mortgagor are vested. He can no doubt fall back upon the mortgage but he cannot recover possession on the strength of that mortgage, as that mortgage being a simple mortgage does not give him any right to possession. Whatever right the prior mortgagee may have under the first mortgage can no doubt be enforced by him by a proper proceedings taken for the purpose. This suit cannot however be treated as a suit to enforce the first mortgage on which the plaintiff in any view of the case is entitled to fall back, if 12 years from the date when the mortgage money payable on the first

mortgage became due, and elapsed before the institution of the suit and the plaintiff cannot claim any deduction of time during which the alleged fusion of his rights as mortgagee and purchaser of the mortgagor's rights by virtue of his auction-purchaser at the mortgage sale subsisted. [P 141 C 1, 2]

(b) Mortgage—Redemption — Redemption is legal right and not liability.

Redemption is a legal right which a person entitled to redeem may seek to enforce. It is not a liability which he may be compelled to discharge : 9 *I C* 513, *Rel on.* [P 141 C 1]

Chandra Sekhar Sen — for Appellant.
Narendra Kumar Das — for Respondents.

Judgment.—The facts which are relevant for the purposes of the present appeal and which are in dispute now are as follows: One Dasarath De, who is defendant 6 in the present suit, mortgaged the disputed land to the father of the plaintiff and the proforma defendants 7 and 8 and the husband of pro forma defendant 9 on 20th Sraban 1274 M. E. corresponding to 4th August 1912. The plaintiff and the pro forma defendants brought a suit on their mortgage on 9th July 1920. Usual mortgage decree for sale was passed on 8th September 1923 and the property was purchased by the plaintiff on 8th May 1924. The same mortgagor, that is defendant 6, mortgaged these very lands to one Lakshi Charan Saha on 21st Chaitra 1274 corresponding to 5th April 1913. Lakshi Charan Saha's son Prasanna Kumar Saha sued on his father's mortgage on 2nd June 1919 and obtained a decree on 11th September 1919 in execution of this mortgage decree. Defendant 2 purchased the property in execution of the mortgage decree on 2nd February 1922, and obtained possession of the lands through Court. The plaintiff after his purchase on 8th May 1924 could not get actual possession. On 13th December 1927 he raised the present suit for recovery of khas possession of the lands which he purchased on declaration of his auction-purchased right in the lands. The defence of defendant 2 was that the plaintiff was not entitled to any relief in the suit, in view of the fact that neither he nor the second mortgagee was impleaded as parties in the mortgage suit instituted by the plaintiff in the year 1920. The trial Court accepted the defence of defendant 2 and dismissed the suit. On appeal the learned Judge has reversed the decision of the trial Court and has passed the following order

"The case is remanded to the Court below for enabling defendant 2 to redeem the prior mortgage of the plaintiff's father in accordance with the observations as above made. If defendant 2 exercise his right of redemption in pursuance of the Court's order, the suit will fail, but if he does not do so, the suit will succeed and the plaintiff will be given possession of the suit lands by ousting him (defendant 2) and the other defendants if in possession".

Hence the present appeal by defendant 2. The points for determination in this appeal therefore are (1) whether the plaintiff can claim possession of the property as against defendant 2, and (2) whether defendant 2 is bound to redeem the plaintiff in view of the events that have happened in this case. The principle is now well established that

"persons who have taken transfers of property subject to a mortgage cannot be bound by proceedings in a subsequent suit between the prior mortgagee and the mortgagor to which they were never made parties : See 18 Cal 164 (1)".

Defendant 2 is therefore not bound by the proceedings in the suit instituted by the plaintiff and his right cannot in any way be affected by the sale which was held in execution of the decree passed in that suit. Now what are the rights of defendant 2 on the basis of his purchase at the auction-sale held before the plaintiff purchased this property. It cannot be disputed now that a purchaser at a sale in execution of a mortgage decree gets the mortgagee's rights as well as the rights of the mortgagor and after the mortgagor's interest has once passed away to a purchaser, that interest cannot again be sold effectively: See 25 Cal 179 (2). The rights of the mortgagor vested in defendant 2 before the plaintiff's purchase and consequently he became entitled to possession before the plaintiff purchased at the auction-sale in execution of the decree obtained by him on the basis of his first mortgage. Consequently, the plaintiff cannot claim the mortgagor's right on the basis of his purchase. Again the purchase by the plaintiff cannot affect defendant 2's purchase of the mortgagor's right, that is, the equity of redemption, inasmuch as the suit by the first mortgagee was started after the second mort-

1. Umesh Chandra Sircar v. Mt. Zahoor Fatima (1890) 18 Cal 164 = 17 I A 201 (PC).
2. Moti Lal v. Karrab-ul-din, (1897) 25 Cal 179 = 24 I A 170=7 Sar 222 (PC).

gagee had obtained his decree. In other words the plaintiff is bound by the doctrine of lis pendens and cannot claim the mortgagor's rights.

The position therefore is that the plaintiff on the basis of his purchase cannot claim the equity of redemption as against defendant 2 in whom the rights of the second mortgagee as well as the rights of the mortgagor are now vested. He can no doubt fall back upon the first mortgage but he cannot recover possession on the strength of that mortgage, as that mortgage being a simple mortgage does not give him any right to possession. Whatever right the plaintiff may have under the first mortgage can no doubt be enforced by him by a proper proceeding taken for the purpose. This view appears to us to be supported by the principle underlying the decision of the Judicial Committee in the case of 1929 P C 288 (3). The plaintiff's claim for khas possession therefore must be dismissed. As this is the only prayer in the plaint, the plaintiffs case is liable to be dismissed on this finding alone.

It is however contended by the learned advocate for the respondents that as the plaintiff had no notice of the second mortgage at the time when he brought the mortgage suit, the equities between the parties ought to be adjusted in the present litigation. It is argued that as under the law defendant 2 is bound to redeem the plaintiff's mortgage, the plaintiff's right to recover possession may be declared subject to defendant 2's right to redeem. In other words the contention of the learned advocate is that defendant 2 must be compelled in this suit to redeem. Redemption however is a legal right which a person entitled to redeem may seek to enforce. It is not a liability which he may be compelled to discharge, see 9 I C 513 (4). Again on the question whether the plaintiff had notice of the second mortgage at the date of his suit, the Courts below have differed. In view of the decision in 1918 P C 34 (5), it is very difficult to hold that the first Court was wrong in holding that the plaintiff had notice. The case of 1921 P C 112 (6), on which the learned Judge has relied does not lay down that the decision in 1918 P C 34 (5) is wrong. It may be noticed here that the proviso about notice contained in S. 85, T. P. Act, has been omitted from R. 1, O. 34, Criminal P.C., which has repealed the said section.

It was next contended on behalf of the plaintiff that each party ought to be placed as nearly as possible in the position which he would have occupied if all the parties interested in the mortgage security had been brought before the Court in the plaintiff's suit on mortgage. The real import of this contention is that this suit should be treated as a suit to enforce the first mortgage on which the plaintiff in any view of the case is entitled to fall back. It cannot be disputed now in view of the provisions contained in O. 34, R. 5 which has replaced S. 85, T. P. Act, that the plaintiff's mortgage has not been extinguished by the sale. Consequently the plaintiff is entitled to claim the rights of the first mortgagee. But the real difficulty in the way of the plaintiff in this connexion is that 12 years from the date when the mortgage money payable on the first mortgage became due, had elapsed before the institution of the present suit, and consequently the plaintiff's right to enforce the mortgage lien had become barred by limitation before the institution of this suit. See 11 C W N 403 (7). There is no provision in the Limitation Act under which the plaintiff in view of the facts of the present case can claim exemption from the bar of limitation. In 35 All 227 (8), the right of a mortgagor to redeem became inoperative for a time owing to the fusion of the rights of the mortgagor and purchaser. After the dissolution of the dual capacity he applied to redeem the property and claimed to deduct the time during which the fusion subsisted. Sir John Edge in delivering the judgment stated that there is nothing in Act 15 of 1877 which would justify the Board in holding that, once that period of limitation had begun to run in this case, it could be suspended.

3. Bijai Saran v. Bageshwar Prosad, 1929 P C 288=120 I C 650 (PC).
4. Mulla Veetal Seethi Kutti v. Achuthan Nair (1911) 9 I C 513.
5. Het Ram v. Shadilal, 1918 P C 34 = 45 I C 798=45 I A 130=40 All 407 (PC).
6. Tilakdhari Lal v. Khedan Lal, 1921 P C 112 =57 I C 465=47 I A 239=48 Cal 1 (PC).
7. Gangadas Bhattar v. Jogendra Nath (1907) 11 C W N 403=5 C L J 315.
8. Soni Ram v. Kanhaiya (1913) 35 All 227 = 19 I C 291=40 I A 74 (PC).

Their Lordships consider that if they were to hold that by reason of the fusion of interest between 1883 and 1898, the period of limitation was suspended, they would be deciding contrary to the express enactment of that section that "when once time has begun to run, no subsequent disability or inability to sue stops it." The principle laid down in that case is equally applicable to the facts of this case. The plaintiff cannot claim any deduction of time during which the alleged fusion of his rights as mortgagee and purchaser of the mortgagor's rights by virtue of his auction-purchase at the mortgage sale subsisted. Much reliance was however placed by the learned advocate for the respondents on two decisions of this Court namely, 32 Cal 891 (9), and 11 C W N 403 (7). The first case however is not of much assistance to us in this matter as the judgment of Brett, J., really proceeded on the footing that in view of the provisions of S. 82, T. P. Act, which governed that case, the purchaser could not fall back on his mortgage, as under S. 89, T. P. Act, after the sale, the mortgage security became extinguished. This section however has now been repealed and the sale at which the plaintiff purchased was held under the provisions of O. 34, Civil P. C. Consequently though the plaintiff could not acquire any title to the mortgagor's right, his mortgage security cannot now be considered as having been extinguished by the sale. The second case, i. e., the case in 11 C W N 403 (7), simply follows the first case.

It is true that when defendant 2 purchased the property, he purchased it subject to the first mortgage, but at the time when the present suit was brought, the claim on the first mortgage had already become barred as against defendant 2. The plaintiff is therefore not entitled to get any relief in this suit. The view which we have taken in this case is supported by the decision of the Full Bench of the Allahabad High Court in 1931 All 466 (10). The appeal is accordingly allowed and the plaintiff's suit is dismissed, but in view of the circumstances of this case we direct that the parties do bear their own costs throughout.

K.S. *Appeal allowed.*

9. Har Pershad Lal v. Dal Mardan Singh (1905) 32 Cal 891=1 C L J 371=9 C W N 728.
10. Ram Sanehi Lal v. Janki Prosad, 1931 All 466=134 I C 1 (FB).

A. I. R. 1935 Calcutta 142

HENDERSON, J.

(*Khondakar*) *Kasemali*—Defendant 1—Appellant.

v.

Hriday Nath Mandal and *others*—Plaintiffs—Respondents.

Appeal No. 1868 of 1931, Decided on 6th June 1934, from appellate decree of Addl. Sub-Judge, Jessore, D/- 14th March 1931.

Bengal Tenancy Act (1885), Sch. 3, Art. 3—It applies only where person effecting dispossession is landlord.

Schedule 3, Art. 3 only applies when the person effecting the dispossession is the landlord of the plaintiff. Where there is no relationship of landlord and tenant between the defendant and the plaintiff, the general law of limitation applies and not the special rule: 1916 *Cal* 883 and 1921 *Cal* 249, *Rel. on.* [P 143 C 1]

Nausher Ali—for Appellant.

Nagendra Kumar Dutt—for Respondents.

Judgment.—This appeal which is by defendant 1, raises a question of limitation. The facts upon which it has to be determined are as follows: A certain holding belonged to one Nitai; eight annas share passed to his son Rasik and then to Rasik's widow Kali Dasi. Kali Dasi granted a lease to the plaintiff, who had a lease of the other eight annas from one Panchanon. The plaintiff sold his interest to Sukumari, wife of Panchanon, and on the same day took a sublease from her. The appellant purchased the interest of Kali Dasi in execution of a decree and entered into possession of half the holding. The plaintiff instituted the present suit for a declaration of his title and recovery of possession. Among other defences the appellant pleaded that the suit is barred by limitation, as Art. 3, Sch. 3, Bengal Tenancy Act, applies. This contention prevailed in the first Court with the result that the suit was dismissed. The plaintiff then appealed and the learned Subordinate Judge has held that the special rule of limitation does not apply. Defendant 1 has now appealed to this Court and contends that the decision of the learned Munsif should be restored.

Two arguments have been advanced on behalf of the appellant: (1) that as

Sukumari was not recognized by Kali Dasi, the plaintiff is a tenant of the appellant; (2) that in any event the special rule of limitation applies. The first point has no basis in the record and was not taken in the lower Courts. What evidence there is suggests that the transfer was recognized. It has been proved that the plaintiff paid rent to Sukumari after the transfer: There was no suggestion even that he continued to do so to Kali Dasi. If the appellant had really wanted to make a case that the transfer was not recognised, he should have specifically raised it. It is not the sort of point that can be taken for the first time in second appeal.

On the second point it was argued that so long as the person dispossessed is a raiyat or under raiyat and the person affecting the dispossession is anybody appearing in the chain of landlords, then the special rule will apply. This process would clearly have to stop somewhere; otherwise the Secretary of State, after dispossessing an under-raiyat in a revenue paying state, could always plead this special rule of limitation. Mr. Nausher Ali suggested that the process should stop with the immediate landlord of a raiyat. But there is no logical reason for stopping it anywhere. I have no doubt that the article only applies when the person effecting the dispossession is the landlord of the plaintiff. This view is supported by the decision reported in 1916 Cal 883 (1) and 1921 Cal. 249 (2). In the present case there is no relationship of landlord and tenant between the appellant and the plaintiff. I therefore hold that the general law of limitation applies.

The result is that the appeal fails and is dismissed with costs.

K.S. *Appeal dismissed.*

1. Krishnachandra v. Satish Chandra, 1916 Cal 883=35 I C 365.
2. Haran Chandra v. Madan Barai, 1921 Cal 249=61 I C 899.

A. I. R. 1935 Calcutta 143

MUKERJI, AG. C. J. AND S. K. GHOSE, J.

Badrinarayan Chetlingia — Decree-holder—Appellant.

v.

Baidya Nath Pal and *others*—Respdts.

Appeal No. 479 of 1933, Decided on 1st August 1934, from appellate order of Dist. Judge, Nadia, D/- 25th July 1933.

Execution — Prayer for attachment and sale of judgment-debtor's properties described in petition—Sale of such properties and decree partly satisfied—Application to file fresh list of properties granted and such list filed but beyond period of limitation—Such application is not one for execution nor one made in pending execution and as such does not save limitation — Original application held not pending—Civil P. C. (1908), S. 48.

In an application for execution filed by decree-holder, prayer was made for realizing the decree by attachment and sale of the judgment-debtors' properties. In connexion with that application a list of properties was filed and these properties having been sold a part of the decree was realized and a balance of little over Rs. 400 remained due after such realization. Subsequently the decree-holder put in a petition asking for time to put in a fresh list of properties, and such time being granted, a fresh list of properties was filed. But in the meantime the decree became barred in view of the provisions of S. 48, Civil P. C.

Held: that the application for time for giving fresh list could not be regarded as an application for execution, so that the fresh list that was submitted might be treated as having been supplied in connexion with that application.

Held further: that all the reliefs that the decree-holder asked for in the application for execution were granted to him by the executing Court and all such properties as he desired to put up to sale for realizing his decree were sold and nothing further remained to be granted on the basis of that application. In such circumstances it would not be right to treat the original application as a pending one so as to give the decree-holder the benefit of the application and allow him to regard it as pending for the purpose of a fresh prayer for realization of the balance of the decree by sale of the other properties: 1918 *Cal* 73, *Dist.* [P 144 C 1, 2]

Sarat Chandra Basak and *Bijan Kumar Mukherjee*—for Appellant.

Ramendra Mohan Majumdar — for Respondents.

Judgment.—This is an appeal by a decree-holder who has been trying to execute his decree for money which he holds against the judgment-debtors. There was an application for execution filed by the decree-holder on 19th December 1931. In that application prayer was made for realizing the decree by attachment and sale of the judgment-debtors' properties. In connexion with that application a list of properties was filed, on 25th February 1932, and these properties having been sold a part of the decree was realized on 9th June 1932 and a balence of little over Rs. 400 remained due after such realization. On 13th July 1932 the decree-holder put in a petition asking for time to put in a fresh list of properties and such time being granted a fresh list of properties

was filed on 27th July 1932. In the meantime on 17th July 1932 the decree became barred in view of the provisions of 48, Civil P. C. The question which has been dealt with by the Courts below is whether by reason of the application which the decree-holder made on 13th July 1932 the operation of S. 48 of the Code was avoided. Both the Courts below have considered the terms of the said application and have come to the conclusion that in no sense can the said application be regarded as an application for execution, so that the fresh list that was submitted on 27th July 1932 may be treated as having been supplied in connexion with that application. The said application has been read out to us and we think that the Courts below were right in the view they have taken. Dr. Basak appearing on behalf of the decree-holder has put forward a further contention before us. That contention is based on the original application for execution filed on 19th December 1931. His contention is that that application should be regarded as an application which was pending on the date on which the fresh list was supplied. His argument is that inasmuch as in the said application there was a prayer for realization of the entire decree by the sale of the judgment-debtor's properties and in connexion with that application a list of properties was supplied on 25th February 1932 it should be held that it was open to the decree-holder to furnish a fresh list of properties to be sold and that therefore the said fresh list when it was supplied should be regarded as having been filed in connexion with a pending application for execution. We are of opinion that this contention should not be upheld. Our attention has been drawn to a decision of this Court in 1918 Cal. 73 (1) and it has been argued that the said decision supports the contention which has thus been put forward. One point of distinction between that case and the present one apart from any other consideration, is that in that case an application for execution was made by the decree-holder in accordance with law, and on the objection of the judgment-debtor it was discovered that the properties specified in the list of properties to be sold were properties which could not be sold for the realization of the decree and upon that the decree-holder furnished a supplementary list with a prayer that it should be taken as part of the original application.

In the present case all the reliefs that the decree-holder asked for in the application of 19th December 1931 were granted to him by the executing Court and all such properties as he desired to put up to sale for realizing his decree were sold and nothing further remained to be granted on the basis of that application. In such circumstances we think it would not be right to treat the original application as a pending one so as to give the decree-holder the benefit of that application and allow him to regard it as pending for the purpose of a fresh prayer for realization of the balance of the decree by sale of the other properties. We think the present application in connexion with which this appeal has been preferred is barred by the provisions of S. 48 of the Code. The appeal is dismissed. Costs of the minor respondents represented by the Deputy Registrar of this Court having been already paid there will be no further order for costs.

K.S. *Appeal dismissed.*

1. Ganendra Kumar Roy v. Shayama Sunder, 1918 Cal 73=44 I C 553.

A. I. R. 1935 Calcutta 144

HENDERSON, J.

Bhaba Kanta Pachani — Plaintiff — Appellant.

v.

Kerpai Chutia and *others*—Defendants —Respondents.

Appeal No. 2359 of 1931, Decided on 17th July 1934, against decree of Sub-Judge, Addl. Court, Jorhat, D/- 15th May 1931.

(a) Hindu Law—Succession — Daughter's unchastity bars her from inheritance — Daughter living as mistress though for 40 years is unchaste.

Unchastity in a daughter does exclude her from the inheritance. And she is guilty of unchastity in the legal sense even though she lives with a man as his mistress for about 40 years: 22 *Cal* 347 and 1920 *Cal* 237, *Rel on.*

[P 145 C 2]

(b) Adverse possession—Co-sharer — Mere sale of part of joint property does not amount to adverse possession.

The mere fact that a cosharer sells a portion of the joint property would not amount to adverse possession; it would have to be shown that

the title asserted was inconsistent with that of a cosharer and that it was brought to the knowledge of the cosharer. [P 145 C 2]

Gunendra Krishna Ghose and *Panchanan Ghose*—for Appellant.

Hariram Deka—for Respondents.

Judgment.—The land which is the subject-matter of the suit out of which this appeal has arisen formed part of the holding covered by pota No. 79 and originally belonged to one Sisuram. Sisuram left a widow Bhakuli and two daughters Lundari and Lengari. Lundari eloped with a certain Ahmad, and lived with him as his mistress for many years. Bhakuli died in 1916 and Lengari in 1926. The plaintiff purchased the property from Lundari in 1927. Defendant 1 claimed the property on the strength of a Will executed by Lengari. The plaintiff made an alternative prayer that he might obtain a refund of the purchase money from Lundari; this was decreed by the Munsiff. The plaintiff appealed to the lower appellate Court without success and now appeals to this Court. Three points have been taken on behalf of the appellants: (1) that in Hindu law a daughter is not debarred from inheritance on account of unchastity; (2) that any event Lundari was not guilty of unchastity within the meaning of the law and (3) that the Courts below were wrong in holding that the suit was barred by limitation.

With regard to the first point reliance is placed by the appellant upon Mr. G. C. Sarkar Sastri's work on Hindu law. The learned author deals with this subject at p. 662, Edn. 7. He distinguishes between unchastity in the wife and unchastity in other female relations. He expresses the opinion that except in the case of a wife mere unchastity while not followed by conception would not justify exclusion from the inheritance. But in this case the unchastity of Lundari was followed by conception and resulted in the birth of two children. Thus the case of the appellant is not really supported by this treatise. On the other hand, it is now well settled in this Court that unchastity in a daughter does exclude her from the inheritance. The case reported in 22 Cal 347 (1) is the leading authority on the point. This decision was followed in 1920 Cal. 237 (2) where the learned Judges observe that the law is now settled and unchastity would prevent a daughter from inheriting. Mr. Ghose has argued that it cannot be said that Lundari was guilty of unchastity in the legal sense inasmuch as she remained associated with one man for a period of about 40 years. There is no authority for the proposition that a Hindu female who lives with a man as his mistress is not guilty of unchastity in the legal sense. The case reported in 1920 Cal. 237 (2) to which I have already referred is an authority to the contrary. In my judgment, the Courts below were correct in holding that Lundari did not inherit anything.

If the determination of the appeal had rested on the point of limitation I would have felt bound to remand the appeal for a further hearing. Lengari sold a portion of the property in June 1916. The learned Subordinate Judge disposes of the question merely by a reference to this fact; but it cannot be properly determined without an examination and appreciation of the evidence as a whole. The mere fact that a cosharer sells a portion of the joint property would not amount to adverse possession; it would have to be shown that the title asserted was inconsistent with that of a cosharer and that it was brought to the knowledge of the cosharer. In the present case the evidence of Lundari and the plaintiff is to the effect that Lundari obtained possession of the property on the death of Lengari and made it over to the plaintiff; if this is true the suit could not be barred by limitation. There is other evidence to the effect that Lundari never mutated her name, that she was summoned to sign Lengari's sale-deed and that she did not join in the transaction. There is also evidence to the effect that Lundari knew of this sale; but no attempt was really made to show on what date she obtained this knowledge. Without a proper examination and consideration of all this evidence it could not be said that the point of limitation was properly dealt with. The appeal fails and is dismissed with costs to defendant 1.

K.S. *Appeal dismissed.*

1. Ramananda v. Rai Kishore, (1895) 22 Cal 347.

2. Aiti Kochuni v. Aidew Kochuni, 1920 Cal =54 I C 695.

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MUKERJI, AG. C. J. AND S. K. GHOSE, J.

Bibhuti Bhusan Dutta—Petitioner.

v.

Sreepati Dutta and *others* — Respondents.

P. C. Appln. No. 1 of 1934, Decided on 1st August 1934, for leave to appeal to His Majesty in Privy Council, from original decree No. 271 of 1929.

Civil P. C. (1908), S. 110—Appeal to Privy Council—Appellate Court modifying original decree upon single point in appellant's favour—He has no right to appeal on other points simply on such modification.

When the appellate Court modifies the original decree upon a single point and that completely in the applicant's favour so that he has no further grievances in that matter, he cannot, because of that modification, have a right to an appeal on other points on which the Courts have concurred, without showing a substantial question of law: *Case law reviewed.* [P 146 C 2]

Rajendra Chandra Guha and *Mohendra Kumar Ghose*—for Appellant.

Bijan Kumar Mukherjee, Bhupendra Kishore Basu, Biraj Mohan Roy, Dwijendra Nath Dutt and *Nakuleswar Som*—for Respondents.

Order.—This is an application for leave to appeal to His Majesty in Council from a decree made by this Court on a first appeal. The suit was for partition of certain properties the plaintiffs claiming a half share therein, and also for accounts. The Subordinate Judge made a decree declaring in effect the plaintiffs' share to be one-third, after excluding certain properties which he found had been already partitioned, and also ordering accounts for a certain period. Of the properties in respect of which he decreed partition, he ordered a few items to be kept joint and the others he ordered to be partitioned by metes and bounds. This Court, on an appeal by plaintiff 1 and a cross-objection by plaintiff 2, varied the decree of the trial Court by dismissing the appeal save and except that it ordered a partition by metes and bounds of all the properties found to be joint. Plaintiff 1 is the applicant for leave.

The appellant relies upon the decision of the Judicial Committee in 1925 P. C. 60 (1) for his contention that the decree of this Court is not a decree of affirmance and so it is not necessary for him to show that the appeal involves some substantial question of law and that he is entitled to leave as a matter of course inasmuch as the subject-matter of the suit as also of the intended appeal is over Rs. 10,000 in value. There is undoubtedly considerable force in this contention if the arguments of the petitioner's counsel in that case is to be taken as having been accepted by their Lordship in its entirety in the order that was made. This Court however has refused, on the strength of 1925 P. C. 60 (1), to break away from a long course of decisions of Courts in India which have firmly laid down the principle that when the appellate Court modifies the original decree upon a single point and that completely in the applicant's favour so that he has no further grievance in that matter, he cannot, because of that modification, have a right to an appeal on other points on which the Courts have concurred, without showing a substantial question of law. The enormity of the opposite view is so very great that a far more clear and express pronouncement of the Judicial Committee would be necessary to uphold it. 1925 P. C. 60 (1) has been referred to in some of the decisions of the Patna and the Madras High Courts as laying down that unless the decree from which the appeal is sought to be taken is nothing but a decree which in its entirely affirms the decree of the Court immediately below it, leave cannot be withheld if the requirement as to value is satisfied, or in other words that the incident as to affirmance is to be entirely ignored as soon as any variation is found: see 1928 Pat. 609 (2), 1929 Pat 561 (3), 1932 Mad. 46 (4) and 1933 Pat. 262 (5).

Now, in 8 C. W. N. 294 (6) the Judge below had given an award of compensation at a certain figure and the High High Court increased that amount. The applicant for leave wanted to go to the Privy Council so that the amount might be further increased. For this excess which was to be debated before the Privy Council, the two Courts below were

1. Annapurnabai v. Ruprao, 1925 P C 60=86 I C 504=51 I A 319=51 Cal 969 (P C).
2. Ali Zamin v. Mohammad Akbar Ali Khan, 1928 Pat 609=116 I C 541.
3. Jamna Prasad v. Jagannath Prasad, 1929 Pat 561=117 I C 193.
4. Perichiappa Chettiar v. Nachiappan, 1932 Mad 46=139 I C 54.
5. Homeshwar Singh v. Kameshwar Singh, 1933 Pat 262=144 I C 320.
6. Sreenath Ray Bahadur v. Secy. of State, (1901) 8 C W N 294.

at one. It was held that that being the position the decree to be appealed from was one of affirmance, or in other words that S. 110 of the Code was to be construed with reference to the subject-matter in dispute in appeal to the Privy Council. In 1925 P. C. 60 (1) the position was that the person claiming to have been adopted by the senior widow brought a suit claiming the property. The junior widow and the person whom she said she had adopted resisted the claim and the former claimed maintenance at Rs. 3,000 per annum. The first Court decided in favour of the plaintiff upon the question of adoption but decreed to the widow maintenance at the rate of Rs. 800 per annum. The appellate Court increased the maintenance to Rs. 1,200 per annum, but in all other respects affirmed the decree of the first Court. The junior widow and her alleged adopted son applied for leave to appeal to the Privy Council. If 8 C. W. N. 294 (6) was to be applied the only matter of substance in the proposed appeal to the Privy Council, namely the excess amount of maintenance that was being claimed, being one in respect of which both the Court had been in agreement the decree sought to be appealed from was to be regarded as a decree of affirmance. The Privy Council appears to have been of opinion that it was not to be so regarded. The particular application made in 8 C. W. N. 294 (6) of the principle that in applying S. 110 of the Code you have to have regard to the subject-matter of dispute in the appeal to the Privy Council must be taken to have been overruled. But does 1925 P. C. 60 (1) go any further than that and does it lay down that in every case where the decree of the High Court is not a mere decree dismissing the appeal you are to take it that it is not a decree of affirmance so as to take the case out of para. 3 of that section and bring it within the first? Rankin, C. J., in 1927 Cal. 543 (7), was not prepared to hold on the authority of 1925 P. C. 60 (1) that such a position could be affirmed. He observed:

"It appears to me that the case of 1925 P. C. 60 (1) is not in itself a sufficient authority to justify this Court in abandoning the principle which it has with other High Courts acted upon; that is to say, I do not think that it shows that it is an erroneous view that we have to look to the substance and see what is the subject-matter of the appeal to His Majesty in Council."

In 1925 P. C. 60 (1) the appeal to be preferred was on the question of maintenance, and the two Courts had differed on the question of the amount of the maintenance, the High Court in favour of the intending appellant. In the case before Rankin, C. J., the original decree gave the applicant a certain share in the property in suit, but the appellate Court while it confirmed the original decree in every other respect modified it in respect of the share giving him the whole share he claimed so that on that point he had no further grievance. The question was whether the appellate decree was nevertheless one varying the original decree and the applicant was entitled to leave to appeal without proving that a substantial question of law was involved. Rankin, C. J., held in the negative and observed:

"We may take it, I think, that where the amount is a question in dispute the fact that the Courts differ and the higher Court differs in favour of the applicant does not mean that the decision is one of affirmance but I am not prepared to say that because on a totally different point, namely a point about the share, the applicant has succeeded and succeeded altogether, so that he has no further grievance in that matter; he can without showing a substantial question of law have a right to litigate upon other points upon which the Courts have been in agreement."

As regards the cases cited on behalf of the applicant the leave that was granted in them may perhaps be justified upon other grounds than upon the applicant's contention as regards 1925 P. C. 60 (1). But whether that is so or not we need not pause to consider, because it cannot be denied that the cases do support the view which the applicant contends for. On the other hand there have been decisions in which the view taken by Rankin, C. J., as to the true effect of 1925 P. C. 60 (1) has been adopted. For instance in 1932 Nag. 118 (8), it has been said:

"Where the modification of a decree of a lower Court consists of a modification of a pecuniary nature in the appellant's favour on a matter to be debated before the Privy Council, it amounts to a variation of the decree of the trial Court, and it is immaterial as far as that point is concerned, whether under S. 110 any substantial question of law is involved. But the appellant cannot

7. Narendra Lal v. Gopendra Lal, 1927 Cal 543=103 I C 65.

8. Karimbhoy Shamsuddin v. Rudra Pratap Singh, 1932 Nag 118=140 I C 68=28 N L R 142.

make that decision a basis of appeal to the Privy Council on grounds unconnected with or dissociable from those on which he has succeeded and on which the Courts were of one mind."

In 1930 Lah. 102 (9) the trial Court's decree was for Rs. 13,000 and the appellate Court varied it by ordering, in accordance with the award on which it was founded, that if the defendant did not give possession to the plaintiff within a certain time he would have to pay him that amount. Leave was refused as it was thought that the variation was not a substantial one. A Special Bench of the Allahabad High Court however in 1932 All. 65 (10) has taken the view that 1925 P. C. 60 (1) is an authority for the proposition that if the decree of the Court below has been varied, no matter to what extent the decree cannot be one of affirmance and there is no reason why words should be read into the section which are not there. The above in short is the position of authorities bearing on the point. We have carefully considered the matter and are inclined to agree in the view of Rankin, C. J., as to the true effect of 1925 P. C. 60 (1) and we would prefer to adhere to it until a more definite and authoritative pronouncement is made by the Judicial Committee to the contrary.

We proceed next to consider whether there is a substantial question of law involved in the proposed appeal. The substantial question in controversy between the parties is whether the properties in suit belonged to one Hari Nath or to his wife Jagatmohini; the plaintiffs claimed a half share on the footing that the properties belonged to Hari Nath, while the defendants' case was that the plaintiffs' share amounted to only a third the properties having belonged to Jagatmohini and not to Hari Nath. The applicant for leave takes as his first ground that the onus of proof has been wrongly placed on the plaintiffs, and that in any event such burden as rests on them is not the same in respect of all the properties. In our opinion no two views are possible on the question of onus, and the different items of properties have been separately considered in order to find out to what extent the burden lies on the plaintiffs and to what extent it has been discharged.

It is then said that so far as properties standing in Mohendra's name are concerned the plaintiffs as heirs of Mohendra should get a larger share. But this argument overlooks the common case of both parties—a case which has also been found to be true—that Mohendra was not the owner of the properties but only a benamdar either for Hari Nath or for Jagatmohini and that the plaintiffs have never come forward to claim as Mohendra's heirs. Thirdly, it has been argued that the decision overlooks the fact that Jagatmohini having come into possession of some of the properties as guardian under Act 40 of 1858 had assumed a fiduciary character of which she could not divest herself without first making over possession to the beneficial owners and getting herself discharged from that character, and therefore the defendants who claim through her are estopped from setting up her title to the properties. This contention was never raised at any point of time till now and depends on facts which have never been investigated.

Nextly it has been said that from the facts found no inference in the nature of a family arrangement should have been inferred. What is wanting to warrant such inference is said to be this: that a dispute, such as would justify a family arrangement, has not been sufficiently proved by evidence. There is however a finding, rightly or wrongly arrived at, that there was an apprehension of a dispute. We therefore cannot see that any question of law arises. Fifthly it is said that mere acting for a number of years under the said family arrangement could not effect a change of title unless limitation or adverse possession for the statutory period or some doctrine of estoppel intervenes, and it is urged that in the decision there are findings which go to show that these extraneous incidents are absent. The answer to the contention is that part performance has been found. The question though one of law, is not in our judgment a substantial question of law. We accordingly do not see our way to grant the leave asked for. The application is dismissed with costs, hearing-fee 5 gold mohurs.

K.S. *Application dismissed.*

9. Bansi Lal v. Gopal Lal, 1930 Lah 102=122 I C 90=10 Lah 688.
10. Nathu Lal v. Raghubir Singh, 1932 All 65=135 I C 234=54 All 146 (S B).

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MCNAIR, J.

Dabiruddin Sarkar—Defendant—Appellant.

v.

Afaddi Mamud — Plaintiff—Respondent.

Appeal No. 3180 of 1931, Decided on 10th July 1934, from appellate decree of Addl. Dist. Judge, Rangpur, D/- 22nd August 1931.

Landlord and Tenant—Chukani right.

A Chukani right in Rangpur matures into an occupancy right if held for more than 12 years: 1914 *Cal* 661, *Rel on.* [P 150 C 1]

Hiralal Ganguli—for Appellant.

Shamsuddin Ahmed—for Respondent.

Judgment.—This is a suit for ejectment. The defendant in that suit is the appellant before me. The case for the plaintiff was that the defendant was an under raiyat whose tenancy had been terminated by a notice to quit. The defendant denies that he received the notice. He says that the plaintiff is only one of several co-sharers and that the suit would not lie unless they are made parties to the plaintiff's suit. He also says that he has an occupancy right in the disputed land and he claims, in any case, to be entitled to compensation for improvements which he made on the property. The question as to notice to quit has been decided against the defendant. It has been decided by the lower appellate Court differing from the trial Court that there had been a partition between the plaintiff and his co-sharers some 10 or 12 years ago. The evidence and the reasonings on which the learned Subordinate Judge comes to his finding that the plaintiff is the sole landlord do not appear to me very cogent, but I am bound by his finding as it is a finding on a question of fact.

The only point which has been really contested in this Court is the question whether the defendant is or is not an occupancy raiyat. The trial Court considering the evidence which had been produced, particularly certain rent receipts, held that the defendant's father was a Chukani tenant of the disputed land. He pointed out that in the present case the defendant was treated as a tenant on the death of his father. He relied on rent receipts as showing that the jama had been in existence for more than 12 years, and relying on the case of 1914 Cal. 661 (1) he held that the defendant had got an occupancy right in the disputed land. The lower appellate Court appears to me to differ from the decision to which I have just referred. The learned Subordinate Judge says:

"The authority does not seem to go so far as to lay down that the very description "Chukani" signifies that it must be a raiyati holding."

He then quotes from the report of the rent commission on which the learned Judges of this Court relied and says:

"I have already stated my reasons for finding that the plaintiff is a raiyat owning a small holding. The defendant who holds under a raiyati holding can have no better status than that of an under raiyat simply because his holding is described as a Chukani."

He then refers to Wilson's Glossary and says that this word signifies an under tenant. He then holds that according to law the defendant is only an under raiyat. It seems to me that the learned Subordinate Judge was not entitled to come to a decision differing from that of the High Court on a consideration of authorities not referred to in the reported judgment. They may or may not have been considered by the High Court in the case to which I have already referred, but this Court has given a decision which is clear as to the status of a Chukanidar in this very district. At p. 32 of the report their Lordships say:

"There is therefore a permanent element in these Chukani rights which may develop into an occupancy right and they are freely saleable even before they develop into occupancy rights. In this case, if the defendant had such a right, it must have already matured into an occupancy right inasmuch as he had held this Chukani or so called Chukani for more than 12 years."

The learned Subordinate Judge seems to have differed from the decision of this Court when he refers to this particular Chukani and states that an occupancy right can be acquired by an under raiyat only by custom. He decides that no such custom was pleaded or proved in the case now before him. Their Lordships in the passage which I have already quoted definitely stated that a Chukani right in Rangpur matures into an occupancy right if held for more than 12 years. It has never been contested that the right here was a Chukani right. It has faintly been suggested in the argument before me that there was no

1. Jogendra Nath v. Chandra Kumar, 1914 Cal 661=24 I C 193=42 Cal 28.

evidence to that effect. But both the lower Courts have dealt with it as a Chukani right and undoubtedly that is the right which has been considered throughout the case. The findings of the trial Court have not been differed from by the lower appellate Court and they have not been challenged. It appears therefore quite clear that the defendant here had a Chukani right which has been in existence for more than 12 years and on the authority of the case of 1914 Cal. 661 (1) I hold that the Chukani has developed into an occupancy right. The result is that the defence must prevail. The decree of the lower appellate Court is set aside and that of the trial Court restored with costs in all the Courts.

K.S. *Decree set aside.*

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MUKERJI, AG. C. J. AND S. K. GHOSE, J.

Mathuresh Chakravarty—Appellant.

v.

S. R. Mills Co. Ltd. and *another*—Respondents.

Appeal No. 500 of 1933, Decided on 19th July 1934, from original order of Dist. Judge, Hooghly, D/- 23rd August 1933.

Provincial Insolvency Act (1920), S. 52—Properties of debtor attached in execution of decree—Subsequent appointment of interim Receiver by insolvency Court—Insolvency Court ordering stay of execution and passing order under S. 52 on application of decree-holder—Order under S. 52 can be made only by executing Court on application to it and not by insolvency Court—Proper procedure to be followed indicated.

Where properties of a debtor are attached in execution of a decree and subsequent to it an interim Receiver is appointed by the insolvency Court on admitting a petition for insolvency of the debtor, it is only the executing Court that can pass an order under S. 52 on an application made to it and not the insolvency Court; and where the insolvency Court has already stayed the execution proceedings on an application by the petitioning creditor and also on an application by the decree holder passed an order under S. 52 directing the receiver to sell the property for realising the costs of the suit and of the execution, two alternatives either of which may be adopted. One of these alternatives is for the insolvency Court to direct the Receiver to make a proper application to the executing Court in order to obtain the necessary order under S. 52 and the other alternative is for the decree-holder to apply to the executing Court for the sale of his properties under attachment, in order that their dues may be realised in which case the insolvency Court has to vacate the stay order which it has already made. [P 151 C 1]

Narendra Nath Choudhury and *Faninda Mohan Sanyal*—for Appellant.

Chandra Sekhar Sen—for Respondents.

Judgment.—This is an appeal by a debtor against whom insolvency proceedings are pending in the Court of the District Judge of Hooghly. The facts necessary to be stated for the purpose of this appeal are quite simple. The debtor was a surety against whom a certain money decree was being executed in the Misc. Ex. Case No. 101 of 1930 of the 2nd Subordinate Judge's Court, Hooghly. In the course of the said execution proceedings certain properties of the debtor were attached. Long after the attachment a petitioning creditor, namely, Pramatha Nath Chatterjee, started proceedings in insolvency as against the debtor alleging that the latter was indebted to him for a certain amount. The petitioning creditor, after his application was registered, filed a petition praying for restraining the decree-holders Sovaram Ramprasad Mills Ltd. from selling the properties of the debtor in the said execution case until the disposal of the Insolvency proceedings and for the appointment of a Receiver. The learned Judge appointed an interim Receiver and also issued an order staying the sale. Thereafter certain proceedings followed but with them we are not concerned in the present appeal.

The result of those proceedings was that it was ordered by this Court that the said Sovaram Ramprasad Mills Ltd. could not be brought in in the schedule of creditors because they were alleging that there was collusion between the debtor and the petitioning creditor and also because no order of adjudication had yet been passed but that they would be entitled to show that the insolvency application should not be granted, or in other words that the acts of insolvency alleged in the petition of the petitioning creditor have not been established. Thereafter an application appears to have been made by the said Sovaram Ramprasad Mills Ltd. to the learned District Judge before whom the insolvency proceedings are pending that the Receiver might be directed to sell the property for satisfying the costs of the suit and of the execution under S. 52, Provincial Insolvency Act. Upon this petition the learned District Judge has made this order which is complained of in

this appeal. The order in effect was that the Receiver should sell the properties involved in the execution proceedings which had been stayed by the previous order of the learned District Judge to which reference has already been made and should deposit the sale proceeds in Court. It appears therefore that the interim Receiver was appointed by the Insolvency Court long after the attachment order had been issued from the Court in which the execution proceeedings were taking place and the order complained of in the appeal was made by the insolvency Court upon the view that S. 52, Provincial Insolvency Act, would entitle the Court to make such an order. On reading S. 52, Provincial Insolvency Act, it seems to us to be perfectly clear that an application under that section has got to be made to this Court which was executing the decree and it is that Court which. on such an application being made, can direct the property to be delivered to the Receiver in order that a sale may be held. The learned District Judge had no jurisdiction to make the order for sale under the provisions of the said section. The order complained of, in the appeal therefore must necessarily be set aside.

The question then is, what direction should be given by us in order that the respondents who are executing the decree may proceed to realize their costs of the suit and of the execution. We have considered the matter carefully and we think that there are two alternatives either of which may be adopted. One of these alternatives is for the learned District Judge to direct the Receiver to make a proper application to the executing Court in order to obtain the necessary order under S. 52, Provincial Insolvency Act; and the other alternative is for the said respondents to apply to the executing Court for the sale of his properties under attachment in order that their dues may be realized. In case it be necessary for the said respondents to adopt that course it will be necessary for the learned District Judge to vacate the stay order which he had already made because so long as that order stands it will not be open to the said respondents to make any application to the executing Court for the sale of his properties attached. We therefore direct that on receipt of the record from this Court the learned District Judge will either direct the Receiver to apply to the executing Court for an order under S. 52 for the sale of the properties or he will vacate the interim order of stay which he made at the time when the application was made by the petitioning creditor for restraining the respondents from selling the properties, so that the said respondents may have an opportunity to apply to the executing Court for the sale of the properties attached. We make no order as to costs of this appeal.

K.S. *Order accordingly.*

A. I. R. 1935 Calcutta 151

HENDERSON, J.

Nayebali Sarkar and *others* — Appellants.

v.

Lalit Mohan Roy and *others*—Respondents.

Appeal No. 2275 of 1931, Decided on 12th July 1934, from appellate decree of Sub-Judge, Second Court, Dacca, D/- 6th June 1931.

Occupancy Rights - Purchase by co-sharer landlord of non-transferable occupancy holding—He cansue for ejectment of trespasser.

A purchase by a co-sharer landlord of a non-transferable occupancy holding is good against every body except the co-sharers. Hence he can sue for ejectment of a trespasser: 1915 *Cal* 242; *Rel on* and 1924 *P C* 144, *Dist.* [P 152 C 1]

Prokash Chander Pakrashi and *Birendra Nath Ghose*—for Appellants.

Bijan Kumar Mukherjee and *Charu Chunder Chaudhuri*—for Respondents.

Judgment.—Only two points of any substance have been taken by Mr. Pakrashi on behalf the appellants; but in order to understand them it is necessary to note certain facts. The suit was brought against the defendants in a representative capacity as representing the Mahomedan public. It is common ground that the disputed plot formed a gote of one Gedu. The plaintiffs based their title on two successive transfers. The case of the defendants is that the land was dedicated to the Mahomedan public by Gedu. While purchasing the whole of the jote the plaintiffs also have a share in the superior interest to the extent of 4 annas 6 gandas. The first point taken is that the plaintiffs cannot maintain their action for ejectment as the raiyati interest has been extinguished and the plaintiffs

only own a portion of the superior interest. The learned Subordinate Judge found that the holding was a transferable one and that the case was governed by S. 22, Ben. Ten. Act, before the amendment made in 1907. This finding of the learned Subordinate Judge has been challenged on the ground that it is not based on any evidence. There can be no question that this criticism is well founded and Dr. Mukherji did not attempt to support this finding. The plaintiffs never even pleaded that they there was a custom of tranferability and it is, therefore, not surprising that did not adduce any evidence in support of such a proposition. The finding of the learned Subordinate Judge that a custom was proved, if such be his finding, by the fact that this particular jote was transferred twice could not possibly be supported. On the other hand, if he intended merely to find that this particular jote was transferable inspite of there being no such custom because two transfers were reccognized by the landlord, this is a finding which is equally unsustainable.

It is, therefore, common ground that the jote was not transferable. In these circumstances, Mr. Pakrashi has contended that the raiyati jote was extinguished under the general law and in support of that contention he has relied upon certain observations made by their Lordships of the Judicial Committee of the Privy Council in 1924 P. C. 144 (1). That was a case between co-sharers. It is there laid down that no co-sharer can obtain any jote rights not against third persons but against a co-sharer. This case is an authority for the proposition that in purchasing this jote the plaintiffs did so for the benefit of all the cosharers; but this is not a case between the cosharers; on the contrary, the appellants are trespassers; and Dr. Mukherjee has contended that the purchase is good against every body except the co-sharers. The well-known case reported in 1915 Cal. 242 (2) is an authority for that proposition. The plaintiffs are in occupation of this particular land without objection by their co-sharers. They can certainly let it to a tenant and they can certainly eject such a tenant should the necessity arise. It would be somewhat strange if they were unable to eject a trespasser who had us title to be on the land at all. I therefore hold that the plaintiffs may eject the appellants. The other question raised is one of limitation. It is common ground that the case is governed by Art. 142, Lim. Act. The dispossession alleged in para. 9 of the plaint is that defendants 3 and 15 dispossessed the plaintiffs in Falgoon 1934 by entering upon the land and cultivating it at the instigation of the other defendants. The learned Munsiff considered this case and found that it was untrue. He further held that the plaintiffs were not in possession within 12 years of the suit. The learned Subordinate Judge held that the Munsiff had placed the onus on the wrong side. He discussed some of the evidence in a somewhat inconclusive manner and felt rather doubtful whether the defendants had established that their possession had been as long as a period of 12 years.

The finding of the learned Subordinate Judge is based upon a certain entry in the settlement record which raises a presumption that plaintiffs 5 and 6 were in possession of the property at the date of the final publication. This is clearly very important evidence on the question whether the defendants' story of a dedication by Gedu is true; but it affords no assistance whatever on the point of limitation inasmuch as the record was finally published more than 12 years before the institution of the suit. There is a presumption that plaintiffs 5 and 6 were in possession at that time. It is common ground that they have been dispossessed subsequently and it is, therefore, for them to show that such dispossession took place within 12 years of the suit. They made a specific case in their plaint; that case was not supported even by their own witnesses. The question would, therefore, immediately arise whether, if this case is untrue, the actual dispossession took place within 12 years of the suit. In drawing a presumption that the plaintiffs were in possession within 12 years of the suit the learned Judge was clearly not correct and he should have considered whether the plaintiffs had

1. Midnapur Zamindary Co. Ltd. v. Naresh Narayan Rao, 1924 P C 144=80 I C 827=51 I A 293=51 Cal 631 (P C).
2. Dayamoyi v. Ananda Mohan Roy, 1915 Cal 242=27 I C 61=42 Cal 172 (F B).

discharged the burden of showing that they were in possession within 12 years of the suit. The appeal must, therefore, be allowed. The decree of the lower appellate Court is set aside and the case is remanded for the appeal to be reheard on the point of limitation. Costs in this Court and in the lower appellate Court will abide the result.

K.S. *Appeal allowed.*

A. I. R. 1935 Calcutta 153 (1)

JACK, J.

Lahiri & Co.—Petitioner.

v.

Makhan Lal Basak and *another*—Opposite Parties.

Civil Rule No. 699 (5) of 1934, Decided on 8th June 1934, from decision of Sub-Judge, 5th Court, Dacca.

Civil P. C. (1908), S. 21 and O. 47, R. 1—Trial Court dismissing suit as against person on ground of want of jurisdiction as against such person—On appeal by other defendant, appellate Court passing decree as against person against whom it was dismissed—Held decree could not be passed and review could be allowed.

The trial Court found that it had no jurisdiction to try the suit as against defendant 2. The suit was accordingly dismissed as against defendant 2. On appeal by defendant 1 the question of jurisdiction did not arise in the appellate Court and was not discussed but the Court passed a decree against defendant 2 :

Held : that no decree could be passed against defendant 2 and as this was a defect apparent on the face of the record review should be allowed.

Held further : that S. 21, Civil P. C., had no application as no objection was raised in the appellate Court as to place of suing [P 153 C 2]

Atul Chandra Gupta and *Surajit Chand Lahiri*—for Petitioner.

Sarat Chandra Basak, Hemendra Kumar Das, Jitendra Kumar and *Sen Gupta*—for Opposite Parties.

Order.—This is an application for a review. By the appellate judgment it was ordered that the case should be sent back to the Court of appeal below to give a decree to the plaintiff as against defendant 2 subject to the rights and obligations subsisting between defendant 1 and defendant 2 which would be determined after giving the parties an opportunity to adduce evidence on the point. It was further ordered that in the event of the whole claim of the plaintiff being found not to be realisable from defendant 2 the balance of the plaintiff's decree would be realised from defendant 1. This was under the provisions of S. 232, Contract Act. It appears that the trial Court found that it had no jurisdiction to try the suit as against the defendant (No 2) company. The suit was accordingly dismissed as against defendant 2. On appeal by defendant 1 the question of jurisdiction did not arise in the appellate Court and was not discussed. In the circumstances probably no decree could be passed against defendant 2. This is a defect apparent on the face of the record.

It has been suggested that S. 21 of the Procedure Code applies. But that section applies only where there has been an objection to the place of suing. In this case no objection was raised as to the place of suing in the appellate Court and consequently S. 21 has no application. Objection to the place of suing was raised in the trial Court and was allowed in that Court and there was no appeal against that finding. This application for a review is accordingly allowed and the case is restored to the file in order that it may be reheard generally.

K.S. *Application allowed.*

A. I. R. 1935 Calcutta 153 (2)

S. K. GHOSE, J.

Adhar Chandra Saha—Petitioner.

v.

Gour Chandra Saha and *another*—Opposite Parties.

Civil Rule No. 185 of 1934, Decided on 12th June 1934, from decision of Munsif, 3rd Court, Pabna, in Suit No. 111 of 1933.

Bengal Tenancy Act (1885), S. 26-F—All cosharer landlords must be made parties to application under S. 26-F whether they are mentioned in deed of transfer or not.

All persons who are in fact cosharer landlords must be made parties to an application under S. 26-F, whether all such persons are named in the notice of the transfer or not. Hence although a person is described as the sole landlord under the deed of transfer, and notice of transfer is issued only to him, but in fact there are other cosharers also which fact such person knows, he must implead them also within time in the application under S. 26-F. Otherwise his application will be rejected : 1933 *Cal* 460, *Rel on*. [P 154 C 1]

Surajit Chandra Lahiri — for Petitioner.

Surendra Nath Bose (*Sr.*) — for Opposite Parties.

Order. — This Rule arises out of an application under S. 26-F, Ben.Ten. Act. It appears that in the deed of transfer with regard to an occupancy holding the

petitioner was described as the sole landlord and accordingly notice of the transfer was given to him. On 10th April 1933 he filed the application for re-purchasing the holding under S. 26-F impleading the purchaser, the opposite party 1. On 10th June following the opposite party 1 intimated to the Court that there was another cosharer landlord, namely, Reajuddin Khondkar who had not been made a party. On 8th July the petitioner stated to the Court that he did not admit Reajuddin Khondkar to be a cosharer, but that still to get over the objection he would pray that Reajuddin be added as a party. On 5th August Reajuddin was added as a party. The learned Munsif held that this addition was not made within time and accordingly he rejected the application. Against that order the present Rule has been obtained.

It is contended that as the petitioner was described as the sole landlord under the deed of transfer it is not for him to make any other person a party to the application under S. 26-F stating such other person to be a cosharer. It is contended that it was for the opposite party to repudiate the statement in the deed of transfer. But under S. 188 read with S. 26-F and according to the trend of decisions particularly in 1933 Cal. 460 (1), the position is that all persons who are in fact cosharer landlords must be made parties to an application under S. 26-F whether all such persons are named in the notice of the transfer or not. In the present case the petitioner does not admit Reajuddin to be a cosharer landlord. The learned Munsif has enquired into this point and has found that as a matter of fact Reajuddin is a cosharer. There is the Record of Rights with regard to plot No.436 which is the subject-matter of transfer and the petitioner himself brought partition suit No. 80 of 1933, in which he treated this very plot No. 436 as joint. That being so, it was for the petitioner to make Reajuddin a party to this application within the time allowed by law. Consequently the decision of the lower Court cannot be interfered with. The Rule is discharged with costs hearing fee one gold mohur.

K.S. *Rule discharged.*

1. Barkatulla Pramanik v. Ashutosh Ghose, 1933 Cal 460=145 I C 121.

A. I. R. 1935 Calcutta 154

MITTER AND PATTERSON, JJ.

Bhupati Charan Basu — Plaintiff — Appellant.

v.

Chandi Charan Basu Mallik— Defendant—Respondent.

Appeal No. 85 of 1933, Decided on 23rd November 1934, from original decree of Dist. Judge, Hooghly, D/- 24th January 1933.

(a) Will— Probate — Probate Court can consider on construction of will as to whether applicant for probate is residuary legatee or universal legatee.

It is open to a probate Court to consider on the construction of the will as to whether the applicant for the probate is entitled to letters of administration being the residuary legatee or universal legatee. [P 155 C 2]

(b) Will—Construction—One will cannot be consrued with reference to another.

While occasionally reference may be made to construe one will with reference to the provisions of another will, it is always dangerous to rely on the provisions of a different will for the purpose of construing the will which is in controversy before the Court: *Lloyds Bank Ltd* v. *Fenwick* (1922) 2 *Ch D* 775, *Rel on.* [P 156 C 1]

(c) Will—Absolute gift to wife — On her death properties to vest in sister's son—Gift over to sister's son held void.

The material portion of the will was as follows: "After my death my wife on becoming the sole heir to all the properties moveable or immovable and of all monies whether cash or due from the money-lending business to be left by me, shall hold and enjoy the same and become entitled to make gift and sale, and to that no objection on the part of any one shall be entertained. Whatever properties shall be left after the death of my wife shall vest in our future heir, my sister's son B who will be the sole heir to the said properties.

Held: that the gift to the wife was an absolute gift and that the gift over could not take effect. [P 157 C 1]

Bijan Kumar Mukherji and *Kumud Bandhu Bagchi*—for Appellant.

Naresh Chandra Sen Gupta and *Bama Prosanna Sen Gupta*—for Respondent.

Mitter, J.-- Two questions arise in this appeal from the decision of the District Judge of Hooghly refusing letters of administration to the estate of one Bhuban Mohan Roy who died on 23rd November 1930. The proponent, who is now the appellant before us, set up a Will said to have been executed by Bhuban Mohan several years before his death. Bhuban died leaving behind him a widow, Krishna Bhabini Dassi, but no issue. The widow died shortly after on 20th February 1931. The widow had two sisters, Karuna Moyee Dasi and

Ayhore Moni Dasi. Chandi Charan Basu Mallik, who is the respondent before us, is a son by the first sister, and Bhupati Charan Bose, who is the applicant for letters of administration, is the son by the last named sister. According to the ordinary law of inheritance the applicant as well as the objector would be entitled to a share in the properties of Bhuban after the death of the widow in case of his dying intestate. When the application for letters of administration with the will annexed was made by Bhupati on 21st April 1931 a preliminary objection was taken by the objector that the present application was not maintainable as no estate of Bhuban remains to be administered and this objection seems to have prevailed with the learned District Judge who has held, on the construction of the will, that the applicant for the letters of administration has no interest in Bhuban's estate and that the gift over to him was inoperative and had no effect. The learned Judge, as has already been said, dismissed the application for letters ef administration. It is against this decision that the present appeal has been brought and the two questions indicated in the beginning of our judgment which have been debated before us are: (1) that the probate Court was not competent to deal with the construction of the will and secondly that on the construction of the will the appellant Bhupati has no locus standi to maintain the application. With regard to the first question reliance has been placed by Dr. Mukherji who appears for the appellant to a decision of this Court in 1933 Cal. 571 (1). The passage on which reliance has been placed occurs in the judgment of S. K. Ghose, J., who delivered the judgment of the Court and which runs as follows:

"As regards the question of locus standi the learned Judge no doubt refers to Ss. 232 and 233, Succession Act. He was entitled to read the will in order to see whether in the circumstances the petitioners could come in as residuary legatees of their representatives."

And then the learned Judge quoted a passage from Tristam and Coot's Probate Proctice, Edn. 7, p. 5 which is to the following effect:

"The function of the Probate Division is to determine what documents are testamentary and who is entitled to be constituted the personal representative of the deceased."

The true rule, however, appears from another passage in Tristam and Coot's Probate Practice to which our attention has been drawn by Dr. Sen Gupta who appears for the respondent. What passage occurs at p. 432 of the same edition. The passage is as follows:

"After the Court has admitted a document to probate the construction and interpretation of its contents are left to the Chancery Division. But where the question who is entitled to a grant of probate or of administration (with will) depends on the construction of a Will the Probate Division may and should construe it to that extent."

In support of this statement the learned author states two cases, Frogley (1905), p. 137 and Lupton (1905), p. 32. We have examined the two cases and it appears to us that for the purpose of determining as to whether a person applying for letters of administration is entitled to such administration it is open to the probate Court to determine as to whether the applicant is a residuary legatee under the will on a construction of the will. Both the applications in the two cases cited were made for the grant of letters of administration with a copy of the will annexed by the person named in the will as the residuary legatee. Notwithstanding that, the Court had to enter into the question of construction of will to see whether the applicant was the residuary legatee under the will and entitled as such, according to the practice, to apply for the grant of letters of administration with a copy of the will annexed. Under the Indian Succession Act having regard to the provisions of Ss. 232 and 234 it would appear that before letters of administration can be granted the probate Court should see as to whether the applicant is a universal or a residuary legatee so as to be entitled to apply for the letters of administration with a copy of the will annexed. Some of the observations in the case cited might have stated the law somewhat broadly. As for instance it is said,

"the probate Court cannot go into the question whether a gift over in the Will is valid or not."

As we understand the judgment of the learned Judge if on the face of the will it appears that the applicant for the letters of administration is either a residuary legatee or a universal lega-

1. Sudhir Chandra Pal v. Uttari Sundari Pal, 1933 Cal 571=145 I C 684.

tee it is not open to the Court to decide as to whether such provisions are valid or not. In the earlier part of the judgment the learned Judges however stated this, as we have already said, that the Court is entitled to read the will in order to see whether the applicant is a residuary legatee or his representative. That seems to be the correct statement of the law. In a subsequent passage to which reference has been made the law seems to have been somewhat broadly formulated (p. 5, Tristam and Coot's Probate Practice). We have examined the cases cited in p. 432 and we are of opinion that it is open to a probate Court to consider on the construction of the will as to whether the applicant for the probate is entitled to letters of administration being the residuary legatee or universal legatee. The next question is the question of the construction of the will. The will has been printed in the appendix at the end of the paper book and the material portion of the will runs as follows:

"After my death my wife Srimati Krishna Bhabini Dasi, on becoming the sole heir to all the properties moveable or immovable and of all monies whether cash or due from the money-lending business to be left by me, shall hold and enjoy the same and become entitled to make gift and sale, and to that no objection on the part of any one shall be entertained. Whatever properties -shall be left after the death of my wife Srimati Krsihna Bhabini Dasi, shall vest in our future heir my sister's son Sriman Bhupati Charan Basu who will be the sole heir to the the said properties. I absolutely disinherit the other sister's son of mine, Sriman Chandi Charan Basu, who is of very bad character and addicted to excessive drinking and who has treated us badly."

Then there is a provision as what is to happen if Bhupati dies before the death of Krishna Bhabini:

"In that case Sriman Tara Prosanna Roy, the great-grandson of the elder brother of my father, will get the estate which will be left by Krishna Bhabini."

It is contended for the objector that this contention has prevailed with the District Judge that in the first paragraph of the will the gift to the wife is an absolute gift and therefore the subsequent clause, if it refers to the testator's estate, must be held to be inoperative seeing that it is repugnant to the absolute gift in favour of the wife in the first paragraph. We have no doubt read the original will in Bengali as also the translation which appears to us to have been accurately made and it appears to us that the gift to the wife was an absolute gift. The Bengali words are: "*Samasta aurther uttra adhikarinee haiya bhogsamaya abang dan bickroyaer malick haiben tahate kahars upotty chalibena.*" It was distinctly stipulated that she was to hold and enjoy the same i. e. the properties left by the testator and become entitled to make gift and sale and to that no objection on the part of any one shall be entertained. A Hindu widow under the Hindu law has no power to make a gift or sale except for the purposes of what is understood as as legal necessity. By giving this power to her the testator was intending to confer on her an absolute estate. That seems to be the dominant intention in the will and in the subsequent cause the testator is careful enough to state,

"that whatever properties shall be left after the death of my wife Sm. Krishna Bhabini shall vest in our future heir my sister s son Sriman Bhupati Charan Basu who will be the sole heir to the said properties."

The Bengali words are: "*Aumar patny Srimati Krishna Bhamini Daseer lokantte je kono sampathy thakicey. Aumader bhabee oyarish aumar bhaginiya Sreeman Bhupati Charan Bysu oi sampattier eake matra uttra adhikari haibey,*" intending thereby that if Krishna Bhabini did not dispose of all the properties bequeathed to her by the testator in that case those properties shall vest in Bhupati. The testator had clearly in view the legal position which he had indicated in the first paragraph that he was giving absolute estate to the wife. Of course Cls. 2 and 3 are contrary to Hindu law and therefore cannot be given effect to. Several cases have been cited before us, many of them being the decisions of their Lordships of the Judicial Committee of the Privy Council. As for instance, the leading case of 30 All. 84 (2) and the subsequent cases in which their Lordships approved of the said decision. But the provisions of those wills were different and while occasionally reference may be made to construe one will with reference to the provisions of another will it is always dangerous to rely on the provisions of a different will for the purpose of construing the will which is in controversy before the Court. The proper rule in cases of this kind is laid down

2. Mt. Surajmani v. Rabi Nath Ojha, (1908) 30 All 84=35 I A 17 (P C).

by Lord Sargent in (1922) 2 Ch. D 778 (3):

"One Will will not be contrued with reference to another, but that does not mean that one is debarred from seeking assistance from the reasoning which the Courts have employed in construing bequests of a similar character."

In 23 Cal. 563 (4), it is laid down that,

"to contrue one Will by reference to expressions of more or less doubtful import to be found in other Wills is for the most part an unprofitable exercise. Happily that method of interpretation has done out of fashion in this country."

We are therefore of opinion that the learned District Judge has arrived at the right conclusion on the question of the will and having regard to this view it appears to us that the plaintiff-appellant has got no locus standi to maintain the application for Letters of Administration which has rightly been refused. The result is that the appeal fails and is dismissed with cests, hearing fee being assessed at two gold mohurs.

Patterson, J.—I agree.

K.S. *Appeal dismissed.*

3. Lloyds Bank Ltd. v. Fenwick, (1922) 2 Ch D 775=92 L J Ch 97=128 L T 191=66 S J 631.
4. Narendra Nath Sircar v. Kamal Basiul Dasi, (1896) 23 Cal 563=23 I A 18=6 Sar 663 (P C).

A. I. R. 1935 Calcutta 157 (1)

JACK AND KHUNDKAR, JJ.

Sm. Annapurna Dassi and *others*—Plaintiffs—Petitioners.

v.

Sarat Chandra Bhattacharjee and *others*—Opposite Parties.

Civil Rule No. 1272 of 1933, Decided on 14th May 1934, from order of Dist. Judge, Hooghly, D/- 11th July 1933.

Civil P. C. (1908), S. 115 and O. 7, R. 11 (b) (c)—Suit dismissed for proper court-fee not being paid within time—Appeal and second appeal are competent—Revision from appellate Court's order is not competent.

Where a suit is dismissed because proper court-fee has not been paid within the time allowed, this amounts to rejection of the plaint under O. 7, R. 11, Cls. (b) and (c). From that order there is an appeal and a second appeal. In such a case no revision lies from the order of the appellate Court dismissing the appeal : 1932 *Cal* 482, *Disting.* [P 157 C 2]

Harendra Chandra Ghose — for Petitioners.

Bejan Kumar Mukherjee and *Jatin Mohan Bose*—for Opposite Parties.

Order—This rule was issued calling upon the opposite parties to show cause why two orders of the District Judge of Hooghly dated 7th June 1933 and 11th July 1933 should not be set aside. The order of 7th June was that the suit must be valued at the valuation of the decree itself and in that view the learned District Judge allowed the petitioners time for six weeks in which to pay the deficit court-fee on the valuation of Rs. 13,000 and he further directed that if the petitioners complied with this order they would be permitted to proceed with the suit, otherwise the appeal would stand dismissed with costs. The petitioners failed to comply with this order and then the learned District Judge on 11th July 1933 dismissed the petitioners' appeal with costs and he added that the petitioners were liable to pay Rs. 242-8-0 as additional court-fees for the appeal to the Government.

A preliminary point has been taken in opposing this rule, namely, that a second appeal lies against the order of the learned District Judge and that therefore this application in revision is not maintainable. This appears to be correct. A contrary ruling has been referred to by the petitioners, namely, the case of 1932 Cal. 482 (1). That case is distinguishable inasmuch as that was not a case of dismissal because the balance of court-fee which was due on the plaint was not deposited within the time allowed by the Court. In the present case the original suit was dismissed because proper court-fee had not been paid within the time allowed. This amounts to rejection of the plaint under O. 7, R. 11, Cls. (b) and (c). From that order there is an appeal and a second appeal. In this case therefore an appeal lies against the order of dismissal of the first appeal. We understand that the petitioners have presented an appeal. The rule is accordingly discharged.

K.S. *Rule discharged.*

1. Jnanada Sundari v. Madhab Chandra, 1932 Cal 482=138 I C 643=59 Cal 388.

A. I. R. 1935 Calcutta 157 (2)

MITTER, J.

Helim Ulla—Plaintiff—Appellant.

v.

Hakim Ali and *others*—Defendants—Respondents.

Appeal No. 610 of 1932, Decided on 23rd November 1934, from appellate decree of Addl. Sub-Judge, First Court, Sylhet, D/- 18th April 1931.

Civil P. C. (1908), O. 23, R. 1 (3)—Withdrawal of suit—No order granting leave to institute fresh suit—Whether withdrawal of suit is with consent of defendant or not, subsequent suit based on same cause of action is barred

A withdrawal is a withdrawal within the meaning of O. 23, R. 1 (3) whether the defendant consented to the plaintiffs' prayer for withdrawal or not. To hold that para. 3, O. 23, R. 1, would have no effect, if the application for withdrawal made by the plaintiff is consented to by the defendant when there is no order of the Court granting leave to institute a fresh suit on the same cause of action, would be to introduce into O. 23, R. 1 some words which are not there. Hence where plaintiff withdraws suit without permission to institute a new suit on same cause of action with the consent of the defendant in the hope of the matter being settled out of Court by arbitration but the arbitration proves abortive and he files a fresh suit on the same cause of action simply because of the arbitration, the cause of action does not alter and the subsequest suit is barred. [P 158 C 2]

Benoyendra Nath Palit — for Appellant.

Hemendra Kumar Das—for Respondents.

Surajit Chandra Lahiri—for Dy. Registrar.

Judgment.—This appeal must be dismissed. The plaintiff instituted a suit in the year 1922 for possession being Suit No. 286 of that year for declaration of title alleging that he had been dispossessed from the lands by the defendants in Chait 1326 B. S. While the suit was pending the plaintiff made an application to withdraw the suit on the plea that the matter would be settled out of Court through the intervention of arbitrators. In this application he did not ask the Court to reserve in his favour a right to bring a new suit on the same cause of action in case the settlement out of a Court through arbitration fell through. On 17th February 1923, the Court permitted the plaintiff to withdraw the suit and as no leave to institute a new suit on the same cause of action had been prayed for no order granting leave was passed. Eventually there was a reference to arbitration out of Court but that arbitration failed. The plaintiff now institutes the suit basing his claim on the same title which he pleaded in Suit No. 286 of 1922. He also pleaded that he had been dispossessed in Chait 1326 as in the earlier suit.

In the present suit he however recites the circumstance under which the suit of 1922 was withdrawn, recites the facts of the abortive reference to arbitration and institutes the suit, as I have stated stated, on the same title and on the same disturbance of his title. I do not think that simply because it is stated in the present plaint that there was an arbitration and the arbitration failed that alters the cause of action. The cause of action in the present suit is the same, in my judgment, as the cause of action in the suit of 1922 and that is the view that has been taken by both the Courts below and I agree with them. The plaintiff contends further that the bar of O. 23, R. 1 (3) would not apply if the withdrawal without permission to institute a new suit on the same cause of action was made with the consent of the defendant in the hope of the matter being settled out of Court. The withdrawal is a withdrawal within the meaning of O. 23, R. 1 (3), whether the defendant consented to the plaintiffs' prayer for withdrawal or not. To hold that para. 3, O. 23, R. 1 would have no effect, if the application for withdrawal made by the plaintiff is consented to by the defendant when there is no order of the Court granting leave to institute a fresh suit on the same cause of action, would be to introduce into O. 23, R. 1, some words which are not there. I would accordingly hold that the Courts below have rightly held that the present suit is barred by reason of the provisions of para. 3, O. 23, R. 1. Defendant-respondent 9 has preferred cross-objections which relate to the question of costs. But the cross-objections are not pressed. The result is that both the appeal and the cross-objections are dismissed with costs.

K.S. *Appeal dismissed.*

A. I. R. 1935 Calcutta 158

NASIM ALI AND KHUNDKAR, JJ.

Prabhatnath Das—Appellant.

v.

Ramendrakumar Shaha — Respondent.

Appeal No. 477 of 1932, Decided on 13th June 1934, against order of Dist. Judge, Noakhali, D/- 26th May 1932.

Administration—Executor— Grant of probate is not condition precedent to institution of suit — He is entitled to get decree if he produces probate before passing of final decree.

The grant of a probate is not a condition precedent to the institution of the suit by the exe-

cutor. He has a right to institute the suit as executor before he obtains the probate. Whether as executor he would be entitled to recover the decree or to maintain the same passed by the trial Court without producing the probate is an entirely different matter. He will be entitled to get a decree, if he produces the probate before the passing of the final decree : 38 *Cal* 327 and 1931 *Bom* 547, *Rel on.* [P 159 C 2 ; P 160 C 1]

Jitendrakumar Sen Gupta and *Paresh-chandra Sen*—for Appellants.

Bhagirathchandra Das — for Respondent.

Judgment. — The facts which gave rise to these two appeals are as follows :

One Ramsundar executed a mortgage bond in favour of Udaychandra Das borrowing Rs. 250 with interest at the rate of 2½ per cent per month. There was also a stipulation for compound interest. On 15th November 1928, Uday's son, Mahendra, the sole appellant in S. A. 184 of 1933 and one of the appellants in M. A. 477 of 1932, instituted a suit on the mortgage-bond against the heirs of Ramsundar for recovery of Rs. 1,200 as executor to the will left by his father Uday after the death of Uday. At the time of the institution of the suit Mahendra did not institute any proceeding for getting a probate of the will of his father.

During the pendency of the suit however he applied for probate and was appointed administrator pendente lite under S. 247, Succession Act. Thereafter he prosecuted the mortgage suit as administrator pendente lite and obtained a mortgage decree on 9th January 1931. The plaintiff's claim for a personal decree for realization of the balance, if any, that may remain unrealized from the sale proceeds, was however dismissed. Thereupon, the defendants filed an appeal to the lower appellate Court on 23rd March 1931, impleading the appellant, Mahendra, as the sole respondent in the appeal. The application for probate however was dismissed on 2nd April 1932 only on the ground that the appellant could not pay the probate duty. On 10th May 1932, an application was filed by the heirs of Uday for being substituted as respondents in place of Mahendra, on the ground that the probate of the will left by Uday was not taken out. This application was rejected by the lower appellate Court on 21st May 1932. On 27th May 1932, the heirs of Uday filed an application for staying the hearing of the appeal to enable them to file an appeal against the said order to this Court and to get an order for staying the hearing of the appeal from this Court. This application was however refused. The appeal was thereafter heard by the learned Judge and the suit was dismissed. M. A. 477 of 1932 is by the heirs of Uday against the order dated 21st May 1932 and S. A. 184 of 1933 is by Mahendra as executor, who has now ceased to be the administrator pendente lite, against the order dismissing the suit.

M. A. 477 of 1932. — From the facts stated above, it is clear that the interest in the subject-matter of the suit, that is the interest in the mortgage security, did not come to or devolve upon the heirs of Uday during the pendency of the appeal in the lower appellate Court. Consequently, the learned Judge was right in dismissing the application for substitution and addition of the heirs under O. 22, R. 10, Civil P. C. This appeal is accordingly dismissed.

S. A. 184 of 1933. — It appears from the judgment of the lower appellate Court that the only point, which it decided, was whether the decree could be maintained by the appellant after he had ceased to be the administrator pendente lite. The learned Judge has observed :

"Under S. 213, Succession Act, the plaintiff's right, as executor, could not be established till he was granted probate or letters of administration with a copy of the will annexed and, if he succeeded in obtaining a decree on the basis of a grant of letters of administration pendente lite, that decree must be regarded as conditional on the plaintiff finally obtaining probate of the will. When therefore his application for probate was allowed to be dismissed, the whole decree was liable to be set aside on that ground alone."

From the facts stated above, it is clear that the appellant is the executor to the will of his father. There is no dispute about the genuineness of the will. The appellant failed to get the probate, because he could not pay the probate duty in time. He however obtained the decree in the trial Court as administrator pendente lite, as the application for probate was then pending. During the pendency of the appeal in the lower appellate Court, the appellant ceased to be the administrator pendente lite. But this fact cannot take away his right to proceed with the proceeding or to maintain the decree as an executor.

The grant of a probate is not a condition precedent to the institution of the suit by the executor : see 38 Cal 327 (1). There cannot be any doubt that the appellant had the right to institute the present suit as executor before he obtained the probate. Whether as executor he would be entitled to recover the decree or to maintain the same passed by the trial Court without producing the probate is an entirely different matter. It is well established on authorities that he will be entitled to get a decree, if he produces the probate before the passing of the final decree. In 1931 Bom 547 (2), Beaumont, C. J., observed as follows :

"If the deceased mortgagee left a will . . . . . the defect can be cured by plaintiffs 3 to 6 (who are alleged to be and who sued as heirs and legal representatives of the deceased mortgagee) taking out probate and then proceeding with their action seeing that their title arises under the will and the only necessity for obtaining probate is to enable them to prove the will in the only manner which the Court recognizes."

The learned advocate for the appellant prayed before us for remanding this case to the lower appellate Court in order to enable his client to cure the defect by producing the probate before the matter is finally disposed of by the said Court. From what has been stated above it is clear that the learned Judge has not come to any decision on the merits of the case. He dismissed the suit only on the ground that the appellant before us could not maintain the decree as he had already ceased to be the administrator pendente lite. It has been already pointed out that the appellant is still entitled to prosecute the suit as executor and will be entitled to get a decree, if the lower appellate Court comes to a decision on the merits in his favour and if he produces the probate before the lower appellate Court at the time of the hearing of the appeal. We accordingly set aside the decree of the lower appellate Court and remand the case to that Court. If the plaintiff appellant produces the probate before the lower appellate Court within five months from this date, it will thereafter proceed to hear the appeal as well as the cross-objection on the merits and, if the findings of the said Court be in favour of the plaintiff, the suit will be decreed. If however the plaintiff fails to produce the probate within the time aforesaid, then the plaintiff's suit will stand dismissed with costs in the lower Courts. There will be no order for costs of both the appeals in this Court.

K.S. *Case remanded.*

1. Chandra Kishore Roy v. Prasanna Kumari Dasi, (1910) 38 Cal 327=9 I C 122=38 I A 7 (PC).
2. Menahim Yousef v. Islam Aman Satah, 1931 Bom 547=134 I C 1167.

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COSTELLO AND LORT-WILLIAMS, JJ.

Samarendranath Mitra and *others* — Plaintiffs—Appellants.

v.

Pyareecharan Laha—Defendant—Respondent.

Appeal No. 37 of 1934, Decided on 21st May 1934, from original in Extraordinary Civil Suit No. 4 of 1933.

(a) Civil P. C. (1908), O. 32, Rr. 4 and 11 —Certificated guardian appointed guardian ad litem — Merely because he ceases to be certificated guardian, he does not ipso facto cease to be guardian ad litem—Minor.

Normally if a minor wishes to institute a suit and he has a certificated guardian, then that certificated guardian is the right person to act as the next friend of the minor. If, on the other hand, a suit is brought against a minor who already has a certificated guardian, then he is the person who must be appointed guardian for the suit, unless the Court otherwise decides. Hence there is no inherent disqualification in all persons other than certificated guardian to be a guardian-ad-litem. When a person who is the certificated guardian is appointed as the guardian ad litem, the mere fact that he subsequently ceases to be the certificated guardian, and somebody else is appointed in his stead, does not of itself impose such an absolute and fundamental disqualification that he automatically vacates his office and becomes functus officio. The only way of getting rid of a guardian-ad-litem who has once been properly appointed, is under the provfsions of R. 11, subject perhaps to the implications of sub-R. (1), R. 4. [P 165 C 1]

(b) Civil P. C. (1908), S. 11—Suit dismissed for want of prosecution—Issues not tried —No question of res judicata arises.

Where a suit has been dismissed for want of prosecution, under the provisions of O. 9, R. 9 and the issues which are raised or might have been raised are never tried out and there is no judicial determination of any of them, no question of res judicata arises. [P 166 C 1]

(c) Words and Phrases—Cause of action.

It is quite correct to define 'cause of action' as meaning all the congories of facts which it is necessary for the plaintiff to establish before he can ask the Court to grant the relief which he claims in the suit. [P 167 C 1]

Sudhir Ray and *N. Sanyal*—for Appellants.

S. N. Banerjee, *Page*, *K. Basu Roy*, *Advocate-General* and *Sambhu Banerji* for *Kshettri*—for Respondents.

Costello, J.—The facts, out of which this appeal arises, are set forth in the early part of the judgment of Buckland, J. In order to make it clear however how it came about that only certain issues were decided by the learned Judge it is necessary that I should recite some of the salient facts. In the year 1931, one Krishnakatyayanee Mitra became entitled to the estate of her grandfather, Kumarkrishna Deb, in the right of a Hindu lady. It is said that her husband, Asokenath Mitra, was a man of dissolute habits, who had dissipated the properties which he had himself inherited from his own father. The story is that Krishnakatyayanee Mitra was induced by her husband, Asokenath Mitra, to borrow various substantial sums of money and to create mortgages and other securities on the estate which she had acquired from her grandfather, in order that the personal debts of her husband might be paid off, and also to provide him with funds for what is described as his "evil propensities." It is said that the result of these operations was that Asokenath Mitra and his wife were in such finacial straits that they, in conspiracy with an attorney named N. C. Mandal, and a man named Amalkanta Sarkar, who was their son-in-law, entered into various projects for the purpose of raising large sums of money for discharging the antecedent liabilities whereby their infant sons were deprived of the interest which they would eventually have acquired upon the cessation of their mother's estate.

On 25th March 1927, Amalkanta Sarkar was appointed guardian of the person and property of the present plaintiffs, the two sons of Asokenath Mitra and Krishnakatyayanee, who are minors. Amalkanta Sarkar was ostensibly appointed for the purpose of safeguarding the reversionary interest of the plaintiffs in the property. The conspiracy alleged may be described thus : The solicitor N. C. Mandal, advised Asokenath Mitra to induce Krishnakatyayanee to surrender her interest in her grandfather's estate to the minors, which was done, and the solicitor arranged for a loan on the security of a mortgage of the properties. It is said that the defendants, Pyareecharan Laha and Anandacharan Laha, are relations of the solicitor. The surrender having been made, the solicitor then filed a petition on behalf of the then guardian of the plaintiffs, Amalkanta Sarkar, before the District Judge of the 24-Parganas, and obtained permission to raise a loan of Rs. 2,50,000 on behalf of the minors by means of mortgage of the properties. That was done on 16th August 1929. On 22nd September 1929, another petition was put in before the District Judge of 24-Parganas asking for approval of the draft mortgage to be prepared in favour of the Laha defendants. On 27th September 1929, a deed of surrender and a mortgage-deed for Rs. 2,50,000 in favour of the Laha defendants was executed by Amalkanta Sarkar. Part of the allegations against the defendants is that the whole of the money was retained by the solicitor defendant, N. C. Mandal, and that no part of it came into the hands of Amalkanta Sarkar, as guardian of the minors.

It was, subsequently, found that the surrender might not have been entirely valid in law because certain portions of the property inherited by Krishnakatyayanee Mitra had not been included in the original deed of surrender. Consequently, on 5th October, she executed an instrument which has been referred to as a Deed of Rectification of the Deed of Surrender. I would pause here to say that it is not material for our present purpose to discuss the question which might have arisen as to whether a surrender of this kind was properly within the contemplation of the provisions of Hindu law. That point has not been taken. But the surrender is challenged on the ground that the whole matter was in the nature of a plot to deprive these minors of their reversionary rights in regard to the property.

On 12th April 1930, the attorney, N. C. Mandal, again made an application to the District Judge, 24-Parganas, and on that occasion asked for permission to raise a further loan of Rs. 80,000 also on the mortgage of the estate. It was, in fact, a second mortgage of the same property as that comprised in the mortgage to the Lahas. It is said that as a result of that transaction, the solicitor defendant received for his own benefit a sum amounting to Rs. 44,000 and that Amalkanta Sarkar, the then guardian, and Asokenath Mitra, the father of the

minors, also received large sums for their own purposes. The allegations made by the minors against their parents and their guardian and the attorney relate to the transactions I have just described.

After an interval of a few months—about the 12th November 1930—the Lahas instituted a suit on the mortgage to them and that was suit No. 2090 of 1930. In that suit, they made Krishnakatyayanee a defendant and also Lakshmeenarayan Kshettree who was a second mortgagee, the man who had lent the Rs. 80,000. On 22nd November 1930, Amalkanta Sarkar, who, as I have already said, had been appointed guardian of the person and the properties of the present plaintiffs on 25th March 1930, was appointed guardian-ad-litem of the minors in the mortgage suit and for the purposes of that suit, and that it is an important fact to be borne in mind, having regard to what transpired subsequently. On 30th April 1931, a man named Asheshnath Mitra, who is also some kind of relation of the present plaintiffs, made an application to the District Judge of the 24-Parganas at Alipore, asking for the removal of Amalkanta Sarkar from the guardianship of the minors' on the allegations that he was neglecting and disregarding their interests and had in effect worked hand-in-hand with the parents of the minors and this solicitor N. C. Mandal, to defraud the minors of their properties. On that date, an order was made appointing Asheshnath Mitra guardian provisionally. It was also directed that the eldest of the three minors (there were three at that time) who was aged about 20, should appear before the Court.

Then, on 5th May 1931, the suit with which we are concerned was instituted by the minors, the present plaintiffs and their elder brother, through their next friend and guardian, Asheshnath Mitra. It is to be noted that at that time he was, strictly speaking, only provisionally the guardian. However, he instituted a suit, which is suit No. 936 of 1931, asking for a declaration that the four instruments I have mentioned, viz.. the deed of surrender, the first deed of mortgage, the deed of rectification, and the second deed of mortgage were of no effect and invalid in law and for an order setting aside those instruments. On the same day, an application was made in that suit by the minors through their guardian. This application was made by the minors for an injunction restraining the plaintiffs in the mortgage suit, that is to say, the Lahas and the Kshettrees, from proceeding with their suit, and on the application an interim injunction was granted. On 7th May, an order was made appointing Asheshnath Mitra as guardian of the minors, subject to his furnishing security as specified and directing the removal of Amalkanta Sarkar from the guardianship which he previously held. On that date, the eldest of the three minors appeared before the Court and apparently expressed some opinion in the matter. On 14th May the matter of the application in suit No. 936 made for the purpose of staying the mortgage suit, came again before the Court and on that occasion an order was made without prejudice to the rights of the parties in suit No. 936 of 1931, that the mortgage suit, being No. 2090 of 1930, should be proceeded with. The mortgage suit, apparently, was pursued in the usual course.

On 14th May 1931, a preliminary decree, was made in the mortgage suit. The mortgage suit was in fact not defended and the usual preliminary decree was made. One of the allegations in the present suit, in effect, is that the mortgage suit was allowed to go undefended, owing to the deliberate action or rather abstention of the guardian-ad-litem, Amalkanta Sarkar. What is complained of with regard to that decree is that the mortgagees ought to have made it their business to have substituted Asheshnath Mitra in place of Amalkanta Sarkar, as guardian-ad-litem of the minor defendants. On 9th June 1931, Asheshnath Mitra definitely became the guardian of the person and property of the minors having satisfied the District Judge with regard to the matter of the security which he had been directed to furnish. It is clear therefore at any rate, as from 9th June 1931, Asheshnath Mitra was in a position to take such steps as he thought fit in the interest of the minors.

On 24th July 1931, suit No. 936 of 1931 was dismissed for want of prosecution. It was said that Asheshnath Mitra had to go away to Benares owing to the

illness of his mother. That is the explanation given on behalf of the plaintiffs. On the other hand, it was suggested, on behalf of the defendants in the present suit, that what really happened was that the non-appearance of Asheshnath Mitra was really consistent with, and indeed in pursuance of, the whole conspiracy. It is suggested that Asheshnath Mitra was really acting in conjunction with the parents of the minors, and with the solicitor in getting himself made a certificated guardian, in order that he might then accuse the other conspirator, Amalkanta Sarkar, of having betrayed the interests of the minors in connexion with the antecedent transaction. I am bound to say, speaking for myself and looking at the matter in due perspective, that one cancannot altogether be free from a suspicion that that may have been the true state of affairs. We are however not concerned with that aspect of the matter at the present stage.

On 13th May 1932, a final decree was made by Ameer Ali, J., in the mortgage suit (No. 2090 of 1930), and at that time, so far as the records show, Amalkanta Sarkar was still the guardian-ad-litem of the infant defendants. Against that final decree there was an appeal, but that appeal was dismissed for want of prosecution on 2nd February 1933, and some three months later the eldest of the three minors, Sailendranath Mitra died. It is to be observed that the mortgagees had clothed themselves with full rights in the way of enforcing their mortgage as early as 30th June, or at any rate, 2nd February, when the appeal of the defendants was finally dismissed. One result of that appeal against the final decree was that the mortgagors had succeeded in staving off execution under the final decree for a period of some nine months.

Nothing more was done by the mortgagors until 29th June 1933, when the mortgagees were enforcing their security by bringing the mortgaged properties to sale, and on that date a rather curious thing happened. A suit was filed in the Alipore Court asking for a declaration that the decrees obtained in the mortgage suit No. 2090 of 1930, including presumably the decision of the Court of appeal, were void and the properties were not saleable in the execution proceedings and also for a perpetual injunction restraining the defendants, that is to say, the mortgagees, from putting the decrees which they had obtained to execution. One cannot fail to observe, in passing, that it seems somewhat strange that Asheshnath Mitra, acting for these minors, thought fit to take himself to the Court of a Munsif at Alipore, in order to challenge the decrees made by this Court. The defendants in that " extraordinary " suit (it was extraordinary in more senses than one) took appropriate proceedings for having that suit transferred to the Original Side of this Court, and on 1st August 1933, there was an order transferring the suit on certain terms, one of which was that the defendants in the suit, the mortgagees, should provide a sum of money to enable the plaintiffs to pursue the suit in this Court.

On 17th August 1933, there was an order for amendment of the plaint which is of some importance, as some of the amendments clarified the attitude which the plaintiffs were taking up as regards the whole of the transactions entered into by their parents by the solicitors and by their former guardian. On 30th August 1933, an order was made in the suit that certain issues should be tried as preliminary issues, obviously a proper order in the circumstances, because, in one view of the matter, the determination of those issues might have put an end to the whole of the proceedings. It is in consequence of that order that the suit came before Buckland, J., and from his decision it now comes before us in appeal. The order was made by Panckridge, J., and he directed that the following issues should first be tried :

" (1) Whether the minors are properly represented in Suit No. 2090 of 1930, (2) whether this suit is barred by res judicata and by principles analogous thereto, and (3) whether the suit is barred under O. 9, R. 9, Civil P. C."

With regard to the first of those issues, the learned Judge came to the conclusion that there was no such defect in the form of the proceedings in suit No. 2090 of 1930, as would operate to make either the preliminary decree or the final decree obtained in that suit, invalid. The learned Judge puts the matter in this way :

" On the first issue it is submitted that the minors are not properly represented because O. 32, R. 4, Civil P. C., provides that where a

minor has a guardian appointed by competent authority, no person other than such guardian shall act as the next friend of the minor or be appointed his guardian for the suit unless the Court considers otherwise."

And then the learned Judge says :

"The certificated guardian of the minors was undoubtedly appointed as their guardian-ad-litem at the inception of Suit No. 2090 of 1930, and there can be no question that at the time the minors were properly represented within the meaning of the section."

Mr. Roy has argued before us, on behalf of the plaintiffs-appellants, that as Asheshnath Mitra was appointed guardian of the person and property of the minor on 5th May 1931, and Amalkanta Sarkar was removed from the guardianship on that date, at the time when the mortgage suit came to trial, the minors were not properly represented in that Asheshnath Mitra had never been substituted in place of Amalkanta Sarkar. The learned Judge came to the conclusion that if a person has once been validly appointed guardian-ad-litem he remains such and properly represents the minors, or lunatics, as the case may be, unless and until he has been removed from the office of guardian-ad-litem. This point is of considerable importance. Mr. Ray was quite unable to put before us any direct authority on the point. I ventured to suggest to Mr. Ray that hitherto it has never occurred to any one seriously to argue that a guardian who has been properly appointed guardian-ad-litem ipso facto ceases to be guardian-ad-litem, merely because some other person has got himself appointed guardian of the person and property of the minors plaintiffs, by some other Court. I have mentioned the fact that in the present instance the guardian-ad-litem was appointed by this Court in Suit No. 936 of 1931. The certificated guardian was appointed by the Court at Alipore and it struck me as being somewhat remarkable and that it might lead to considerable inconvenience, if orders made by some other Court were to have the effect of abrogating orders made by this Court, in a pending suit. In my opinion, that position cannot arise however because I take the view that once a person has been properly appointed guardian-ad-litem, he can only cease to be guardian ad litem in one or other of the ways specified in O. 32, R. 11 which says in sub-R. (1).

"Where the guardian for the suit desires to retire or does not do his duty, or where other sufficient ground is made to appear, the Court may permit such guardian to retire or may remove him, and may make such order as to costs as it thinks fit."

Then in sub-R. (2) it is provided that:

"Where the guardian for the suit retires, dies or is removed by the Court during the pendency of the suit, the Court shall appoint a new guardian in his place."

In my opinion, as there are no other direct provisions in the Code in the regard to this matter, it must be taken that there are only three ways by which a guardian ad litem can cease to function as such during the pendency of a suit: (1) by his retirement with the permission of the Court. It should be noted that under the old Code, even that was not allowed. (2) By his death and (3) by his removal by an order of the Court itself. It is to my mind of great significance in these proceedings that though Asheshnath Mitra got himself appointed certificated guardian by a Court at Alipore, he never came to this Court to ask for the removal of Amalkanta Sarkar from being guardian ad litem in Suit No. 936 of 1931, even though he was making before the Alipore Court very serious allegations as to the integrity and diligence of Amalkanta Sarkar. I think I ought perhaps qualify what I have said with regard to the termination of the office of guardian ad litem, during the pendency of a suit, by saying that it may perhaps be that if a guardian ad litem became of unsound mind, he might by reason of the provisions of R. 4, sub-R. (1) thereby become so disqualified that he would cease to act as guardian for the suit.

It is to be noted that the provisions of sub-R. (1) are in general terms and they lay down that any person who is of sound mind and has attained majority may act as next friend of a minor or as guardian for the suit. I emphasize the words "may act" because it is quite arguable from that phraseology that a person who ceases to be of unsound mind, can no longer 'act' as guardian for the suit. But what we are concerned with, in the present case, are the provisions of R. 4, sub-R. (2) and they are as follows:

"Where a minor has a guardian appointed or declared by a competent authority, no person other than such guardian shall act as the next friend of the minor or be appointed his guardian for the suit unless the Court considers, for reasons to be recorded, that it is for the minor's

welfare that another person be permitted to act or be appointed, as the case may be."

Now the effect of that rule is that normally if a minor wishes to institute a suit and he has a certificated guardian then that certificated guardian is the right person to act as the next friend of the minor. If, on the other hand, a suit is brought against a minor who already has a certificated guardian then he is the person who must be appointed guardian for the suit unless the Court otherwise decides. That last proviso, to my mind, indicates that there is no inherent disqualification in all persons other than certificated guardian to be a guardian ad litem. In the present proceedings, at its inception, the suit was undoubtedly properly constituted because the person appointed guardian ad litem at the time when the suit was started was in fact the certificated guardian. Therefore the appointment was strictly in conformity with the provisions of sub-R. (2). It seems to me that the mere fact that he subsequently ceased to be the certificated guardian, and somebody else was appointed in his stead, does not of itself impose such an absolute and fundamental disqualification that he automatically vacated his office and became functus officio. In my opinion, the only way of getting rid of a guardian ad litem who has once been properly appointed, is under the provisions of R. 11, subject perhaps to the implications of sub-R. (1). R. 4, which I have mentioned. In that view of the matter, it follows that the decision of the learned Judge on issue 1 was correct. Buckland, J., then says:

"It is further argued that the interests of Amalkanta Sarkar were adverse to those of the minors. As to that I express no opinion. This involves questions of fact, and questions of fact are not being considered at this period. The learned Advocate-General objects that the plaintiffs are not entitled to take such point on their pleadings. As to that again, I express no opinion, and I leave it for determination by the learned Judge to whom may fall the duty of determining this case upon the facts should such occasion arise."

Now, that passage means this: The learned Judge held, and in my opinion rightly, that the question whether or not Amalkanta Sarkar had done his duty as a guardian-ad-litem, in the mortgage suit, was not a matter which was before the Court at that time, because it was not really comprehended within any of the issues which had been ordered to be tried as preliminary to the trial of the actual suit itself. The learned Judge was therefore right in saying that the question was not a matter with which he need concern himself. If as a result of his decision on the other points in the suit, the matter ultimately proceeded to trial, then that would be the proper time for the question of the conduct and the position of Amalkanta Sarkar to be gone into. Mr. Banerjee has argued before us, just as the learned Advocate-General has argued, that, in any event, this question was not properly raised on the pleadings in the suit and he referred to paras. 13 and 14 of the plaint which appear at p. 5 of the paper book. Paragraph 13 says:

"That the plaintiffs state that defendant 5 was at all material times under the control and domination of defendants 6 and 7 and he, having sacrificed the interest of the plaintiffs and their eldest brother for his own ends and the benefit of defendants 6 and 7, his interests became adverse to that of the minor plaintiffs and their brother."

Para. 14 says:

"That having come to know that the guardian appointed by Court, i. e., defendant 5, is acting adversely to the interests of the minors, the present guardian applied to the Court of the District Judge, 24-Parganas, in Act 8, Case No. 57 of 1927, for removal of the said guardian for appointment of a new guardian."

Now, looking at para. 13 by itself, it would seem that the allegation there was something in the nature of a suggestion that the guardian Amalkanta Sarkar had an interest in the property itself which conflicted with that of the minors; but there is undoubtedly in para. 14 an allegation in general terms that he was "acting adversely" to the interests of the minors, and eventually the defendants took up the challenge contained in para. 14 as is shown by their denials in para. 6 of the written statement which are these words:

"They do not admit the occasion for such appointment or that defendant 5, Amalkanta Sarkar acted adversely to the interest of the minors."

Upon that state of the pleadings, it does seem to us that there is or may be an issue to be tried as to whether or not this man, Amalkanta Sarkar, acted traitorously, or negligently, or faudulently in connexion with the minors' affairs and, in particular, in connexion with the mortgage suit. The other two matters, which were before Buckland, J., were in one sense interwoven, though in

another way they were distinct. Those issues were in effect whether in regard to the issues in the suit, one ought to apply the principle of res judicata having regard to the matters in issue in Suit No. 936 of 1931, and whether the present suit is barred by reason of that Suit No. 936 of 1931 having been dismissed for want of prosecution, under the provisions of O. 9, R. 9. Now the learned Judge took the view, and we think quite rightly, that properly speaking, no question of res judicata arises at all because the issues which were raised or might have been raised, in Suit No. 936 of 1931, were never tried out and there was no judicial determination on any of them. It is not necessary that I should quote any authorities in support of that proposition. As regards the effect of O. 9, R. 9, the rule says:

"Where a suit is wholly or partly dismissed under R. 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action."

It then proceeds to say:

"But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal . . . . . ."

Although that is a procedure very frequently resorted to however, it was not taken in the case of Suit No. 936 of 1931. I have already indicated that the plaintiffs seem to have become quiescent after that suit had been dismissed, and that it was only after a considerable period that they eventually instituted the present suit. What we have to decide is whether the present suit is in respect of the same cause of action as Suit No. 936 of 1931. Now the learned Judge discussed the point at some length and he compared the allegations which were made in the plaint in Suit No. 936 with the allegations made in the plaint in the present suit and he said:

"The first seven paragraphs of the two plaints are substantially the same."

And then he proceeded to discuss the subsequent paragraph and said:

"Up to the point prior to the mortgage suits, there can be no question that the causes of action are identical."

But in regard to this suit he said:

"In the present plaint . . . . . the suit is referred to and the decree is attacked in para. 21, but that is attacked on the ground of the conspiracy which in the earlier plaint was the ground of the conspiracy which in the earlier plaint was the ground of the attack upon the mortgages, and so far as there is any new cause of action in para. 21, it relates back to the subject-matter of the former suit. The only fresh grounds upon which the mortgage decree is attacked are to be found in para. 20, but that does not state any cause of action upon which the plaintiffs would be entitled to relief. Substantially, the whole matter now put in issue was the foundation of the former suit, and in these circumstances I hold that the suit is barred under O. 9, R. 9, Civil P. C."

It may no doubt be the case that substantially the whole matter, now put in issue, was the foundation of the former suit. Looking at the matter from a non-technical and non-legal point of view, I have no doubt that any average person of ordinary commonsense would at once say:

"are not the two suits to all intents and purposes the same; and that which the plaintiffs are now seeking to get is exactly the same kind of thing they sought to obtain in the previous suit."

That no doubt would be a sensible and reasonable view to take, but we have to administer the law as it is and we have to look at the matter having in mind the technicalities and niceties of adjectival law and the definitions of "cause of action" which are to be found in the authorities. I do not propose to recite a concatenation of those authorities. It is sufficient I think, for the present purpose if I quote the well-known passage from 22 Q. B. D. 128 (1), where Lord Esher said, when he was referring to the meaning of the phrase "cause of action arising":

"It has been defined in 8 C. P. 107 (2), to be this: every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court, it does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved. It has been suggested today in argument that this definition is too broad, but I cannot assent to this, and I think that definition is right."

Reference may be made to the case of 1931 Cal. 659 (3), where the Court of appeal, consisting of the Chief Justice and C. C. Ghose, J., upheld a judgment of my learned brother Lort-Williams in which he discussed the authorities and followed the principles laid down in 22 Q. B. D, 128 (1) supra. In one of the cases decided in India it was said:

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1. Read v. Brown, (1888) 22 Q B D 128=58 L J Q B 120=37 W R 131=60 L T 250.
2. Cooke v. Gill. (1873) 8 C P 107.
3. Engineering Supplies, Ltd. v. Dhandhania & Co., 1931 Cal 659=134 I C 65=58 Cal 539.

"The cause of action is a bundle of essential facts which it is necessary for the plaintiff to prove before he can succeed in the suit."

I think it is quite correct to define "cause of action" as meaning all the congeries of facts which it is necessary for the plaintiff to establish before he can ask the Court to grant the relief which he claims in the suit. In the present case no doubt a greal of the averments in the plaint were merely reiteration, either in the same or other language of the averments in the plaint in Suit No. 936 of 1931. No doubt the basic factor in the plaintiffs' case, in the other suits, was what they have described as the consipracy between their parents and their present solicitor and the former guardian, in connexion with the four transactions—two in connexion with the surrender of the property and two in connexion with the mortgages, but it is a fact that in their present plaint in para. 21 as amended, they have added this :

"The plaintiffs state that the said ex parte decree and the final decree made in the said Suit No. 2090 of 1930 of the Hohourable High Court were procured in pursuance of the conspiracy and were made without jurisdiction and are therefore a nullity and void ab initio."

It seems to be tolerably clear that, as regards the greater part of their case, the plaintiffs are relying on the original conspiracy but before they can get a declaration that the preliminary and final decrees in the mortgage suit are invalid, they will have to prove that those decrees were in fact made. It happens that the defendants have admitted the making of those decrees, but it would have been open to them to have denied that the decrees were made, that is to say, to traverse the plaintiffs' allegations in regard to the decrees, in which case, the fact of the making of the decrees would have been one which the plaintiffs would have been bound to prove in order to succeed in this suit. That statement of the position seems to bring the matter within the four corners of the definition of "cause of action." We therefore though speaking for myself with some hesitation, come to the conclusion that the view taken by the learned Judge cannot be sustained, and, as regards the technical point, we must hold that the suit is not barred by O. 9, R. 9, and that the cause of action is not wholly the same as that in Suit No. 936 of 1931, particularly havin- regard to the fact that there are averg ments with regard to a matter which had not even arisen at the time when the former suit was dismissed for want of prosecution, namely, the validity of the actual decree.

The case must therefore be sent back to the Court below for the determination of the two questions, namely, (1) the question of whether Amalkanta Sarkar did, in fact, act adversely to the interest of these minor plaintiffs and (2) the vital question of whether the plaintiff are entitled to have it declared that the two decrees in the mortgage suit are bad by reason of the conspiracy or conspiracies alleged. The position is this, that as we think the learned Judge was wrong in his decision on as regards Issue 3 and as he never dealt with the question of whether the interests of Amalkanta Sarkar were adverse to those of the minors, the suit will have to be proceeded with. No doubt, the learned Judge before whom the case comes up for trial, will have due regard to the fact that there was a prior suit and that certain issues were raised in that suit, which therefore should be excluded from the present suit together with any other matters which might have been put in issue in the former suit.

It follows that the appeal will be allowed to the extent I have indicated, but, in view of all the circumstances, we think that the costs of the proceedings before Buckland, J. and before this Court should abide the ultimate result of the trial. We express the opinion that it is desirable that the hearing of the suit should be expedited. By consent, the sale which was to have taken place in execution of the decree in the mortgage suit will be stayed until the determination of the suit.

Lort-Williams, J.—I agree.

K.S. *Appeal allowed in part.*

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COSTELLO AND LORT-WILLIAMS, JJ.

Premsukhdas Singhynia—Defendant—Appellant.

v.

N. C. Bural and *Pyne*—Plaintiffs—Respondents.

Appeal No. 120 of 1933, Decided on 15th May 1934, from original suit No. 568 of 1926.

(a) Legal Practitioner—Cost — Order of direct payment may be made in appropriate cases.

It is the settled practice of the Calcutta High Court that an order for direct payment of costs to which an attorney is entitled may, in appropriate cases, be made. [P 170 C 1]

(b) Legal Practitioner— Solicitor's lien—English Law principles should be applied—O. 21, Civil P. C., does not alter law as to solicitor's lien—Civil P. C. (1908), O. 21.

It cannot be correct to say that the law as to solicitor's lien has been altered by the provisions of O. 21. Such cases have to be dealt with and decided in the light of the principles of the English law applicable to a solicitor's lien. [P 170 C 2]

(c) Legal Practitioner—Solicitor has lien over property recovered or proceeds of judgment - Bona fide compromise between parties—Court will not interfere for preserving solicitor's lien—But if it is collusive, Court will interfere—Meaning of 'collusive' explained.

A solicitor has, apart from any order of the Court or any statute, a lien over any property recovered or preserved and over the proceeds of any judgment, that is to say of any decree which is obtained for his client by the solicitor's exertions. That lien is known as a particular lien. It relates only to the costs incurred in recovering the property or obtaining a judgment for payment of money. The right of the solicitor is really in essence a claim to the equitable interference of the Court for the solicitor's protection. The solicitor's lien may, in some circumstances, be affected by a compromise between the parties and as a general rule, the Court will not, for the purpose of maintaining the solicitor's lien, interfere in a compromise which is a bona fide compromise. But if the compromise is not bona fide but collusive and is entered into between the parties specifically for the purpose of depriving the solicitor of his lien, then the Court will usually interfere for the protection of the solicitor and there is no doubt that, in such an event, the solicitor may apply for payment of the costs by either of the parties to the scheme. It should generally be held that there is 'collusion' if the agreement between the parties is made with the knowledge that the result will inevitably be to deprive the solicitor of his costs which he has earned. There is certainly 'collusion' if the parties enter into an agreement knowing and intending that the outcome will be that the solicitor is deprived of his lien : *English Cases considered.* [P 172 C 1; P 173 C 2]

(d) Appeal—Question as to state of mind of parties is one of fact—Finding on such question will not be disturbed unless it is not supported by evidence.

A question of the state of mind of the parties is, of course, a question of fact. A finding on such a question ought not to be disturbed by the High Court, unless it can be demonstrated that there was really no evidence at all on which the Judge could have so found. [P 174 C 1]

Isaacs and *H. Banerji*—for Appellant.

S. N. Banerjee and *Sudhir Ray*—for Respondents.

Costello, J.—This is an appeal from a judgment of Ameer, Ali, J., dated 16th August 1932 and the order which the learned Judge made, as part of that judgment, is in these terms : The order I propose to make is as follows :

(i) An order for payment of the costs of the applicant as are taxed against both respondents to this application.

(ii) an order charging the fund in the hands of P. N. Sen & Co., with payment of such costs in support of the applicant's lien.

(iii) an order against both respondents restraining them from withdrawing the said fund in excess of the amount due to the applicant without payment of such amount.

(iv) an order restrainiug both defendants from satisfying the decree in this suit in any manner which will deprive the applicant for such costs.

(v) the respondents to pay the costs of this application.

(After reciting the facts, His Lordship proceeded). Put compendiously therefore the claim which Messrs. Bural & Pyne were making was that the settlement arrived at between Singhania and Didwania, was to all intents and purposes, a device intended to deprive the solicitors of the costs which they earned in obtaining the decree in suit No. 568 of 1926. The learned Judge, when the matter came before him, dealt with the law at considerable length. After reviewing a large number of authorities he came to this conclusion :

" I regard the arrangement, in this case, substantially as a set off of decrees, under O. 21, R. 18, Civil P. C. As such, I regard it as an arrangement of a different character, and therefore to be regulated by rules different to those applicable to a bona fide settlement of disputed claims .... Even so regarded however I consider myself bound by the ruling of Chaudhuri, J., in 1917 Cal 241 (1) to the effect that normally set off of two decrees will be allowed notwithstanding the solicitor's lien.

The learned Judge however qualifies his ruling by admitting an exception where "there are equities" in favour of the solicitor.

In a clear case under O. 21, R. 18 it is difficult to see what equities would or could arise.

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1. Bhupendra Nath Bhose v. E.D. Sassoon & Co; 1917 Cal 241=38 I C 30=43 Cal 932.

I therefore take the meaning of the learned Judge to be this: that the Court will interfere to prevent a set-off upon grounds similar to those upon which it interferes in the case of a compromise of disputed clauses, i. e., 'collusion,' etc. In other words, the learned Judge treats set-off of decrees and compromise of claims upon the same footing.

I have therefere still to consider the arrangement in the present case, as if it were a compromise.

A compromise (if so, it can be called) of this nature is in any event very different in degree to the compromise of doubtful claims. In the former case, the burden of showing that the arrangement was intended to defeat the solicitor's claim is obviously far more easily discharged. Indeed, in some cases, it might be necessary for the parties seeking to set off to explain the reason for the course taken."

Then comes the final conclusion at which Ameer Ali, J., arrived, which is as follows :

"I have carefully considered the circumstances of this case and I have on the facts no hesitation in coming to the conclusion that the parties intended so to arrange matters as to defeat the solicitor's lien. I am further of opinion, notwithstanding observations in some of the authorities above cited, that I am entitled to come to this conclusion without referring the applicants to a suit."

The learned Judge then made the order which I have already stated. It is to be seen that what the learned Judge decided, in effect, was this. The settlement arrived at between the parties was in the nature of a compromise. The evidence before him was sufficient to indicate to his satisfaction that what was included in that compromise, if I may so put it, was an intention to defeat the lien which the plaintiff's solicitors undoubtedly had; so, in the circumstances, it was open to him (the learned Judge) to make an order for direct payment. It may perhaps be convenient, if I deal with the last point first, namely, the question whether it was proper for the learned Judge to make an order upon the parties, or either of them, for payment direct to the solicitors concerned of the amount of costs in regard to which they had a lien. That matter was dealt with by the present Chief Justice in the case of 1920 Cal. 122 (2). The head-note of that case says:

On an application by a solicitor made in a suit in which certain costs had been awarded to his client against the opposite party, the Court has jurisdiction to enforce, in a proper case, the solicitor's lien by making a direct order for payment to the solicitor by the opposite party of such costs.

2. Harnandroy Foolchand v. Gootiram Bhuttar, 1920 Cal 122=54 I C 691=46 Cal 1070.

The learned Chief Justice after referring to a number of cases said:

"I am not going to lay down that I shall require an attorney, before I enforce his lien, to satisfy me that he has utterly exhausted every possibility in order to get payment otherwise. It seems to me that this solicitor is quite reasonable in coming to the Court to ask that the Court should allow him to stand in the shoes of this defendant and to claim this money which the plaintiffs have been ordered to pay. The original client is dead; there is evidence that his legal representatives are not people of substance; there is definite evidence that they are unable to pay, and I think it is no abuse at all of the summary powers of this Court for this attorney to ask for an order which merely puts him in the shoes of his own client so that this sum of money which was ordered to be paid in 1916 should at least be realized.

I shall direct that this order be made to far as the plaintiff is concerned, and that the plaintiff be ordered to pay those costs to the attorney direct."

Subsequently, in a case which unfortunately has not been reported, A. A. O. No. 108 of 1930 (3), a judgment was delivered by the present Chief Justice, with the concurrence of Buckland, J., on 10th March 1931, on the hearing of Appeal from an Original Order No. 108 of 1930, where a similar point had arisen. In course of the judgment, the learned Chief Justice said:

"Thereupon, the attorney brought the present application in the suit against the defendants asking that a certain sum should be paid to him and the learned Judge has given him an order for payment of the sum of Rs. 922-0-6, being the balance of the amount of his taxed costs. Whether in 1920 Cal. 122 (2), I was right or wrong in following the decision of Jenkins, J., in 25 Cal. 887 (4), is a matter upon which there is a good deal of room for doubt, particularly as we have had cited to us a decision to the contrary of Sale, J., in 27 Cal. 269 (5); but as the practice appears at present to be in favour of making these orders and as there does not seem to be any practice by which an attorney can come to the Court and get a charging order as in England, I am not prepared to deviate in this case from the practice which I followed on the previous occasion."

It appears therefore that the learned Chief Justice was of opinion that it was right for him to hold, as the settled practice of this Court, that it is competent for a Judge sitting on the original side to order direct payment of the costs to which an attorney is entitled and in respect of which he has a lien. That practice can be supported by reference

3. Durgacharan Das v. Nabinkrishna Das, A A O No. 108 of 1930.
4. Khetter Kristo Mitter v. Kally Prosunno Ghose, (1898) 25 Cal 887=2 C W N 508.
5. Ramdoyal Serowgie v. Ramdeo, (1899) 27 Cal 269=4 C W N 208.

to a number of cases in England but I will refer to only one or two of them, viz., 2 D. P. C. 119 (6) and 3 H. & C. 294 (7), where it was held that a Judge had power, in the exercise of the equitable interference of the Court, to order that the plaintiff or the defendant should pay the attorney costs due to him. The only other case, which I will cite in this connexion, is the case of 4 Q.B. 153 (8). I would add that I respectfully agree with the learned Chief Justice that it is now the settled practice of this Court that an order for direct payment may, in appropriate cases, be made. It appears therefore that assuming that the learned Judge was right in the first two conclusions at which he arrived, he was entitled to make the order which in fact he made.

We have now to consider whether the main conclusions of the learned Judge were such that we should support the findings at which he arrived. Mr. Isaacs, on behalf of the appellant Singhania, has argued that it was not open to the Court to deal with this matter at all by reason of the provisions of O. 21, R. 2 or O. 21, R. 18 of the Code. He says that the provisions of O. 21, R. 2 are plain, unequivocal and mandatory, and therefore if the parties came before the Court to have an adjustment recorded or to have a set-off recorded under the provisions of O. 21, R. 18, then the Court must record the adjustment without reference to any extraneous considerations. Mr. Isaacs has argued that, as the only reference in the Code to any attorney's or solicitor's lien is by implication in O. 8, R. 6, no lien should be recognized when there is a question of recording a set-off. O. 8, R. 6, sub-R. (1) says:

> Where in a suit for the recovery of money the defendant claims to set off against the plaintiff's demand any ascertained sum of money legally recoverable by him from the plaintiff, not exceeding the pecuniary limits of the jurisdiction of the Court and both parties fill the same character as they fill in the plaintiffs' suit, the defendant may, at the first hearing of the suit, but not afterwards unless permitted by the Court, present a written statement containing the particulars of the debt to be set off.

Then sub-R. (2) says:

> "The written statement shall have the same effect as a plaint in a cross suit so as to enable the Court to pronounce a final judgment in respect both of the original claim and of the set-off: but this shall not affect the lien, upon the amount decreed, of any pleader in respect of the costs payable to him under the decree."

The word 'pleader' is defined in sub-S. (15), S. 2 of the Code as meaning any person entitled to appear and plead for another in Court, and includes an advocate, a vakil and an attorney of a High Court. Accordingly, Mr. Isaacs says that it is only in the circumstances contemplated by O. 8, R. 6, that an attorney's lien would not be affected. Therefore in any other circumstances such as the present where there is a settlement between the parties in the nature of a compromise or set-off, it is always open to the parties to make any arrangement they choose even though it has the effect of prejudicially affecting the lien of an attorney in the case. Speaking for myself, I cannot accept the suggestion that that is the state of the law, and in my opinion as the Civil Procedure Code does not in terms say that the pre existing law is to be set aside or repealed, we must take it that the Code does not contain exhaustive general principles of law applicable to the question of attorney's lien in the way contended for by Mr. Isaacs. Sir Dinshaw Mulla in his note to O. 8, R. 6 gives a quotation from the case of 10 Bom. 248 (9) in which the Chief Justice (Sir Charles Sargent) said:

> " It is to be borne in mind that the solicitor's lien in the High Courts of India is governed exclusively by the law as it existed in English Courts before the passing of 23 & 24 Vic., C. 127, by which that lien was very much extended. By that law the solicitor had a lien for his costs on any funds or sum of money recovered for or which became payable to, his client in the suit."

I respectfully agree with the observations of the learned Chief Justice that the question of the solicitor's lien in this country is still governed by the relevant principles of English law. Therefore a matter such as this falls to be decided on the footing of those principles. In any event, in this particular case, it is to be noted that the parties had not reached the stage where they were actually before the Court asking either that the arrangement between them should be recorded as an adjustment under the terms of O. 21, R. 2 or dealt with as provided for in O. 21, R. 18 as a "set-off," if set-off it was. It is true that

6. Young v. Readhead, (1833) 2 D P C 119.
7. Ex parte W. Games: In re Williams v. Lloyed, (1864) 3 H & C 294=33 L J Ex 317.
8. In re, Sullivan v. Pearson, Ex parte Morrison, (1868) 4 Q B 153=9 B & S 960=38 L J Q B 65 =19 L T 430.
9. Devkabai v. Jefferson, (1886) 10 Bom 248.

they had taken out a summons for such purpose, as I have already stated, but before the return of this summons, the solicitors, Messrs. Bural & Pyne, had managed to interpose and bring the matter before the Court, upon an application for enforcement of their lien. Therefore, it seems to me that any argument based on the operative effect of the provisions of O. 21 is immaterial in the circumstances of the present case.

Before passing from this aspect of the matter that is to say the operative effect if any, of O. 21, Civil P. C., I ought to add that Mr. Isaacs sought to base his argument upon the contention that these provisions of the Code have in effect abrogated the operation of the English law as regards solicitors' lien in cases where there is an "adjustment." He referred to the case of 1 K. B. 399 (10), where it was held that, by S. 150, of the County Courts Act, 1888, it was open to the parties in actions in county Courts to enter into an arrangement the involving the setting off of cross judgments, even though such an arrangement made no provision for the solicitors' costs, and had the effect of depriving solicitor of one of the parties of the benefit of his lien. But it is to be observed that, in the judgment of that case, Wills, J., said with reference to the jurisdiction given to county Courts:

"The object was to secure a cheap and speedy administration of the law for the benefit of the poorer classes and the Court which was established by the Act was called in popular parlanee 'the poor man's Court.' I am not sure that the legislature did not intend to prevent the multiplication of costs in some cases, even though the costs which could be properly incurred."

The answer to Mr. Isaacs' argument therefore is, that the county Courts in England have been given a special jurisdiction under the provisions of the County Courts Act, 1888, which were clearly designed to bring about an expeditious and inexpensive method of settling disputes between parties who have cross judgments, the one against the other. I do not think it right to extract any general principle from that one English case which would be sufficient to justify the propcsition that the Civil Procedure Code by the provisions of O. 21, has pro tanto abrogated the previous law with regard to solicitor's lien.

10. Ward v. Haddrill, (1904) 1 K B 399=73 L J K B 277=52 W R 398=90 L T 232.

Neither can I subscribe to the proposition advanced by Mr. Isaacs to the effect that the Courts ought not to allow any extraneous considerations to enter into the matter when the parties appear before the Court in proceedings either under O. 21, R. 2 or under O. 21, R. 18. In my opinion, it cannot be correct to say that the law as to solicitor's lien has been altered by the provisions of O. 21. Upon that view of the matter, it follows that this case has to be dealt with and decided in the light of the principles of the English law applicable to a solicitor's lien. Perhaps it would be more accurate to say that the matter has to be decided in the light of the English authorities on this point. As I have indicated, in an earlier part of this judgment, the learned Judges came to various conclusions the last of which was upon the question whether it was competent for him to make an order for direct payment or not. That I have already dealt with. The other conclusions were that the arrangement entered into by the parties was in the nature of a compromise and the matter must be dealt with upon that basis. The learned Judge next found that the parties intended so to arrange matters as to defeat the solicitor's lien. It is to be observed that a solicitor has, apart from any order of the Court or any statute, a lien over any property recovered or preserved and over the proceeds of any judgment, that is to say, of any decree which is obtained for his client by the solicitor's exertions. That lien is known as a particular lien. It relates only to the costs incurred in recovering the property or obtaining a judgment for payment of money. The right of the solicitor is really in essence a claim to the equitable interference of the Court for the solicitor's protection. That was laid down nearly a century ago in 12 M. & W. 441 (11) and it was re-stated very clearly in 42 Ch D 190 (12) by Stirling, J. In that case it was said that the lien of the solicitor of a plaintiff for the costs of an action attaches to money received by the plaintiff even by way of compromise where such money is in substance the fruit of the action. Stirling, J.,

11. Barker v. St. Quintin, (1844) 12 M & W 441=1 D & L 542=13 L J Ex 144.
12. Ross v. Buxton, (1889) 42 Ch D 190=58 L J Ch 442=54 J P 85=38 W R 71=60 L T 630.

referred to an earlier case of 1 East 464 (13) where Lord Kenyon had said:

"The convenience, good sense, and justice of the thing require that an attorney should have the same lien on damages awarded as if they were recovered by the judgment of the Court in the ordinary course of the cause."

That is the fundamental position and by virtue of the lien which he has, the solicitor has a right to ask for the intervention of the Court for his protection whenever he finds, after recovering and preserving the property of his client or after obtaining judgment for payment of the money of the client that there is a probability of the client depriving him of his costs. At the same time however it is quite clear that the solicitor's lien may, in some circumstances, be affected by a compromise between the parties and it has been definitely laid down that, as a general rule, the Court will not, for the purpose of maintaining the solicitor's lien, interfere in a compromise which is a bona fide compromise, The case of 2 E. & E. 19 (14), cited by Mr. Isaacs, is a clear authority for that proposition. The headnote of that case is in these terms :

An attorney's right of lien for his costs, on a judgment recovered by his client, is subject to the right of the parties to the action to make a bona fide compromise. The result of such compromise is that the lien is lost. But the lien may prevail against a collusive compromise made by the parties with the express object of defeating it. (In this particular case)—the parties to cross actions, the plaintiff in each of which had obtained judgment, bona fide compromised the actions, after notice to one of them and his attorney from the attorney of the other not to do so in prejudice of the latter's lien on his clients' judgment.

It was held, in that case, that the attorney had no ground for claiming the equitable interference of the Court to enforce his lien. Therefore if there is a genuine bona fide compromise the Court will not interfere. That brings me to observe that if the compromise is not bona fide but collusive and is entered into between the parties specifically for the purpose of depriving the solicitor of his lien, then the Court will usually interfere for the protection of the solicitor and there is no doubt that, in such an event, the solicitor may apply for payment of the costs by either of the parties to the scheme. In 2 E. & E. 19 (14), ubi supra, Wightman, J., remarked:

"The Court of Exchequer has held, in 12 M. & W. 441 (11), that even collusion between the parties to the suit gives him no right to put in force the process of the Court upon a judgment, of his own mere motion and without his client's consent. Perhaps there may be cases in which, if a case of collusion is thoroughly made out, the Court will, in the exercise of an equitable jurisdiction, interfere in the attorney's favour. But I think that no sufficient evidence of collusion exists in the present case. The affidavits do not convince me that the object of the arrangement between the parties to the suit was to deprive the plaintiff's attorney of his costs ; though, no doubt, that was the result of it. The object appears to have been to make a bona fide compromise in order to get rid of Allard's opposition to Brunsdon in the insolvent Court."

Erle, J., said in the same case that each party in an action has been described as dominus litis :

"Lien," properly speaking, is a word which applies only to a chattel ; "lien upon a judgment" is a vague and inaccurate expression, and the words "equitable lien" are intensely undefined. The attorney's right however certainly goes to this extent. that, if a conspiracy between the plaintiff and defendant, to defraud the attorney of his costs, is clearly made out, the Court will interfere to prevent it. It is somewhat difficult to say what would amount to such a conspiracy ; suffice it to say that here no such conspiracy has been shown.

Another case to which I should refer to in this connexion is 2 Ch. 314 (15), where it was held that the Courts will not interfere with a bona fide compromise, but will interfere where there is collusion. It is necessary therefore to consider what is meant by "collusion" in this connexion. The case of 2 Ch. 314 (15) follows the earlier case of 60 L. J. Q. B. 767 (16), where "collusion," for the purpose of deciding whether or not a compromise ought to be allowed to exclude the solicitor's lien, was defined, I will take the case of 60 L.J.Q.B. 767 (16) first. In that case, Lord Denman, who was then Denman, J., said;

"The m in question in the case however is whether all these circumstances taken together enable us to hold that it is brought within the meaning of the word "collusion." If the learned Judge at chambers had found that there had been collusion, there certainly was evidence which would have justified him in doing so. The only doubt I have is, * * * * what the proper finding of fact is for us to arrive at now. The point appears to me to be, what is the meaning of the word "collusion" in relation to such a case as the present ; and the meaning of the word goes no further than to denote an agreement between two parties, with the knowledge

13. Ormerod v. Tate, (1801) 1 East 464.
14. Brunsdon v. Allard, (1859) 2 E & E 19 = 21 L J Q B 306=5 Jur N S 596=7 W R 581.
15. In re, Margetson and Jones, (1897) 2 Ch 314 =66 L J Ch 619=76 L T 805=45 W R 645.
16. Price v. Crouch, (1891) 60 L J Q B 767.

that they are doing an unfair thing in depriving a third party of a right he had. Mr. Gore cited the judgment of Lord Campbell in 2 E. & E. 19 (14) and laid great stress upon this passage : "Although an attorney has a lien for his costs, and, when his client has recovered judgment in an action, may apply the fruits of the action in payment of the sum which is due to him, that does not prevent the parties to the action from coming to a compromise, the result of which is that the attorney loses his lien, provided that the arrangement is not a mere juggle between the parties, entered into by them to deprive the attorney of his costs." I do not think however that Lord Campbell meant to say that, unless there was a "mere juggle," a juggle in a fraudulent sense, there could be no collusion.

The other Judges do not go so far."

Then, commenting on the judgment of Wightman in 2 E. & E.19 (14), ubi supra, Lord Denman said:

"Wightman, J., hits the point : "Was the object of the arrangement to deprive the plaintiff's attorney of his costs ?" I conclude from the language both of Wightman, J., and Crompton, J., in that case that we are justified in holding that in the present case the object of the bargain was to defeat the applicant's lien, and so to deprive him of the costs of the work he had done as solicitor to the plaintiff. Upon the facts brought before us, I am of opinion that a jury would be warranted in saying that there was in this transaction an object or purpose to prevent the applicant getting his costs."

Wills, J. ,added these observations :

"Both the plaintiff and the solicitors for the defendant were well aware that a considerable sum for costs was due, and their conduct shows that they desired to defeat the applicant's claim for them. The defendant's solicitors knew that they could get better terms for their client from the plaintiff if he left his solicitor out in the cold. This being the motive, I am of opinion that the order at chambers was rightly made, and must be sustained, although upon grounds different from those upon which the learned Judge decided."

From the judgments in this case of 60 L. J. Q. B. 767 (16), I think we can extract two propositions : first, there is collusion, if the agreement is made between the parties and there is knowledge of the doing of an unfair thing by depriving the solicitor of his costs ; and, secondly, there is collusion if the motive underlying the action of the parties is to deprive the solicitor of his costs. Now, in the case of 2 Ch. 314 (15) above mentioned, the decision in 69 L. J. Q. B. 767 (16) was followed by Kekewich, J. He deals with the matter thus. He first of all refers to a dictum of Lindley, L. J., in 8 P. D. 144 (17), where Lindley, L. J., said :

"There is no rule that the parties may not compromise an action without the intervention of their solicitors. They must however do so honestly, and not intend to cheat the solicitors of their proper charges."

17. The Hope, (1883) 8 P D 144.

Kekewich, J. comments on that and says :

"The word cheat is not a bit too strong; the Master of the Rolls also uses it."

Then he says:

"The question is whether I have here such evidence as satisfied the Court in 60 L J Q B 767 (16):"

Then he deals with the evidence and comes to the conclusion:

"I have no doubt they did not realise the impropriety of what they were doing. The case seems to me to come within the decision in 60 L J Q B 767 (16)."

He then deals with the form of the order. When one examines all these authorities, the position seems to be that the conclusion to be drawn from them is this: where there is a compromise, the Court will not interfere unless the motive or the object or the intention of the parties is that the solicitor shall be deprived of his lien. Putting the matter in another way, it should generally be held that there is "collusion," if the agreement between the parties is made with the knowledge that the result will inevitably be to deprive the solicitor of his costs which he has earned. There is certainly "collusion" if the parties enter into an agreement knowing and intending that the outcome will be that the solicitor is deprived of his lien. At the outset of his argument, Mr. Isaaces definitely stated that what he was intending to argue in this case was that the arrangement between the parties was not in the nature of a compromise, but was in the nature of a set-off. He said that quite plainly, and argued that the law applicable to such a situation is this: If the parties enter into a set-off, it is entirely a matter of discretion with the Court whether the Court should exercise its right of equitable interference or not. Therefore if the learned Judge had found that the arrangement between Singhania and Didwania, in the present case, was a set-off, we should have been obliged to enquire whether the learned Judge in making the order for payment had exercised the discretion, which he would undoubtedly have, judicially, and in accordance with proper principles. That aspect of the matter can however be entirely eliminated for our present purpose because later in his argument Mr. Isaacs abandoned his contention that the ar-

rangement was a set-off and argued solely on the footing that there was a compromise between the parties and not a set-off. Mr. Isaacs having finally adopted the attitude that there was a compromise and the learned Judge having so found, I do not think that anything more need be said as regards the precise nature of the transaction. We may take it for the purposes of our judgment that it was in fact a compromise. It now remains to be seen whether the learned Judge was right in coming to the conclusion that it was a compromise which had the element of collusion attaching to it, collusion in the sense which I have tried to define. The learned Judge expressed a very definite view as to the state of mind of the parties at the time when they entered into the arrangement. He said:

"On the facts, I have no hesitation in coming to the conclusion that the parties intended so to arrange matters as to defeat the solicitor's lien."

The question of the state of mind of the parties is, of course, a question of fact. Therefore when the learned Judge said that he come to the conclusion that the parties intended to deprive the solicitor of his costs, that conclusion is a finding of fact which ought not to be disturbed by this Court unless it can be demonstrated to our satisfaction that there was really no evidence at all on which the learned Judge could have so found. We must therefore see if there was any such evidence. (After considering the evidence the judgment proceeded) The position seems to have been this: Hardayal Didwania was impecunious and financially involved, even if he was not actually an insolvent at the time when the arrangement was entered into. That fact obviously was well known to Singhania, who was his son-in-law. Singhania then goes to the solicitor of Didwania and attempts to get him to settle his claim for costs upon the basis of a payment of annas 4 in the rupee. Mr. Isaacs argued that that was only an incident in the warfare between the parties and that what Singhania was really trying to do was to buy up Messrs. Bural & Pyne's claim against their client Didwania in order that, having bought up the claim, Singhania might deal Didwania a further blow and put pressure on him by claiming the full amount of the solicitor's bill of costs.

In the light of the petition and the affidavit of Messrs. Bural & Pyne, and considering that there are no satisfactory denials in the affidavit of Premsukhdas Singhania, I think we ought to come to the conclusion that there was ample evidence on which the learned Judge could find that the parties were acting in "collusion", in the sense in which that term can be used for the purpose of deciding whether a compromise should be allowed to defeat the solicitor's lien or not. I would therefore hold that there is no reason why we should set aside the learned Judge's conclusions. In that view of the matter, it follows that this appeal fails and must be dismissed with costs.

Lort-Williams, J.—I agree.

K.S. *Appeal dismissed.*

A. I. R. 1935 Calcutta 174

MUKERJI, AG. C. J. AND GUHA, J.

Brojendra Nandan Saha and *another* —Appellants.

v.

Nekunja Behari Das and *others*—Respondents.

Appeal No. 64 of 1933, Decided on 22nd August 1934, from original order of Dist. Judge, Birbhum, D/- 15th November 1932.

Provincial Insolvency Act (1920), S. 10—'Debtor' may be interpreted in plural—Joint petition by three brothers for adjudication is competent.

The word 'debtor' used in S. 10 which lays down the conditions on which the debtor's petition may be presented may, under the General Clauses Act, S. 13, be interpreted in the plural; and if the conditions mentioned in S. 10, Provincial Insolvency Act, aforesaid are satisfied there is no other provision in the Act in consequence of which such a joint petition would not be maintainable. Under S. 5 of the Act, the powers and Procedure of the Court, in proceedings under the Act are to be the same as in the exercise of its original civil jurisdiction. And the true test to apply, is to see whether a joint petition, treated as a plaint, would be bad for multifariousness, that is to say for misjoinder of causes of action or of parties. Hence a joint petition by three brothers for adjudication is competent, unless the joint petition treated as a plaint, would be bad for multifariousness: 1921 *Mad* 294; 1927 *Mad* 124 and 1925 *Rang* 36, *Rel on*; 2 *C L J* 318 and 1920 *Cal* 964, *not Foll.*

[P 175 C 2]

Bijan Kumar Mukherjee, *Sourendra Kumar Ghose Chaudhury* and *Mani Lal Bhattacharjee*—for Appellants.

Gopendra Nath Das and *Hemanta Kumar*—for Respondents.

Judgment.—This is an appeal preferred by certain creditors from an order adjudicating three persons as insolvents. The three persons so adjudicated are brothers, who alleged that they had been carrying on a business in silk which proved a failure involving them in a heavy debt to the extent of Rupees 44,000 odd in consequence of which they had been compelled to close the businees. The debts were set out in a schedule annexed to their petition, and it was stated that some of the creditors had obtained decrees and that in respect of some such decrees some of the properties of the three brothers had already been attached, while in respect of others execution would shortly be applied for. Schedules of joint properties, movable as well as immovable, and of joint claims against some debtors not already barred were also appended to the petition.

The substantial point urged in the appeal is that a joint petition by the three brothers was not maintainable. Reliance in this connexion has been placed upon the decisions in 2 C. L. J. 318 (1) and 1920 Cal. 964 (2). The former of these decisions was passed when the provisions as to insolvency were contained in the then Code of Civil Procedure (Act 14 of 1882) and it was held that S. 344 of the Code did not contemplate a joint application by several judgment-debtors to be adjudged insolvent, and that if in execution of a joint decree against several persons their joint property was attached and all or some of them applied to be declared insolvents, each must make a separate application under S. 344 of the Code and the case of each of them should be tried separately from that of the others. The decision proceeded upon the view that if a contrary view was adopted there would be serious inconvenience in holding the investigation and trial. In the latter decision, the reasons given as aforesaid being adopted it was held, under the Provincial Insolvency Act (3 of 1907), that the said reasons would also apply to the case of an application made against several joint debtors and that consequently a declaration of insolvency cannot be asked for in one petition against several joint debtors. In the said decision it was further observed that there is no provision in the Provincial Insolvency Act for proceeding, agains two or more persons, who are partners, in the name of the firm. The decisions aforesaid are no longer law in view of the fact that the rules framed by this Court under S. 79, Provincial Insolvency Act (5 of 1920), presuppose a joint petition by a partnership or a firm (vide, Rr. 19 to 24).

The word " debtor " used in S. 10 of the Act, which lays down the conditions on which the debtor's petition may be presented may, under the General Clauses Act, 10 of 1897), S. 13, be interpreted in the plural ; and if the conditions mentioned in S. 10 aforesaid are satisfied there is no other provision in the Act in consequence of which such a joint petition would not be maintainable. Under S. 5 of the Act, the powers and proceedure of the Court, in proceedings under the Act are to be the same as in the exercise of its original civil jurisdiction. And the true test to apply, in our opinion, is to see whether a joint petition, treated as a plaint, would be bad for multifariousness, that is to say for misjoinder of causes of action or of parties.

The two decisions on which the appellants rely have been dissented from in several cases. In 1921 Mad. 294 (3) it has been pointed out that the ground of inconvenience on which they proceeded is not so substantial as it would at first seem, and it was held that the members of a joint Hindu family can be adjudicated insolvents on a single petition by a creditor, if they are liable on a joint debt and have been guilty of a joint act or acts of insolvency. That was a decision under the Act of 1907. A later decision of the same Court, 1927 Mad. 124 (4) which is a decision under the present Act, is to the same effect and has perhaps gone further. The same view has been taken in the Burma High Court in 1925 Rang. 36 (5), All these no doubt are cases of a petition against several joint debtors. But

1. Sorada Prosad Ukil v. Ram Sukh Chanda, (1905) 2 C L J 318.
2. Kali Charan v. Hari Mohan, 1920 Cal 964=58 I C 531.
3. Mamayya v. K. K. R. Rice Mill Co., 1921 Mad 294=63 I C 916=44 Mad 810.
4. Punniah v. Kermal Firm, 1927 Mad 124=99 I C 185=50 Mad 256.
5. Mung Kin v. Arunachalam Chetty, 1925 Rang 36=84 I C 969=2 Rang 309.

we do not see why the same view should not be taken in respect of a petition by several joint debtors. We accordingly hold that the appellants' first contention should be overruled.

The other objection urged is that there were circumstances suggesting that the debts alleged are fictitious and all assets have not been disclosed, and from these it is argued that the finding of the Judge that the debtors are not able to pay their debts should be reversed. We find that the learned Judge has given very good reasons, supported by adequate materials, for holding that a prima facie case, which is all that is necessary for the order he has made, has not been made out. If bad faith or concealment of fact is disclosed at a later stage the Act makes ample provisions for dealing with the same. The appeal is dismissed with costs two gold mohurs.

K.S. *Appeal dismissed.*

A. I. R. 1935 Calcutta 176

S. K. GHOSE AND HENDERSON, JJ.

Ganga Prasad Sinha—Accused—Petitioner.

v.

Brindaban Chandra Das—Complainant—Opposite Party.

Criminal Revn. No. 634 of 1934, Decided on 6th December 1934.

Penal Code (1860), S. 197—For protection under S. 197 act itself must be done in pursuance of public office.

For protection under S. 197 it is necessary that the act itself must be done in pursuance of the public office.

Where the petitioner a Subdivisional Officer of the Public Works Department had gone to discharge some official duty in connexion with earth words, he was not still purporting to act in the discharge of that duty when he got on the boat, lost his temper and assaulted the complainant and as such his act was not covered by S. 197: 1929 *Cal* 724, *Rel. on.*; 1929 *Mad* 659 and 1931 *Cal* 646, *Dist*, [P 176 C 2]

N. K. Basu and *Paresh Lal Shome*—for Petitioner.

Syed M. Saadullah and *Serajuddin Ahmed*—for Opposite party.

S. K. Ghose, J. — The petitioner in this Rule is a Subdivisional Officer of the Public Works Department and he is accused in a complaint filed by a P. W. D. road mohurir. The complaint is to the effect that the accused went to supervise the work which was done by the complainant on a road. On seeing the accused the complainant was proceeding from one bank to the other by boat. When the boat reached the bank the accused got into the boat and finding that the western bank had collapsed in spite of its having been repaired he became enraged and without seeking any explanation he remarked "Can't you maintain the dhip of the western bank" and then he gave to the complainant two blows on the left knee causing injury to the knee. The Magistrate held that the accused was not covered by the provisions of S. 197, Criminal P. C., and directed summons to issue under S. 323, I. P. C. Against that order the present Rule was obtained. It is contended that the petitioner being a public servant is covered by S. 197, Criminal P. C. Mr. Basu on behalf of the petitioner has pointed out that S. 197 of the present Code is wider in its terms than the corresponding section of the old Code and it is contended that, whatever be the offence committed by a public servant, so long as he is acting in official capacity he is entitled to be protected by this section. In his petition of complaint the petitioner has given his own version of the occurrence. But the question must be determined with reference to the allegations in the complaint and the further question is whether at the time of the committing of the offence alleged against him the petitioner was acting or purporting to act in the discharge of his official duty.

It is strongly contended that all the time the petitioner was a Subdivisional Officer of the Public Works Department. But we think it is going too far to say that, although the petitioner had gone to discharge some official duty in connexion with earth works, he was still purporting to act in the discharge of that duty when he got on the boat, lost his temper and assaulted the complainant. In the cases upon which Mr. Basu has relied, for instance in 1929 Mad. 659 (1) and 1931 Cal. 646 (2), the accused were no doubt purporting to act in the discharge of their official duty and the act complained of might be said to have been committed in excess of their duty. But in the

1. Gangarju v. Venki, 1929 Mad 659=1929 Cr C 140=118 I C 102=30 Cr L J 864=52 Mad 602.
2. Sasadhar Acharjya v. Charles Tegart, 1931 Cal 646=1931 Cr C 846=134 I C 1189=33 Cr L J 83.

present case it was no part of the official duty of the petitioner to beat the complainant. It was not merely an abuse of an official act, it was a differact altogether, and I am in agreement with the view taken in 1929 Cal. 724 (3), that the act itself must be done in pursuance of the public office. The result is that the Rule must be discharged.

Henderson, J.—I agree.

K.S. *Rule discharged.*

3. Amanat Ali v. Emperor, 1929 Cal 724=1929 Cr C 360=122 I C 627.

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GUHA AND BARTLEY, JJ.

Harendra Nath Basak and *others*—Defendants 1 to 5—Appellants.

v.

Gopal Chandra Basu Thakur and *others*—Respondents.

Appeal No. 1532 of 1933, Decided on 28th November 1934, from appellate decree of Addl. Dist. Judge, First Court, Dacca, D/- 8th April 1933.

(a) Execution — Agreement anterior to passing of decree cannot be set up in proceeding for execution of decree—But a party can restrain by injunction decree-holder from executing decree for breach of obligation under such anterior agreement—Civil P. C., O. 21, R. 2.

A case of an agreement anterior to the passing of a decree could not be allowed to be set up in a proceedings for execution of a decree; but there cannot be any bar to a party asking for relief by way of an injunction to restrain the decree-holder from putting in execution the decree, if the decree-holders committed a breach of their obligation under an anterior agreement : 1930 *Cal* 356, *Rel on.* [P 178 C 1]

(b) Estoppel — Decree for rent—Anterior agreement not to execute decree proved — Execution by decree-holder taken and payment made by judgment-debtor to avert sale —Subsequent suit by judgment-debtor for injunction to restrain decree-holder from executing decree held not barred by waiver or acqueiscence on part of judgment-debtor as payments were made under compulsion of law—Execution.

A decree for rent was passed. An anterior agreement before the passing of the decree that the decree-holder could not execute the decree on certain conditions was also proved. But the decree-holder executed the decree and in order to avert the sale, the judgment-debtor made payments. Subsequently he sued for injunction restraining the decree-holder from executing the decree.

Held : the suit was not barred by estoppel, waiver and acqueiscence by his having made the payments. The payments were made under compulsion of law and involuntary : 40 *Cal* 598 (*P C*) *Rel on.* [P 179 C 1,2]

Basak and *Subodh Chandra Basak*—for Appellants.

Bhupendra Kishor Bose—for Respondents.

Surajit Chandra Lahiri—for Deputy Registrar.

Judgment.—This is an appeal by defendants 1 to 5 in a suit for permanent injunction in the matter of execution of a decree in a suit for rent, (Rent Suit No. 2 of 1927, in the First Court of the Subordinate Judge at Dacca), on the ground that there was a contract between the plaintiff and the contesting defendants, before the decree was passed in the suit, that the decree was not to be executed against the plaintiff if he withdrew from the contest of the suit in which the decree was passed; the plaintiff's case before the Court was that he did withdraw from contest, and suffered the decree to be passed in view of the contract. The plaintiff set up another agreement between the parties to the rent suit, in the nature of adjustment of the decree which was passed in the suit. As indicated already, the prayer made by the plaintiff in the suit in which the appeal has arisen, was in view of the two different agreements between the parties concerned, one for a permanent injunction, so that the decree passed in the suit for rent might not be allowed to be executed against him. The claim made by the plaintiff in the suit was resisted by the contesting defendants, the appellants in this Court. The contract alleged by the plaintiff as to arrangement not to execute the decree prior to the passing of the decree, as also the subsequent adjustment of the decree were denied; and it was asserted by the defendants that there was waiver on the part of the plaintiff, inasmuch as in the proceedings for execution of the decree for rent, the plaintiff took time on seven occasions, and made payments, waiving fresh sale proclamations and admitting service of process in execution. On the pleadings of the parties, three distinct issues were raised for determination in the suit, on the points raised before us, in support of the appeal : 1. Was there any agreement that the father of defendants 1 to 5 would not execute the decree as against the plaintiff ? 2. Has the ante-decretal agreement been superseded by any subsequent adjustment ? 3. Is the suit

barred by estoppel, waiver and acquiescence ?

The Courts below have agreed in deciding all the above points in favour of the plaintiff in the suit. Defendants 1 to 5 have appealed to this Court. The first ground taken in this appeal is that the Courts below should have held that the decree in the suit for rent having been passed against the plaintiff and in his presence, it was a valid and binding decree so far as he was concerned; and it was not competent to the plaintiff so long as that decree stands to obtain a permanent injunction preventing the defendants from executing the decree; and reliance was placed on the decision in 29 Cal 810 (1) in support of the arguments advanced in this behalf, in which it was laid down that a decree once made, it must be taken to be conclusive between the parties; an agreement alleged to have been come to between the parties before the decree was made could not be given effect to. The decision aforesaid was given in an appeal to this Court arising out of proceedings in execution, and as it has been pointed out by Rankin, C. J., 1930 Cal 356 (2) the decision in 29 Cal 810 (1) mentioned above laid down a sound proposition of law, inasmuch as a case of an agreement anterior to the passing of a decree could not be allowed to be set up in a proceeding for execution of a decree. There was not and there could not however be any bar to a party asking for relief by way of an injunction to restrain the decree-holder from putting in execution the decree, if the decree-holders committed a breach of their obligation under an anterior agreement. This was clearly laid down by the learned Chief Justice in his judgment in 1930 Cal 356 (2) referred to above; and no principle nor authority has been cited before us which could possibly enable us to consider the propriety of the decision in that case. In our judgmant. the plaintiff was entitled to bring a suit of the nature which is before us now, in which the relief prayed was one for an injunction to restrain defendants 1 to 5 from putting in execution a decree obtained by them, in view of an agreement entered in to by the parties concerned, anterior to the passing of the decree.

The point next argued in support of the appeal is the one relating to the adjustment subsequent to the passing of the decree for rent, described as a second agreement, which must, according to the defendants appellants, be taken to have superseded the first agreement come to, anterior to the passing of the decree. On this part of the case, the Courts below have arrived at findings on evidence, which is in accordance with the case of the contesting defendants in the suit, the appellants in this Court. The plaintiff, according to the Court below, failed to establish the adjustment of the decree set up by him; and this decision on evidence must be treated as conclusive in the appeal before us. There was no adjustment after the decree, or any second agreement as set up by the plaintiff and there was no question of second agreement having superseded the agreement anterior to the passing of the decree.

It has to be considered next, whether if the anterior agreement was to be allowed to operate, as it must operate, in favour of the plaintiff in the suit and enable him to get the relief he prayed for in the suit, namely a perpetual injunction preventing defendants 1 to 5 from executing the decree for rent, unless there was any legal bar to the same. The anterior agreement has been found to have been established on evidence, by both the Courts below, and that agreement was not superseded by any subsequent agreement or adjustment after decree. On these conclusions the plaintiff was entitled to get the relief he sought in the suit, unless there was any waiver on his part, as indicated by the third issue referred to in a previous part of this judgment, namely whether the suit was barred by estoppel, waiver and acquiescence ? The Courts below have on the materials before them, come to the conclusion on evidence that there was no waiver or acquiescence on the part of the plaintiff. The question was whether the plaintiff had waived his right to bring an action of the present description and have a permanent injunction restraining the defendants-appellants, as he was alleged to have waived his rights under the agreement anterior to the passing of the decree in

1. Benode Lal Pakrashi v. Brojendra Kumar Saha, (1902) 29 Cal 810=6 C W N 838.
2. Ramchandra Debnath v. Brojendra Kumar, 1930 Cal 356=126 I C 265.

the suit for rent, by taking several adjournments and making several payments in the course of the proceedings in execution of the decree. The facts that adjournments were taken in the matter of the impending sale in execution of the decree, and payments were made by the plaintiff for averting the sale, are not in dispute. There were seven applications before the executing Court; and in one of them it was expressly mentioned that the judgment-debtor did not waive his right to establish that the decree-holders were not entitled to execute the decree against him. On the materials before the Court it is not possible for us to refuse to accept the finding arrived at by the Courts below that in the circumstances of the case, adjournments were taken and payments made under protest and there was therefore no waiver or acquiescence.

It is to be noticed on the above question of waiver, the decision in 31 Cal 822 (3) was relied upon on the side of the appellant, in support of the position that the plaintiff in the suit, the respondent in this Court, having successfully obtained stay of sale from Court on the plea that he would satisfy the decree, if time were allowed, and having approbated the execution proceedings by paying the decree-holder a part of the debt, and thus inducing him to consent to time being granted for the payment of the balance, could not be permitted by the principle of estoppel to say that the decree was incapable of execution against him. The decision in 31 Cal 822 (3) mentioned above, was given by this Court on the facts and circumstances in that case, in which the principle of estoppel by conduct was clearly applicable in the case before us, we are unable to hcld as a matter of law, that there was estoppel operating against the plaintiff respondent. In our judgment, it further appears to be beyond question that the payments made by the plaintiff in execution proceedings to arrest an impending sale were involuntary. They were made to prevent sales which would otherwise have inevitably taken place, and as such payments were made under compulsion of law. The payments made by the plaintiff-respondent in the course of execution proceedings, could not amount to waiver of his rights in the matter of having the relief now sought in the suit in which the appeal has arisen : (See in this connexion the observation of their Lordships of the Judicial Committee in 7 Cal 648 (4), 40 Cal 598 (5). On the question of waiver on the part of the plaintiff, as raised before us our decision is that the findings arrived at on evidence by the Courts below must be accepted, and further, that as a matter of law there was no waiver of his rights sought to be enforced in the present action by virtue of payment made by the plaintiff, which must be taken to be involuntary, and made under compulsion of law. The result of the conclusions we have arrived at as indicated above, is that the appeal fails, and is dismissed with costs.

K.S. *Appeal dismissed.*

3. Conventry v. Tulsi Prosad Narain Singh, (1904) 31 Cal 822=8 C W N 672.

4. Doolichand v. Ram Kissen Singh, (1882) 7 Cal 648=8 I A 93=4 Sar 245 (PC).

5. Kanhya Lal v. National Bank of India, (1913) 40 Cal 598=18 I C 949=40 I A 56 (PC).

A. I. R. 1935 Calcutta 179

HENDERSON, J.

Mati Lal Das and *others*—Plaintiffs—Appellants.

v.

Aditya Chandra Das — Defendant — Respondent.

Appeal No. 2008 of 1931, Decided on 12th June 1934, against decree of Addl. Sub-Judge, Jessore, D/- 26th March 1931.

(a) Bengal Tenancy Act (1885), Ss. 160 (d) and 85—Under-raiyati created in contravention of S. 85—Occupancy right by custom is not protected interest under S. 160 (d).

The right of occupancy existing by custom is not a protected interest within the meaning of S. 160 (d) when the under-raiyati is created in contravention of the provisions of S. 85 : 1932 *Cal* 389 and 571, *Rel on.* [P 180 C 1]

(b) Practice—New point—Point of law, not requiring additional evidence or assumptions can be raised in second appeal.

Where a point is a point of law and it is not necessary to take evidence or to make assumptions before the point can be decided, it can be raised for the first time in se ond appeal. [P 180 C 1]

Hemendra Chandra Sen and *Satyendra Chandra Sen*—for Appellants.

Joy Gopal Ghose—for Respondent.

Judgment. — This appeal is by the plaintiffs. They instituted the suit in order to recover khas possession of the land after service of notice under S. 167,

Ben. Ten. Act. They had purchased a certain raiyati interest. The defendant is holding an under-raiyati. His case was that he had a right of occupancy by custom and in this he is supported by the Record of Rights. The plaintiffs denied the existence of any such custom but both the Courts have held that they failed to rebut the presumption that the Record of Rights was correct.

Mr. Sen has contended that such a right, i. e., a right of occupancy existing by custom is not a "protected interest" within the meaning of S. 160 (d), Ben. Ten. Act, when the under-raiyati was created in contravention of the provisions of S. 85. This contention is supported by the decision of Mitter, J., in the case reported in 1932 Cal. 389 (1) and that decision has been approved by a Division Bench in 1932 Cal. 571 (2). On behalf of the respondent it is argued that this point cannot be taken for the first time in this Court. Of course, if it were necessary to take evidence or to make assumptions in favour of the appellants before the point could be decided it would not be possible for the appellants to raise it here for the first time. But the lease itself is already on the record and it contravenes the provisions of S. 85. As the point is a point of law, it can be taken in this Court.

The result is that the appeal is allowed, the decrees of both the lower Courts dismissing the plaintiff's claim for khas possession are set aside and they will be given a decree for khas possession. The appellants will get their costs in this Court. As the respondent did not appear in the lower appellate Court, there will be no order as to costs in that Court. The respondent asks for leave to appeal. This is refused.

R.K. *Appeal allowed.*

1. Kamini v. Nepal, 1932 Cal 389=137 I C 688.
2. Sonatan Dafadar v. Daulat Gazi, 1932 Cal 571 =141 I C 702.

A. I. R. 1935 Calcutta 180

MITTER AND NASIM ALI, JJ.

Abdul Jalil—Appellant.

v.

Asraf Ali and *others*—Respondents.

Letters Patent Appeal No. 2 of 1934, Decided on 21st August 1934, against judgment of Patterson, J., D/- 26th January 1934.

Patni Regulation (8 of 1819), S. 8—Proceedings for realization of arrears of rent are not against defaulter personally but are against tenures — Notice under regulation duly published and sale held—Sale is not invalid merely because defaulter is dead at time of sale.

The proceedings taken under the Patni Regulation for realization of arrears of Patni rent are not taken against the defaulter personally at all but are taken against the tenures. Hence where the necessary notice as required by the regulation has been duly published, the sale cannot be held invalid merely because at the time when the sale was held the defaulter was dead. There is no procedure in the Patni Regulation which enables the Collector to bring on record the heirs of the defaulting patnidar, if he has died in the meantime, nor is there any provision in the statute which makes it incumbent on the zamindar to seek out such heirs and to apply to the Collector that the sale should be held after bringing the heirs of the deceased patnidar on the record: 19 *Cal* 703, *Doubted*. [P 181 C 2]

Narendra Kumar Das—for Appellant.

Chandra Sekhar Sen—for Respondents.

Mitter, J.—This is an appeal under S. 15, Letters Patent, against the decision of my learned brother, Patterson, J., who reversed the decision of the Courts below and has dismissed the suit of the plaintiff. The plaintiff instituted the suit in which this appeal arises for a declaration of his alleged taluki title to an undivided 2/3rd share of the lands described in the schedule to the plaint and for recovery of possession of the same jointly with defendant 8. There was a further prayer in the plaint that the sale of the land held under the patni regulation on 18th November 1918 was void and did not affect the interest of the plaintiff in any way. Amongst the several defendants to the suit defendant 7 alone contested the suit. It is to be noticed that although the sale under the regulation took place on 18th November 1918, the present suit was not instituted till nearly ten years after, on 7th February 1928. The facts on which this suit is based, lie within a narrow compass. It appears that by reason of the arrears in payment of rent, the patni taluk in question was sold at a mid year sale on 18th November 1918. Notices according to the terms of the regulation were duly served on 29th October 1918. The patnidar died on 10th November 1918, and the sale which is now impugned took place on 18th November 1918. The ground of the suit is that as the heirs of the deceased patnidar were not brought on the record and as the Collec-

tor, held the sale in pursuance of the regulation, the proceedings before the Collector which culminated in the sale, are void and without jurisdiction. It is contended that on general principles, any proceeding taken against a dead person is of no effect against those that succeed to his estate. This ground did prevail with the Courts below which decreed the suit. On appeal to this Court, Patterson, J., came to the conclusion that the regulation nowhere provides that it is incumbent on the zamindar to ascertain who are the actual holders of any particular patni taluk or to enter the names of the actual holders in his books, and that all that it does in this respect is to require the zamindar, on the fulfilment of certain conditions, to register and otherwise give effect to alienations of patni taluks on an application being made to him to that end. After considering the relevant provisions of the regulation, the learned Judge has come to the conclusion that as all conditions precedent to the sale are fulfilled prior to the death of the defaulter and the zamindar is under no obligation to trace out and substitute the heirs of the defaulter, the sale was a good one and must be allowed to stand. He has accordingly dismissed the plaintiff's suit. The present appeal as has been already stated, is against this decision.

We are of opinion that the conclusion arrived at by Patterson, J., is right. The provisions of the patni regulation which relate to the service of notices with regard to sales held under the regulation are contained in S. 8 of the Regulation. S. 8 says that on the first day of Kartic in the middle of the year, the zamindar shall be at liberty to present a petition to a civil Court of the district and a similar one to the Collector, containing a specification of any balances that may be due to him on account of the expired year from all or any talukdars or other holders of an interest of the nature described in Cl. 1, S. 8. The said petition containing this specification shall then be stuck up in some conspicuous part of the cutchery with a notice that if the amount claimed be not paid before the first Agrahayan, the tenures of the defaulters will on that day be sold by public sale in liquidation. In the case of a mid-year sale it is further stated that either the entire amount due shall be paid or so much of it as shall reduce the arrear including any intermediate demand for the month of Kartic, to less than one-fourth of the total demand of the zamindar, according to the kistibandi, calculated from the commencement of the year to the last day of Kartic. Then it is stated that a notice shall be sent by the zamindar to be similarly published at the cutchery or at the principal town or village upon the land of the defaulter. The zamindar shall be exclusively answerable for the observance of the forms above prescribed and the notice required to be sent into the mofussil shall be served by a single peon who shall bring back the receipt of the defaulter or of his manager, for the same or in the event of inability to procure this, the signatures of three substantial persons residing in the neighbourhood, in attestation of the notices having been brought and published on the spot. Now it appears clear from these provisions with regard to the publication of notices that the proceedings taken under the patni regulation for realization of arrears of patni rent are not taken against the defaulter personally at all but are taken against the tenures.

In these circumstances there would be no doubts in this case that the necessary notice as required by the regulation having been duly published, it seems difficult to hold that the sale is invalid merely because at the time when the sale was held the defaulter was dead. There is no procedure in the patni regulation which enables the Collector to bring on the record the heirs of the defaulting patnidar, if he has died in the meantime, nor is there any provision in the statute which makes it incumbent on the zamindar to seek out such heirs and to apply to the Collector that the sale should be held after bringing the heirs of the deceased patnidar on the record. In the absence of any such provision and having regard to the scheme and policy underlying the very stringent provisions of the patni sale law which is really enacted for the purpose of making it possible for the zamindars to pay the Government revenue in time, we do not think that it can be held that the sale held under the circumstances as in the present case was a void or invalid sale. We are therefore of opinion that Patter-

son, J., came to the right conclusion. Our attention has been drawn by the learned advocate for the respondent to the case of 19 Cal 703 (1) where one of the learned Judges, Tottenham, J., held that even if the patnidar had died before all the proceedings under the regulation were taken the sale would not by reason of that circumstance be invalid. The learned Judge observed at p. 717 of the report thus:

"Issues 5 and 6 relate to the fact that two of the recorded patnidars were dead before these proceedings under the regulation were taken. We think that the fact is immaterial, and that the Court below was wrong in holding that the proceedings were illegal by reason of their having been directed against dead persons; for proceedings under the patni regulation taken for the realization of the patni rent are not taken against persons at all, but against the tenure. And the zamindar is quite right in setting out in his petition and notices the name of the patni and the names of the patnidars as recorded in his books. The findings therefore of the lower Court upon these issues cannot avail the plaintiffs."

This was the opinion of Tottenham, J. who was one of the Judges who were dealing with the matter. C.M. Ghosh, J., did not express any such opinion. It is not necessary for the purposes of this appeal to express any opinion as to how far this decision is correct, in view of the provisions contained in S. 8 of the Regulation. S. 8 in para. 2 states:

"The zamindar shall be exclusively answerable for the observance of the forms above prescribed, and the notice required to be sent into the mufassil shall be served by a single peon who shall bring back the receipt of the defaulter, or of his manager, for the same."

This evidently implies, or at any rate refers to, the case of a defaulter who is alive and not the case of a defaulter who is dead. Be that as it may, without expressing our final opinion, but as at present inclined, we say that we have some doubts as to the soundness of the decision of Tottenham, J., in the case referred to above. The result is that this appeal fails and it is dismissed with costs.

Nasim Ali, J.—I agree.

K.S. *Appeal dismissed.*

1. Raj Narain Mitter v. Ananta Lal Mandal, (1892) 19 Cal 703.

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S. K. GHOSE AND HENDERSON, JJ.

Srikisson Beriwalla and *another*—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 917 of 1934, Decided on 19th December 1934.

Criminal Trial—Stay—Civil and criminal proceedings—Issues in criminal case likely to be included in issues in civil Court and possibility of conflict of jurisdiction—Criminal proceedings should be stayed.

Where the issues in a criminal case are likely to be included in the issues in a civil Court which is ripe for hearing and there is a risk of a conflict of jurisdiction, it is better that the criminal proceedings are stayed. In such a case, the mere fact that it is a case of a public prosecution does not decide that the criminal proceedings should not be stayed, though it is a matter which has to be considered in determining the question of stay: 1920 *Cal* 624, *Applied.* [P 183 C 2]

S. N. Banerji and *Bireswar Chatterjee*—for Petitioner.

Khundkar—for the Crown.

S. K. Ghose, J.—In this Rule the question is whether the criminal proceedings under Ss. 409 and 114, I. P. C., pending against the petitioners in the Court of the Chief Presidency Magistrate of Calcutta should not be quashed or in the alternative stayed until the disposal of the two civil suits pending in the Original Side of this Court. A brief history of the circumstances which gave rise to the present proceedings may be relevant. It appears that there were two brothers, Bissessurlal and Matilal of whom the latter predeceased the former. Subsequently Bisssessurlal died leaving a Will in which he appointed certain persons including the present two petitioners as executors and made various legacies. In 1927 Madan Mohini, the widow of Matilal, filed a suit No. 2336 of 1927 in the High Court against the executors alleging that the two brothers Matilal and Bissessurlal had separate estates. In 1928 Shamsundar, the adopted son of Bissessurlal filed a suit, being Suit No. 236 of 1928, against the petitioner No. 1 and Madan Mohini claiming a declaration that the Will was void. Subsequently on 23rd April 1929 there was a consent decree passed in both the suits. As a result of this decree a portion of the estate was alloted to charities through the petitioner No. 1 as trustees with power to appoint other

trustee. It next appears that one K. A. Desai who was manager of one of the trust properties in the Punjab was dismissed by the petitioner No. 1. Thereupon Desai started various proceedings which were at first unsuccessful. In September 1933 he filed a complaint in the Court of a Magistrate in the Punjab making certain allegations against the petitioners. This complaint was eventually referred by the Punjab police to the Calcutta Police where the head office of the trust is situate. As a result of the investigation held by the Calcutta police on 23rd August 1934 a challan was submitted against the petitioners under Ss. 409 and 114, I. P. C., in respect of various monies belonging to the estate of Bissessurlal deceased. Meanwhile in 1933 Desai filed a suit against the petitioners and others under S. 3, Charitable Trust Act, and this suit is still pending. In August of the same year Desai filed another suit against the petitioners and others for accounts and other reliefs. Then in 1934 certain persons with the sanction of the Advocate General of Bengal filed a suit being suit No. 47 of 1934 against the petitioners and others for accounts, removal of trustees, and other reliefs. In the same year Desai filed an application to be added as a party to suit No. 47 of 1934. On 19th April 1934 another suit being suit No. 737 of 1934 was instituted by Shamsundar against the petitioners and Madan Mohini for setting aside the consent decree referred to above. These suits are now pending.

The question in this Rule, as I have stated above, is whether in the circumstances it is expedient that the criminal prosecution of the petitioners should be proceeded with. The Magistrate in his explanation simply states that :

"It is not known by me whether any connected civil suits are pending in the Original Side of the High Court."

The Rule however is opposed on behalf of the Crown. Mr. Khundkar has pointed out to us that the plaint in suit No. 47 of 1934 is vague in its allegations and it does not specifically mention the various sums which are stated in the challan of the criminal case and that only general allegations of misappropriation are made in the plaint. It is also contended that since this prosecution is launched by the police and not by a private party it ought to have precedence over the civil litigations. In support of this argument reliance is placed on 1929 Cal. 563 (1), 112 I. C. 477 (2) and 1927 Mad. 778 (3). Undoubtedly the fact that it is a public prosecution and not a private one is a matter which has to be considered. But that only goes to show that the prosecution may be conducted in good faith and it does not carry us much further than that. On the other hand the important question is whether the issues in the criminal case are likely to be included in the issues in the civil suit and whether in that case there is risk of a conflict of jurisdiction, as was remarked by Sir Lawrence Jenkins in 1920 Cal. 624 (4). It is ordinarily undesirable to institute criminal proceedings until determinatien of civil proceedings in which the same issues are involved. Apart from the question of improper pressure in a case of this sort, there is the risk that in the criminal proceedings there may be an imperfect appreciation of the facts which would be subjected to a more searching investigation in the civil suit. No doubt as Mr. Khundkar has pointed out the allegations in the plaint are vague and it is also alleged that the plaintiffs are unable to furnish full particulars before obtaining discovery and inspection of the documents. But it is quite clear that the items, on which criminal charges are sought to be based, appertain to the estate of the deceased, Bissessurlal which is also the subject matter of the suit. Indeed the allegations in the challan sufficiently indicate that there will have to be an accounting. The suit claims many other reliefs; such as accounting and removal of the trustee which also involve an inquiry into the charges of misappropriation. It is said that the suits are ripe for hearing and we do not appreciate that the ends of justice will suffer by postponement of the prosecution in the criminal Court. On the other hand I have mentioned already, in view of the nature of the

1. Gopal Chandra v. Suresh Chandra, 1929 Cal 563=1929 Cr C 202=121 I C 308.
2. Jehangir Pestonji Wadia v. Framji Rustomji Wadia, (1928) 112 I C 477.
3. Chitrala Ramiah v. Natu Kula Ramiah, 1927 Mad 778=104 I C 252=28 Cr L J 812=50 Mad 839.
4. J. M. Lucas v. Official Assignee of Bengal, 1920 Cal 624=56 I C 577=21 Cr L J 481.

case there is some risk of a conflict of jurisdiction. In these circumstances we think the best course will be to direct that the criminal proceedings pending against the petitioners should be stayed until the disposal of suit No. 47 of 1934 and Suit No. 737 of 1934 pending in the Original Side of this Court.

The rule is made absolute accordingly.

Henderson, J.—I agree.

K.S. *Rule made absolute.*

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Full Bench

DERBYSHIRE, C. J., MUKHERJI AND COSTELLO, JJ.

Rafiqueuddin Ahmad and *others*—Accused.

v.

Emperor—Opposite Party.

Jury Ref. No. 51 of 1934, Decided on 11th December 1934.

(a) Criminal P. C. (1898), S. 103 — Search lists—Prosecution should prove case with regard to different terms severally — They should separately and consecutively number different items of property—Criminal Trial.

When in a case there are several search lists in each of which several items of property are mentioned, the prosecution ought to prove their case with regard to the different items severally, and the different items of property or different groups thereof mentioned in a search list ought to be separately and consecutively numbered either by letters or figures or by some other distinguishing marks and the same numbering should be followed while recording the evidence of witnesses relating to the searches to which those search lists refer. If that procedure is adopted there will be no difficulty on the part of the Court in appreciating the evidence that is adduced in respect of the searches. [P 187 C 1]

(b) Criminal Trial — Capital case — Evidence should be led in sufficient detail and with due regard to sequence of events.

In a capital case, it is important that the more important of the witnesses should be examined in such a way as would enable the Court to properly appreciate their evidence. The evidence should be led in sufficient detail and with due regard to the sequence of events the facts which the witnesses saw or the acts which they did and also the reasons which actuated them to do the acts being narrated in an intelligent fashion. It is only by this means that a clear and consistent account of the whole thing may be presented before the Judge and Jury. [P 187 C 1]

(c) Evidence Act (1872), Ss. 8 and 27 — Joint acts of several persons sought to be proved for inference to be drawn from such conduct by Court—Evidence should be led with some degree of particularity—Principle applies to evidence relevant under S. 27 also.

Where joint acts of several persons are sought to be proved, in order to ask the Court to draw an inference from such conduct, evidence should be led with some degree of particularity so that it may be possible for the Court to draw the necessary inference from the conduct of each one of the persons concerned in the act. The principle applies not only to evidence relevant under S. 27 but also to that under S. 8 of the Act: 1932 *Cal* 297 and 6 *All* 509, *Rel on*. [P 188 C 1]

(d) Criminal Trial—Retrial should not be ordered too lightly.

In a criminal case retrial should not be ordered too lightly and should be avoided, as much as possible. A retrial certainly should not be ordered where it can be established that there is really no evidence to go before a jury, because to order a retrial in such circumstances should be to put the accused to unnecessary harassment. [P 188 C 1]

(e) Criminal P. C. (1898), S. 307 (3) — High Court has ample power under S. 307 (3) to order retrial where there has been no proper or adequate trial.

Where a reference is made to the High Court under S. 307 (3), it has ample power in a case, in which there has been no proper or adequate trial, to make an order that the accused person should be retried. *Case law reviewed.* [P 189 C 2]

Charu Chunder Biswas, Hari Das Gupta, Basanta Kumar Mukherji and *Nirmal Chunder Chuckerburty*—for Accused.

Kkundkar and *Nirmal Chunder Das Gupta*—for the Crown.

Mukherji, J.—The four accused persons Rafiqueaddin Ahmed, Jyotish Chandra Ghose, Jatindra Nath Ray and Bhengra alias Hasimuddin Mamud were tried by the Sessions Judge of Rangpur with the aid of a jury. The charges on which they were tried were for offences under Ss. 302 and 392, I. P. C., a charge of murder for having caused the death of one Gobind Ram Marwari and a charge of robbery for having stolen away some valuables and cash which were in the possession of the said Gobind Ram Marwari in the room in which he was murdered. The jury at first brought in a divided verdict of 5 to 4. The Judge thereupon aked them to retire and to see if they could be unanimous. They retired and after a deliberation for over fifteen minutes they came back and said that they were still divided, this time in the proportion of 6 to 3; six of the jurors were of opinion that the case against the accused was reasonably doubtful so that they should be held not guilty and the other three were of opinion that all the four accused per-

sons were guilty under both the charges on which they had been tried. The learned Judge, being of opinion that the verdict of the majority of the jury was unreasonable and that the verdict of the minority should be accepted has made this reference to this Court under the provisions of S. 307, Criminal P. C.

For our present purposes it is not necessary to recapitulate the facts of the case; they will be found set out in sufficient detail in the learned Judge's charge to the jury, and a summary thereof is also to be found in his letter of reference addressed to this Court. It will be enough to state for the purpose of the present case that the evidence adduced on behalf of the prosecution, in order to establish the charges against the accused persons, roughly speaking, falls under three heads: first, the confessions which were made by the four accused persons but were subsequently retracted by them; second, the production of some articles, which were alleged to be the proceeds of the crime, at different times and from different places, by the accused persons severally with the exception of one occasion when some articles are said to have been produced by two of them jointly; and third, the identity of foot-prints of three of the accused persons found in the room in which the crime was committed. After we had heard the arguments addressed to us on behalf of the Crown and while the case on behalf of two of the accused persons was being argued before us by Mr. Biswas who was appearing on their behalf, it became apparent to us that upon the present state of the record it would not be possible for us to deal with the case on its merits with any degree of confidence. The difficulty that we felt arose out of certain defects which were noticed in the manner in which the evidence was recorded by the learned Judge and also in consequence of the mode that was adopted on behalf of the prosecution in the matter of leading the evidence that was being adduced in support of the charges. As regards the manner in which the evidence has been recorded I propose to say a few words in order to explain the nature of the difficulty that we have experienced. The prosecution case is that the four accused persons, on one occasion two of them jointly and on other occasions some one of them severally took the police to certain places and produced some of the articles which according to the prosecution, were in the possession of the deceased Gobind Ram Marwari.

The searches, in the course of which these articles were produced, are evidenced by a number of search lists, out of which it will be sufficient to refer here to four, namely, Exs. 10, 11, 12 and 13. Ex. 10 is a search list relating to the production by Jatin and Jyotish of certain articles on 17th May 1934 at 8 p. m. I may state here that the occurrence which forms the subject matter of this case is alleged to have taken place at about 11 p. m. on the night of 16th May 1934. Ex. 11 refers to the production of articles by Bhengra on 17th May 1934 at 9-30 p. m. Ex. 13 describes the production of articles by Rafiqueuddin on the same night at 10 or 10-30 p. m. and Ex. 12 relates to the production by Jatin of certain articles on the morning of 18th May 1934 between 7 and 8 a. m. Evidence relating to these productions was given by the Sub-Inspector of police who conducted the searches and was examined as witness 22 on behalf of the prosecution. The search witnesses examined in connexion with these searches are witness 5, Mahatabuddin Chaudhury; witness 6, Fazal Karim Chaudhury; and witness 7, Moulvi Busirulla Ahamed. The Sub-Inspector having conducted the searches gave an account of the different searches that he had held and of the different articles that were produced by the accused persons in the course of those searches. I propose to quote here a portion of his deposition as recorded. I quote from p. 28 of the paper-book. He said this:

"At 4-30 p. m. I arrested Jotin and Jyotish who were in the cycle shop of Jyotish. I took them to the thana. I arrested Rafiq and Bhengra about 7-30 p. m. Jyotish and Jotin led us to a spot under the mango tree. Jyotish pointed out a spot. Some articles were dug up in the presence of witnesses. I made a list of them attested by witnesses. Proves Ex. 10. Then Bhengra took us to a dried pond; from inside the cavity he produced some ornaments and cash. I made out a search list which the witnesses attested. Proves Ex. 11. Then Rafiq took us to a garden near his house and produced one kherua bag. I prepared a search list which was attested by witnesses. Proves Ex. 13. 18th morning Jotin took us to a dried tank; he produced some purses and an empty tin. Proves

Exhibit. (The number of the Exhibits is left blank, but there is little doubt upon the other evidence that we have that it is Ex. 12). Jotin took us to the house of Debi Barman where he lived. From inside a suit case he produced notes valued Rs. 175. He made over a lungi to me. Proves Exs. 6–28."

It will be seen that from this evidence it is not possible to ascertain which of the aforesaid exhibits were recovered in the course of which of the searches. The articles which correspond to these exhibits will be found described in a list that was prepared in the Court of Session and is printed at p. 46 of the paper-book, of the three searches witnesses to whom reference has been made above, witness 7, Mr. Basirullah Ahmad, has given very general evidence relating to all the searches: he has not referred to the articles that were produced in the course of the searches—at least he has not tried to identify them: but the other two witnesses, namely, No. 5, Mahatabuddin Chaudhury, and No. 6, Fazal Karim Chaudhury, are very important. When one proceeds to examine the evidence of Mahatabuddin Chaudhury as recorded one finds that after speaking about the preparation of the lists—Exs. 10, 11 and 12 and also speaking about the production of articles by Rafiquddin, the witness does not refer to Ex. 13, although he purports to have been a witness to the search that was held in connexion with the production of articles by Rafiquddin, and proves only Exs. 6 to 24. It is very difficult for one to understand why, if he was speaking about the production of the articles in the course of the searches that he was speaking to, he would not refer either to Ex. 13 or to any of the other articles produced in the searches excepting articles Exs. 6 to 24. An examination of the evidence of P. W. 6, Fazal Karim Chaudhury, discloses a still greater confusion. At p. 16 of the paper-book he says:

"The Daroga made a list of the articles found —Proves Ex. 10—and took the articles into custody. Identifies 6 and 14."

In the lists on p. 46, Exs. 6 to 14 are described in this way:

"Nima (khutis containing articles written in the search lists, Exs. 8 to 12 as in lower Court's exhibits.")

The record has been made with reference to exhibits which according to the said list were articles found not only in the course of the search evidenced by Ex. 10 but in the course of searches to which Exs. 8 to 12 of the lower Court's exhibits correspond. This clearly is a confusion which ought to have been cleared up in the course of the trial. Furthermore I find that when the witness was speaking about Exs. 11 and 13, the record that has been made of his evidence in connexion with Ex. 11 is "Proves Ex. 11 and identifies Exs. 15-18"; and with regard to Ex. 13 it has been recorded, "Proves Ex. 13 and Ex. 18-24." Ex. 18 therefore is an article which is found in the record of the evidence of this witness as referring to the search list Ex. 11 as also to the search list Ex. 13. This again is imposible.

Turning to the evidence of identification in respect of the articles it may be observed that considerable difficulty has been felt because there is nothing to indicate which particular item of the exhibits mentioned in the list at p. 46 corresponds to which particular item in a search list. To take one instance; if the evidence of Nella Mamud (P. W. 8) is referred to it will be found on p. 18 that he says that he kept two khilla balas or paunchis and two murkunies as security and the record states that these are Ex. 8, Ex. 23 as well as Ex. 22. Referring now to the list on p. 46 one finds that Ex. 8 and Ex. 23 are khila balas and Ex. 22 is a pair of gold murkunies. If one turns to the search lists in connexion with the searches in the course of which these articles were recovered one finds that in Ex. 10 'a bangle' is mentioned and in Ex. 13 'a silver bangle with a clip' is mentioned. If the evidence which this witness has given as regards identification of these khila balas has to be considered as satisfactory, then one will have to assume that in respect of two items of articles which form a pair one can properly be described as 'a bangle' and the other as 'a bangle with a clip.' It is not for the Court to be placed in such a situation that it will have to make such an assumption for the purpose of connecting the accused with the crime upon the evidence of identification which is given in this way. Four persons having stood their trial together, it is reasonable to expect that evidence should be given and recorded in such a way that it would be possible for each one of them to know what the allegation of the prosecution is

as regards the articles that each of them has produced and how the prosecution has sought to prove that those articles have been identified as being articles belonging to or in the possession of the deceased at the time the crime was committed. When in a case of this nature there are several search lists in each of which several items of property are mentioned the prosecution ought to prove their case with regard to the different items severally, and the different items of property or different groups thereof mentioned in a search list ought to be separately and consecutively numbered either by letters or figures or by some other distinguishing marks and the same numbering should be followed while recording the evidence of wit nesses relating to the searches to which those search lists refer. If that procedure is adopted there will be no difficulty on the part of the Court in appreciating the evidence that is adduced in respect of the searches.

As regards the mode of leading evidence that was adopted in this case I shall now say a few words, because in this respect also some important defects have been noticed by us. In a capital case of this description it is important that the more important of the witnesses should be examined in such a way as would enable the Court to properly appreciate their evidence. The evidence should be led in sufficient detail and with due regard to the sequence of events, the facts which the witnesses saw or the acts whieh they did and also the reasons which actuated them to do the acts being narrated in an intelligent fashion. And it is only by this means that a clear and consistent account of the whole thing may be presented before the Judge and the jury. What I notice is that with respect to some of the more important witnesses in this case, who should have been examined in much fuller detail, the minimum of evidence that would in law be sufficient to establish the charges was adduced on behalf of the prosecution, leaving it to the defence to find out by cross-examination other facts and circumstances which would either go to support or to destroy the evidence which the witnesses gave. I wish to refer here to one instance and one instance only; but in doing so I wish to guard myself against being understood as indicating either that I consider the point to be of no importance from the point of view of the defence or that it is a point which is fatal to the prosecution. Two of these witnesses, namely witness 5, Mahatabuddin Chaudhury and witness 6, Fazal Karim Chaudhury, were certainly important witnesses and their evidence is that although they were residents of places somewhat distant from the place where the thana was they came to the thana in the early morning of 17th May 1934 and remained with the Police Inspector for a considerable time. The prosecution thought that it was sufficient for them to have from each of these witnesses a bare statement that he came to the thana early in the morning of that day and it was left to the defence to find out why or for what reason the said witnesses thought it necessary to come to the thana at all. Such statements, devoid of circumstantial details, if presented before the Court, are of little avail so far as the question of drawing any inference from them is concerned, and can afford but little help to the Court in judging their truth or otherwise. The witnesses, at least the more important witnesses in a case of this nature, should be examined in much greater detail.

Nextly, as regards the production of articles, the evidence is relevant as evidence of conduct under S. 8, Evidence Act. Under that section statements accompanying or explaining conduct are also relevant as part of the conduct itself. What we have on the record, so far as the prosecution witnesses examined on this point are concerned, is only the fact that the articles were pointed out by the accused persons. If there was any statement made by an accused person at the time of the production or just before the production of the articles then this statement may very well go in as part of the conduct under the provisions of S. 8, Evidence Act. So far as the evidence of conduct as adduced in this case is concerned no attention seems to have been paid to this matter and the result is that the evidence is in one sense incomplete and imperfect. Lastly, I should also refer to one other matter, and that is this. There is one instance in which two of the accused persons are said to have jointly produced some of the articles. In leading evi-

dence with regard to this part of the case no attention seems to have been paid to the salutary principle laid down by Straight, J., of the Allahabad High Court in 6 All. 509 (1), a principle which has been reiterated by this Court so recently as in 1932 Cal. 297 (2), namely that where joint acts of several persons are sought to be proved in order to ask the Court to draw an inference from such conduct, evidence should be led with some degree of particularity so that it may be possible for the Court to draw the necessary inference from the conduct of each one of the persons concerned in the act. The principle applies not only to evidence relevant under S. 27 but also to that under S. 8, Evidence Act.

Upon this state of the record we have seriously considered the course which ought to be adopted with regard to this case. We are aware that retrial in a criminal case should not be ordered too lightly and should be avoided as much as possible. A retrial certainly should not be ordered where it can be established that there is really no evidence to go before a jury, because to order a retrial in such circumstances would be to put the accused to unnecessary harassment. That, however cannot be said to be the position here. We are also aware that in a re-trial there is always a danger of the prosecution trying to fill up the gaps in the evidence that has been adduced; but this difficulty may very well be overcome if the Judge who presides at the trial is astute enough and if the jury are properly directed. Having regard to the importance of the case and the gravity of the crime, we think we ought to order a retrial in this case if we have got the power to make such order.

The question then arises as to whether in a case under S. 307, Criminal P. C., it is within the power of this Court to make an order for retrial. This question has been argued by Mr. Biswas appearing on behalf of two of the accused persons and it is necessary that we should express our view on it. The argument that has been addressed to us, as I understand it, is this that although the High Court in a reference under S. 307, Criminal P. C., can exercise the powers which are conferred upon a Court of appeal and which may ordinarily be exercised by a Court dealing with an appeal, the exercise of such powers is subject to the condition that it is the High Court which has got to pass the final order of acquittal or conviction; in other words, it is argued that although this Court sitting on a reference under S. 307, Criminal P. C., may make orders such as are contemplated by S. 426 as regards the release of an accused person on bail or under S. 428 as regards the calling for further evidence and so on, it is not competent to make any order which would be inconsistent with its function as a Court of appeal which has got the duty to discharge of either convicting or acquitting an accused person. This as I understand it, is the argument that has been put forward by Mr. Biswas in this connexion.

Now in support of this argument a good deal of reliance has been placed upon the expression "and subject thereto" which appears in sub-S. (3) of the section and special reliance has been placed upon two words appearing in it, namely the word "and" and also the word "shall." Some difficulty no doubt is felt by reason of the use of the words to which Mr. Biswas has thus referred, because the use of the words may be taken as suggesting that the provision which follows them is a mandatory provision. But his argument if accepted, would amount to this that the words "subject thereto" should be read as being equivalent to the expression "subject nevertheless to the provision that." The sub-section may be divided for the purposes of the present argument into two portions—the first portion saying "the High Court may exercise any of the powers which it may exercise on an appeal," and the second portion saying "it shall, after considering the entire evidence" and after giving due weight to the opinions of the Sessions "Judge and the jury, acquit or convict such accused . . . . .;" and these two portions are joined together by the expression "and subject thereto." As I have said, to adopt this argument would be to regard the expression "and subject there-

1. Queen Empress v. Babu Lal, (1884) 6 All 509 =1884 A W N 229 (FB).
2. Durlav Namasudra v. Emperor, 1932 Cal 297 =1932 Cr C 266=138 I C 116=33 Cr L J 546 =59 Cal 1040.

to" as being equivalent to the expression "and subject nevertheless to the provision that;" in other words, the first portion of the sub-section to which I have referred would have to be treated as being subject to the second portion—the dominating portion which directs, according to the argument, that whatever powers a Court of appeal may exercise in matter under S. 307, Criminal P. C., it will eventually have to pass an order of conviction or acquittal.

I do not think that this argument is well founded. There is I admit, a certain amount of difficulty in construing this sub-section, having regard to the words that have been used. The difficulty has been created by piecemeal amendments which S. 307, Criminal P. C., has several times undergone, since its original enactment, to meet difficulties pointed out from time to time. There are certainly some difficulties: one of them, for instance is that although the word "any" is used there are powers which a Court of appeal possesses under S. 423 but which cannot possibly be exercised by a Court sitting on a reference under S. 307, e. g. the power to order a commitment: again Cls. (a) and (b), S. 423 apeak of "conviction," "acquittal" and "finding and sentence" expressions which are wholly inapposite to a case under S. 307. But notwithstanding all these difficulties, to give effect to the sub-section taken as a whole one is forced to the conclusion that the second part of the sub-section is more or less redundant and that the first part of the sub-section contains the governing provision under which the High Court is to act in a reference under S. 307.

It appears that S. 307 first came into the statute both as S. 263, Act 10 of 1872. Under that section there were cases in which it was held that the High Court was not competent to make an order for retrial. Later on, the sub-section in its present form, or at least in its present form so far as this particular matter is concerned, came into being by the enactment of Act 13 of 1896. In 1899 Sir Arthur Collins, C. J., and Benson, J., in 22 Mad. 15 (3) at p. 18 referring to the amendment made by Act 13 of 1896 observed thus :

> "We might, no doubt order a new trial by the Sessions Judge for the offence under S. 396, but that would be attended with obvious inconveniences."

So that in the opinion of the learned Judges in that case a retrial could be ordered under the provisions of sub-S. (3), S. 307, Criminal P. C., as it then stood. Since then there has been, as I understand, no case in which the power to retrial has been disputed : and on the other hand orders of retrial have been freely and frequently made by this Court while dealing with references under S. 307 of the Code. Some of the instances in which such a retrial has been ordered will be found in the following cases : 1918 Cal. 237 (4).—This was a case in which there was a misjoinder of charges in the course of the trial that had been held. 1921 Cal. 631 (5).—In this case the trial was vitiated by misconduct on the part of the jury. 1923 Cal. 453 (6).—In this case a retrial was ordered upon a new charge which the High Court thought should have been framed upon the evidence that had been adduced.—1925 Cal. 575 (7). The trial in this case was held in contravention of the provisions of Ss. 342 and 364, Criminal P. C.

Coming to more recent times there have been quite a number of cases, not reported, in which orders for retrial have been passed from time to time by different Division Benches of this Court. I am not suggesting for a moment that because the point was not taken in any of the cases before now the point has not to be considered, but on a question of construction of a statute the fact that it has been interpreted by the Court in a particular way for a sufficient length of time is relevant. I am of opinion that under sub-S. (3), S. 307 the High Court has ample power in a case, in which there has been no proper or adequate trial, to make an order that the accused persons should be retried.

On all these considerations I hold that the reference should be accepted in part, that the verdict of the jury in this case

3. Queen-Empress v. Anga Valayan, (1899) 22 Mad 15.

4. Emperor v. Rajendra Ray, 1918 Cal 237 = 47 I C 64=19 Cr L J 868.
5. Emperor v. Nazir Ali Beg, 1921 Cal 631 = 62 I C 334=22 Cr L J 510.
6. Emperor v. Profulla Kumar Mazumdar, 1923 Cal 453=74 I C 267 = 24 Cr L J 763 = 50 Cal 41.
7. Emperor v. Nani Mandal, 1925 Cal 575 = 86 I C 345=26 Cr L J 761=52 Cal 403.

should be set aside and that the case should be sent back to be retried upon charges under Ss. 302 and 392, I. P. C. Having regard to the circumstances of the case such retrial should be held by some Judge other than the Sessions Judge, preferably by an additional Judge to be deputed for the purpose. If the deputation of an Additional Judge for this purpose cannot be conveniently arranged for, the retrial should be held by the Sessions Judge of Dinajpore.

Derbyshire, C. J.—I agree.

Costello, J.—I agree.

K.S. *Order accordingly.*

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MUKERJI, AG. C. J. AND S. K. GHOSE, J.

Panmall Jesraj—Creditor No. 14—Appellant.

v.

Mr. J. Macleod—Respondent.

Appeal No. 494 of 1933, Decided on 2nd August 1934, from original order of Dist. Judge, Chittagong, D/- 14th November 1933.

(a) Provincial Insolvency Act (1920), S. 54 —No formal application under S. 54 — But all parties having notice and evidence fully gone into and order under S. 54 — Proceedings need not be quashed.

Where there is no formal application under S. 54 although all the parties have notice and evidence is fully gone into and Court passes an order under S. 54, the proceedings need not be quashed on the ground. [P 191 C 2]

(b) Provincial Insolvency Act (1920), S. 54 — Payment to creditor shortly before application for insolvency shows intention of undue preference.

Payment made very shortly before application for insolvency is filed would show that undue preference is intended. [P 192 C 1]

H. D. Bose and *Jogesh Chandra Sinha* —for Appellant.

A. K. Roy and *Chandra Sekhar Sen* — for Respondent.

S. K. Ghose, J. — The question involved in this appeal has been already before this Court on two different occasions and it arises out of a proceeding in insolvency. The insolvent is one Maganmal who used to do business in the name of a firm styled Mohan Lal Maganmal. Another firm called Panna Chand Jetmall, which is alleged to have been owned by Daimull and Panmull, used to do business as commission agents for Maganmal. This firm existed down to 1930 when it was wound up. In 1928 Daimull is said to have retired and Panmull, who is the creditor No. 14 in the insolvency proceeding and now the appellant before us, started business under the name of Panmull Jesraj. This firm took up business as commission agents for Maganmal in succession to the other firm of Panna Chand Jetmull. Maganmal used to take out insurance policy for about Rs. 50,000 and by arrangement the creditor firm used to keep the policy and pay the premium. On 31st August 1931 the shop of Maganmull at. Chittagong was looted.

He made a claim on the Insurance Company who gave him a cheque for Rs. 49,638-10-0 and the latter endorsed it over to creditor No. 14. The latter got it caused on 2nd December 1931. On 7th January 1932 the debtor filed his petition for insolvency and therein he mentioned Panmal Jesraj as creditor No. 14 in respect of an amount of Rs. 42,000 and he also mentioned in the list of his own properties item 6. the amount of the aforesaid cheque with Panmal Jesraj. On the application of some of the other creditors the District Judge on 11th April 1932 ordered that creditor No. 14 should surrender the amount of the cheque or furnish security for the whole amount. Thereupon creditor No. 14 appealed to the High Court which by its order dated 8th July 1932 set aside the order of the District Judge as being premature. On 13th September 1932 Maganmal was adjudged to be insolvent and on the same date one Mr. Muir, Manager of the local branch of the National Bank (and after him his successor Mr. Macleod), was appointed receiver. It may be stated here that the creditor No. 14 was all along claiming the bulk of the amount of the cheque as bring due to his firm as arising out of the business transaction with the insolvent. His case was that the firm of Panmall Jesraj had taken over the dues of the older firm of Panmall Jetmal, that he was a secured creditor, and that on about 2nd December 1931 the dues of creditor No. 14 from the insolvent amounted to Rs. 44,539-12-3. The receiver made certain enquiries and on 20th October he submitted a report in the course of which he stated as follows:

"From the ovedence of the above witnesses I am satisfied that the claim of creditor No. 1

that he is a secured creditor, is not convincing. I therefore recommend that he should be directed to deposit the amoun t with me within a fortnight or he should be asked to furnish sufficient security to the satisfaction of the Court."

On 17th November 1932 the District Judge made an order to the effect that the creditor No. 14 should deposit the whole amount in Court or furnish sufficient security within a certain time, on failure of which the amount would be realised by distress. Thereupon the creditor No. 14 again appealed to the High Court and this was disposed of by Mitter and M. C. Ghose, JJ., by their order dated 26th January 1933, by which they set aside the order of the District Judge and directed him to proceed with the case in the light of the observations contained in the judgment. Thereupon the matter went back to the learned Judge and the proceedings continued. On 28th March 1933 the receiver reported that about Rs. 7,000 was due to creditor No. 14 and he recommended that the balance must be brought to Court and also that creditor No. 14 was not entitled to the dues of the firm of Panmall Jetmall. On 8th May 1933 a second report, practically to the same effect with certain variations, was received from the receiver. Before the District Judge evidence was gone into and on 14th November 1933 the learned Judge made the order against which creditor No. 14 has preferred this appeal.

It is contended by the learned counsel for the appellant that, although the order of the learned Judge is in the nature of an order under S. 54, Provincial Insolvency Act, there is no foundation laid for it by a petition from the receiver as prescribed by S. 54 (A) of the Act. It was open to creditor No. 14 to take this point in the appeal which was preferred against the order of the District Judge of date 17th November 1932 by which the creditor was directed to deposit the amount in Court or to furnish security. That order was the result of a report of the receiver containing a recommendation that the creditor should be directed to deposit the amount. It was open to the appellant to take this objection in the previous appeal, but the real point urged in that appeal was that the order of the District Judge was not properly made after an enquiry in accordance with Ss. 4 and 5 of the Act. The judgment of the High Court bearing date 26th January 1933 shows that it was held that a proper enquiry should be made and precise and full directions were given. The learned Judges said in the course of their judgment:

"The learned Judge before he could ask creditor No. 14 to make necessary deposit or furnish security must be satisfied that there had been a prima facie case established as against the appellant which entitled him not to keep the sum on the insurance policy with him. We are not expressing any opinion on the merits of the case. We are of opinion that the learned Judge should examine Maganmal, should examine the appellant and should receive such evidence as may be put forward on their behalf and then proceed to determine the question as to whether the appellant should bring the sum of money into Court."

The subsequent proceedings before the District Judge appear to be in accordance with this direction ef the High Court. Though there was no formal application under S. 54 all the parties have had notice, evidence was fully gone into, and there is no necessity to quash the present proceedings and start afresh by a proper application. On the merits certain questions of fact were raised before the District Judge and they have been raised again here. These questions are (1) that the firm of Mohan 'Lal Maganmal is not owned solely by him but is owned by him and his brothers; (2) that Panmal Jesraj is in the position of a secured creditor; (3) that the aforesaid cheque was not given to Panmal Jesraj solely for the purpose of encashment as alleged by the insolvent; (4) that there was no undue preference in favour of creditor No. 14 by this payment; (5) that creditor No. 14 was entitled to a transfer of the debit balance of Rs. 39,252 together with interest thereon amounting to Rs. 2,636 from the account of Panna Chand Jetmal. All these questions of fact had to be decided upon the evidence, and it has been gone through in this Court. The judgment of the learned Judge shows that he has given due regard to the evidence both oral and documentary, as well as the probabilities, and he has considered that neither the insolvent nor creditor No. 14 is altogether reliable and that the account books of the firms cannot also be a safe guide. We may say shortly that we are not prepared to

differ from the learned Judge in his estimate of the evidence. He has found that Maganmal is the sole proprietor of Mohan Lal Magan Mal, that Panmal Jesraj, creditor No. 14, is not a secured creditor, and that the cheque was made over to creditor No. 14 not merely for encashment, as alleged by the insolvent, but also in payment of the creditor's dues or rather for withdrawing the amount. We are of opinion that these findings must stand. Then, as to the question of undue preference, the learned Judge has taken the view that the receiver has failed to discharge the onus which was on him. The learned Judge however overlooked the very important circumstance that payment was made very shortly before the application for insolvency was filed and that this would show that undue preference was intended. On this finding the learned Judge could have made an order for the production of the entire amount of the cheque. He has however made an order which is more favourable to the appellant and it is to this effect:

"Assessing Panmal Jesraj's dues from Mohan Lal Maganmall as likely, on the evidence, to be at most Rs. 10,000, I direct creditor No. 14 pending decision as to the exact amount to be refunded by him, to furnish sufficient security for the balance of cheque proceeds, namely for the sum of Rs. 39,638-10-0. If security is not furnished by 28th November 1933 the amount will be realised by distress."

In our judgment this order must also stand. The chief grievance of the appellant is with regard to his case of the alleged transfer of the debit balance from the account of Panna Chand Jetmull. The learned Judge has pointed out that this case of creditor No. 14 is not supported by any written adjustment and that the evidence as to the merging of the firm of Panna Chand Jetmall in the firm of Panmal Jesraj is most vague and unsatisfactory. There is no document in support of it and as to the allegation that the insolvent himself consented to the transfer there is no written record of it and he also denies it. No doubt the insolvent admits that he transferred his business from the old firm of Panna Chand Jet Mull to Panmal Jesraj, creditor No. 14, at the personal request of Jetmall; and Mr. H. D. Bose has laid emphasis on a passage in the examination-in-chief of the insolvent which is thus noted by the learned Judge: "The witness also stated; 'e sab Panmull Jesraj Kembarate kardia.' This appears to be a subsequent statement on the part of the witness and we are not prepared to take it literally to mean that he was admitting that he consented to the transfer of his debt from the firm of Panna Chand Jetmal to that of creditor No. 14. Apparently no one in the lower Court took it in that light. There was no cross-examination on it and the learned Judge also does not refer to it. The learned Judge says that in the face of the insolvent's denial and in the absence of documentary evidence he is bound to hold that the onus had not been discharged and that the amount due from the firm of Panna Chand Jetmall should be excluded from computation. With regard to the item of Rs. 2,636 odd for interest the learned Judge has left it over for future settlement. Upon the evidence we must agree with the learned Judge and hold that the transfer of the dues of Panna Chand Jetmal to creditor No. 14 has not been proved. In any event it is not binding on the other creditors.

At the same time, wo cannot overlook the admission of the insolvent that his debts to the firm of Panna Chand Ketmull are still outstanding. In the lower Court the receiver did not question the accuracy of the accounts kept by the firm of Panna Chand Jetmal and from time to time the insolvent or his brothers also acknowledged the periodical adjustments of accounts as evidenced by Exs. B, C and D. With regard to this matter in the present proceedings it will be sufficient for us to say that it will be open to Panna Chand Jetmull or any of the partners acting under S. 263, Contract Act, to put in their claims and, if so put in, such claims will be investigated according to law. With this reservation we confirm the learned Judge's directions as to further investigation by the receiver. The appeal must be disposed of on these terms. As practically all the orders of the learned Judge have been upheld we make no order as to costs. The cross-objection is allowed. We make no order as to costs in the cross-objection. Let the record be sent down as early as possible.

Mukerji, Ag. C. J.—I agree.

K.S. *Order accordingly.*

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MITTER, J.

Hari Pada Dutta—Plaintiff—Appellant.

v.

Gobinda Chandra Das and *another*—Defendants—Respondents.

Appeal No. 228 of 1932, Decided on 22nd August 1934, from appellate decree of Sub-Judge, Bankura, D/- 17th August 1931.

Landlord and Tenant—Tenancy already existing on date when another tenancy created by landlord on same land—Prior tenant party to suit for rent against subsequent tenant and admitting liability to pay rent—General prayer in plaint for rent—Held second tenancy had no effect in law and landlord could not recover rent from tenants but that decree could be passed against prior tenant.

On the date when a tenancy was created on certain land, a prior tenancy was already subsisting and in a suit for rent filed against the latter tenant, the prior tenant was also a party and he admitted the tenancy and his liability to pay rent for the year in suit.

Held : that the subsequent tenancy, though accepted by the landlord and executed by the tenant would have no effect in law and that the landlord could not recover rent from the tenant on that basis.

Held further : that a decree for rent could be passed against the other tenant whose tenancy and liability to pay rent was admitted.

[P 195 C 1]

Naresh Chandra Sen Gupta and *Urukramdas Chakravarty*—for Appellant.

Panchanan Ghose and *Ram Krishna Pal*—for Respondents.

Judgment.—This appeal is on behalf of the plaintiff and arises out of a suit for recovery of produce rent for the years 1333-1335 B. S. The plaintiff claimed at the rate of 5 maps of paddy and 8 pans of straw per year. It appears that the lands in suit belonged to two persons Gosai Das and Hriday Nath Das in equal shares. In execution of a money decree against them the Ratis purchased their interest but this purchase was after Hriday Nath had executed a mortgage in respect of his half share in favour of the plaintiff. The plaintiff sued upon his mortgage, got a decree and in execution of the same purchased the mortgagor's shares. He took possession through Court on 5th October 1923. The case has proceeded on the footing that the plaintiff has got 8 annas share to the lands in suit, the other 8 annas being with the Ratis. It appears that some persons called the Lohars were in possession at least from the year 1910 of the lands in suit as tenants under the Ratis. In the year 1926, the plaintiff instituted a suit for rent being Rent Suit No. 72 of 1926 against the Lohars for his half share of the rent for the year 1330 B. S. This suit was instituted in 1333 B. S. It appears that the plaintiff instituted the said suit on the footing that the Lohars were his tenants in the year 1330 but from the year 1331 he, the plaintiff, had brought on another tenant on the land whose name is Narayan. In this suit a compromise petition was filed between the plaintiff and the Lohars. The said petition is Ex. D in this case. The parties agreed that for the year 1330 the Lohars were to pay to the plaintiff the value of $5\frac{1}{2}$ maps of paddy and 2 pans of straw, the price to be determined by the Court. There is a stipulation that from the year 1333 the Lohars were to pay to the plaintiff a reduced rent at the rate of 4 maps of paddy and 8 pans of straw.

The compromise petition was filed on 19th August 1926. Two days later namely on 21st August 1926, the Court determined the price of paddy, and passed a decree in favour of the plaintiff. Six days before the petition of compromise was put in, that is to say on 13th August 1926, defendant 1 executed a Kabuliat in favour of the plaintiff by which he agreed to pay to the plaintiff the rent claimed in the suit. That Kabuliat was accepted and the case of defendant 1 that he was prevailed upon to execute that Kabuliat through mis representation has failed in the lower Courts. It is on the basis of this Kabuliat that the plaintiff has instituted the suit and claims rent against defendant 1. There is a stipulation in the Kabuliat which would imply that at the date thereof the plaintiff was not in khas possession but the lands were in possession of Narayan. In the Kabuliat there is a statement that the plaintiff had realised the Bhag rent from Narayan for the years 1331-1332, the defendant was to realise from Narayan Bhag rent for the year 1333 and thereafter defendant 1 took upon himself to eject Narayan from the land and cultivate the land in khas. It appears that Narayan referred to this Kabuliat later on, set up the case that he was not the Bhag chasi of the

plaintiff but of the Lohars with the result that defendant 1 had to institute a suit against the Lohars for recovery of possession. In that suit also he failed. That suit was filed on the basis of the settlement evidenced by the Kabuliat Ex. 1. The suit was dismissed on a preliminary point.

There was an appeal to the High Court by which the decree of the lower Court was set aside and the case remanded to the lower Court. During the pendency of this suit in the lower Court after remand the interest of the Lohars was purchased by defendant 2 who is the wife of defendant 1. The case of defendant 1 is that it was under the advice of the plaintiff that this conveyance was made. Defendant 1 has resisted the claim for rent against him on two grounds. Firstly, he says that at the date of Ex. 1, the plaintiff had no right to settle the lands with him, he having recognized the pre-existing tenancy in favour of the Lohars. Secondly, he says that inasmuch as the plaintiff did not put him in possession, there was liability to pay. Defendant 2 filed a written statement, admitted the tenancy under the plaintiff in her right as a purchaser from the Lohars and admitted her liability to pay rent at the rate of 4 maps of paddy and 8 pans of straw a year. The learned Subordinate Judge has dismissed the plaintiff's suit in its entirety. He has held that the Solenama Ex. D clearly recognized a pre-existing tenancy in the Lohars. At the time of the Kabuliat Ex. 1 the plaintiff had already the Lohars as tenants. It also found that defendant 1 could not take possession and the possession which defendant 2 took after her purchase from the Lohars, was a possession taken on her own behalf, she not being a Benamidar of her husband. In this view of the matter, it has dismissed the suit against defendant 1. The suit has been dismissed against defendant 2 inspite of her admission on the ground that the plaintiff has not claimed any relief against her in the suit.

Dr. Sen Gupta who has appeared on behalf of the appellant has raised the following points. First of all, he contends that the Solenama, Ex. D, has been misconstrued. He says that on a proper construction it ought to have been held that a lease was executed for the first time in favour of the Lohars on 19th August 1926. This Solenama, he says, is not admissible as it has not been registered. He contends further that apart from the question of registration the lease in favour of defendant 1 is not at all affected because the Kabuliat Ex. 1 is before the Solenama was filed and he contends that the position in this view of the matter would be not that defendant 1 did not acquire any right as a lessee but it is just the other way, namely that the Lohars did not acquire a right as lessees from the plaintiff, their lease being subsequent to the lease created by the defendant.

His third contention is that having regard to the last clause of Ex. 1, the ordinary rule that a landlord is bound to put the tenant in possession and cannot recover rent until he can put the tenant in possession would not apply because defendant 1 in this case knew that the landlord was not in khas possession that the lands were in possession of another person and that he took upon himself the responsibility of recovering possession. He further contends that in any view, there being no proof that defendant 1 requested the plaintiff to put him in possession, the fact that defendant 1 has no possession would be no answer to the plaintiff's claim for rent. For the last mentioned proposition, Dr. Sen draws my attention to the provisions of S. 108, Cl. (A), sub-Cl. (b), T. P Act, and to the decision of 1925 Mad. 1277 (1). He contends therefore that the finding that defendant 1 is not in possession does not affect his case in the least having regard to the two special features. If I had been in agreement with Dr. Sen Gupta's contention on the construction of Ex. D, it would have been necessary to decide these last two very interesting questions raised by him. But on a consideration of the facts, I am of opinion that the first contention raised by him is not sound and therefore no further consideration arises. The Lohars are raiyats. They were in possession from the year 1910. The plaintiff by instituting a suit for rent in the year 1926 admitted their tenancy right. That suit No. 72 of 1926 was a suit for rent is quite clear from Ex. 5 and Ex. 11, Ex. D,

1. Manavadan Thinumalpad v. Messrs Parry & Co., 1925 Mad 1277=90 I C 729=48 Mad 815.

the Solenama is, at most, an ambiguous document. It is consistent with the creation of a fresh lease or the recognition of the existing tenancy of the Lohars with a reduced rent. Simply because the rent of the tenancy is reduced, the continuity of the tenancy does not cease to subsist. The old tenancy continues. Having regard to the nature of the document it was open to the learned Subordinate Judge to look to other evidence for the purpose of coming to a finding as to whether Ex. D created a new tenancy in favour of the Lohars or recognised the tenancy in them which was in existence.

On a consideration of the evidence which I hold is admissible, the learned Subordinate Judge has came to the latter conclusion. The position therefore is that at the date of Ex. 1 there was already a tenancy held by the Lohars under the plaintiff, and that being so, the plaintiff could not have granted the tenancy in favour of defendant 1. In this view of the matter, I hold that although the kabuliat Ex. 1 was accepted by the landlord and was executed by the defendant under no misrepresentation, still it would have no effect in law and on its basis the plaintiff cannot recover rent from defendant 1. I do not however agree with the learned Subordinate Judge when he dismisses the plaintiff's suit as against dofendant 2 also. She was made a party defendant. There was a general prayer in the plaint. She made an admission that she was the tenant under the plaintiff and was liable to pay rent for the years in suit at the rate of four maps of paddy and eight pans of straw a year. The learned Subordinate Judge has proceeded on too technical a view in dismissing the plaintiff's suit.

I would accordingly modify the judgment and decree of the learned Subordinate Judge and maintain the dismissal of the suit as against defendant 1, but would pass a decree against defendant 2 and direct a decree to be passed in favour of the plaintiff and against defendant 2 in respect of the period at the rate of four maps of paddy and eight pans of straw per year. For the purpose of determining the money value of the same, the case is remanded to the lower appellate Court. The parties, namely the plaintiff, defendant 1 and defendant 2 will bear their respective costs throughout. Leave to appeal under the Letters Patent is asked for and is refused.

K.S. *Order accordingly.*

A. I. R. 1935 Calcutta 195

NASIM ALI, J.

Krishna Chandra Das — Defendant 1 —Appellant.

v.

Purna Chandra Das and *others* —Respondents.

Appeal No. 215 of 1932, Decided on 22nd August 1934, from appellate decree of Sub-Judge, Murshidabad, D/- 4th June 1931.

(a) Cosharer—Cosharer entering into possession of share of other cosharer not as co-tenant but in denial of such right — Possession cannot enure for benefit of other cosharer—Adverse possession.

Where a cosharer enters into possession of the share of the other cosharer, not in his right as a co-tenant but in denial of such right of the co-tenant, it cannot be said that his possession would enure for the benefit of the other cosharers whom he has excluded from the enjoyment of the property: 1929 *Cal* 250 and 19 *Bom* 722, *Rel on*.

[P 197 C 2]

(b) Adverse Possession—Cosharer—Possession of tenant-in-common is not adverse to that of his co-tenant—Principle is inapplicable when person is not recognized as co-tenant.

The principle of possession between the co-owners is that every co-owner is a tenant-in-common and the possession of a tenant-in-common is not adverse to that of his co-tenants, but a person cannot be a tenant-in-common with a person whom he never recognized as a co-tenant.

[P 197 C 2]

(c) Cosharer — Sole possession by one tenant in common continuously for long period without any claim by another claiming under other tenant-in-common — Actual ouster may be presumed—Adverse possession.

Sole possession by one tenant-in-common continuously for a long period without any claim or demand by any person claiming under the other tenant-in-common is evidence from which an actual ouster of the other tenant-in-common may be presumed: 1922 *Bom* 150, *Ref.*

[P 198 C 1]

Satindra Nath Mukherjee, Jnan Chandra Roy and *Hara Krishna Pramanik*—for Appellant.

Gopendra Nath Das—for Respondents.

Judgment.—This appeal arises out of a suit for joint possession of certain lands after declaration of title. The plaintiffs' case, as stated in the plaint is as follows: The disputed lands comprising a Bastu and a small tank formerly belonged to the two brothers Kailash Nath Adhikari and Bhairab Nath

Adhikari in equal shares. Kailash used to possess exclusively the northern half portion of the Bastu land, the southern half portion of the western bank of the tank and five palm trees on the western bank and another one on the south-western corner. Bhairab used to possess the southern half of Bastu land, the northern half of the western bank of the tank and six palm trees to the south .of the tank. The tank was in joint possession of both the brothers. Kailash made a gift of his moiety in favour of defendant 2 and his brother Ananda Gopal Das by a deed of gift, dated 9th Saraban 1289 B. S. Ananda left home about 25 years ago relinquishing his interest in favour of defendant 2. Defendant 2 left the village Singedda in which the disputed lands are situated for Mandunia after the death of his mother entrusting the care of his properties to the sons of Bhairab and was in Ijmali possession by enjoying the usufruct of his share of the property. On 3rd Ashar 1331 B. S. defendant 2 sold away his eight annas interest in the disputed lands to plaintiffs 1 and 2 and the husband of plaintiff 3 by a registered Kobala. Defendant 1 claimed to have purchased the entire 16 annas interest of the suit lands and dispossessed the plaintiffs. There was a proceeding under S. 145, Criminal P. C., in which defendant 1 succeeded. On these allegations the plaintiffs brought the present suit for declaration of their title to and for recovery of joint possession of the eight annas share of the disputed lands with defendant 1.

The defence of defendant 1 is that the disputed lands originally belonged to Kailash and Bhairab in equal shares, that Kailash died without any issue and after his death Bhairab became entitled to this eight annas share by right of inheritance from Kailash and after his death his sons possessed the entire 16 annas share of the suit lands and that defendant 1 subsequently purchased the entire 16 annas interest of the said lands from the sons of Bhairab by registered Kobalas, the last of which was executed on 23rd Kartic 1322 B. S. The defence further was that the title of the plaintiffs' vendor and of the plaintiff, if any, was extinguished by adverse possession of Bhairab and his successors-in-interest for more than 12 years. The trial Court on a consideration of the evidence in the cass came to the following findings:

(1) That defendant 1 was in exclusive possession of the suit lands for about 18 years; (2) that defendant 1 planted various trees on the eastern bank of the tank and converted it into a garden; (3) that defendant 1 re-excavated the tank; (4) that neither the plaintiffs nor their vendor had ever any possession in any part of the suit lands within 12 years from the date of the institution of the suit; (5) that the title of the plaintiffs' vendor, if any, was extinguished by adverse possession of Bhairab's sons and of defendant 1; (6) that neither the plaintiffs nor their vendor were ever recognized as cosharers by defendant 1 or Bhairab's sons; (7) that Bhairab's sons or defendant 1 did not know even that the plaintiffs' vendor was a cosharer. On these findings the learned Munsiff dismissed the plaintiffs' suit holding that the title of the plaintiffs' vendor and of the plaintiffs was extinguished by adverse possession. On appeal by the plaintiffs the learned Subordinate Judge has not reversed the above findings of fact arrived at by the trial Court. He has however dismissed the plaintiffs' claim so far as the Bastu portion of the plaint land is concerned. As regards the remaining portion of the disputed land, the lower appellate Court has decreed the plaintiffs' claim. Hence the present appeal by defendant 1.

The only point urged in support of the appeal is that on the findings of fact arrived at by the trial Court which have not been reversed by the lower appellate Court, the lower appellate Court should have dismissed the plaintiffs' claim in toto. As has been already stated the learned Subordinate Judge who heard the appeal has dismissed the plaintiffs' claim so far as the Bastu portion of the disputed land is concerned, on the ground that the plaintiffs' title to that portion of the disputed land was extinguished by adverse possession. As regards the remaining portion of the disputed land, the learned Judge was of opinion that the plaintiffs' vendor being a cosharer was in constructive possession through the other cosharers, namely, defendant 1 and his vendors. Now as regards the plaintiffs' claim with regard to the western and southern bank and all the trees on those banks, it is very

difficult to understand how the learned Judge could distinguish this part of the plaintiffs' claim from the claim as regards the Bastu portion of the disputed land. The plaintiffs' specific case in the plaint was that so far as these banks and all the palm trees are concerned, the plaintiffs' vendor was in exclusive possession and not in joint possession with defendant 1 or his vendors. The learned Judge no doubt has observed that this exclusive possession as stated in para. 2 of the plaint with regard to these banks and the palm trees on those banks has not been proved. But the plaintiffs having failed to prove the specific case they made in the plaint, they cannot fall back upon theory of constructive possession. So far as the tank is concerned, the plaintiffs' case was that their vendor was in joint possession with defendant 1 and his vendors. But in my opinion the facts which have been found in the present case go to show that there had been ouster of the plaintiff and his vendor more than 12 years ago and that the plaintiffs' title was extinguished by adverse possession for more than 12 years long before the institution of the suit.

It appears that after the death of Kailash, Bhairab entered into possession of the eight annas share of Kailash in his own right as an heir of Kailash. Bhairab never racognized the plaintiff's vendor or the plaintiff as his cosharers. In fact he asserted his own right to the remaining eight annas share of the property by inheritance to the exclusion of the persons claiming under gift from Kailash. Bhairab's sons after the death of Bhairab never recognized the title of the plaintiffs' vendor, as their cosharer. In fact, as the learned Judge has pointed out for the last 30 years the plaintiffs' vendor was never in possession of any portion of the suit land or of any share thereof. The learned Subordinate Judge appears to have relied on a decision of this Court in 1929 Cal 250 (1) for the view which he has taken in this matter. In that case Mukerji, J., observed as follows:

"As a general proposition the entry of one co-tenant in the absence of clear proof to the contrary, enures for the benefit of all. The law makes a presumption that the relation between co-tenants is amicable rather than hostile and regards acts of one co-tenant as being in subordination of the title of all the co-tenants, for by so regarding they may be made to promote the interest of all. This rule prevails not merely on behalf of those who are co-tenants when the entry was made, but extends to all who afterwards acquire undivided interests in the property:

The learned Judge referring to the case of 23 Bom 137 (2) also observed as follows:

"The case of 23 Bom 137 (2) has also little bearing upon this question as it was a case where certain members of a joint Hindu family alienated by sale and mortgage specified plot of land, 'out of their share' giving boundaries of the plots and covenanting for title, and what was really decided was that the purchaser entered as owner and not as a cosharer and being in such possession for over 12 years was able to defeat under Art. 144 the title of the co-parceners of the vendors or mortgagors."

From these observations it is clear that where a cosharer enters into possession of the share of the other cosharer not in his right as a co-tenant but in denial of such right of the co-tenant, it cannot be said that his possession would enure for the benefit of the other cosharers whom he has excluded from the enjoyment of the property. It is true that the principle of possession between the co-owners is that every co-owner is a tenant-in-common and that the possession of a tenant-in-common is not adverse to that of his co-tenants, but a person cannot be a tenant-in-common with a person whom he never recognized as a co-tenant. So far as Bhairab is concerned it is clear that when he entered into possession of Kailash's share he repudiated the title of the donees from Kailash as he entered into possession of that share by right of inheritance by setting up his own right of inheritance from Kailash. It does not appear also whether Kailash was even aware of this deed of gift in favour of these donees. It was not disputed before me that in the absence of such a gift Bhairab would be the heir of Kailash. It does not appear also that these donees ever possessed any portion of the disputed land at any time on the basis of the deed of gift or that they asserted their right on the basis of the gift. In these circumstances it cannot be said that Bhairab or his heirs were in possession of Kailash's share as cosharers, because they never recognized the plaintiffs' vendor as a cosharer. The sons of Bhairab had no knowledge even of the

1. Biswa Nath v. Rabija Khatun, 1929 Cal 250= 117 I C 593=56 Cal 616.

2. Bhavrao v. Rakhmin, (1899) 23 Bom 137 (F B).

existence of these donees: see the case of 1928 Cal 396 (3). In this case another peculiar fact is that defendant 1 purchased the 16 annas share of the property from the heirs of Bhairab more than 12 years ago. He is in possession of the entire property on the basis of his purchase for more than the statutory period. He is not the transferees of an undivided share. Bhairab's sons transferred the 16 annas share in the property setting up their exclusive possession to the property more than 12 years ago. Defendant 1 cannot therefore be said to have entered into the possession of the 16 annas share of the property as a co-sharer but in his own right as 16 annas owner of the property by purchase from the heirs of Bhairab who had already set up an exclusive title to this property.

Again

" sole possession by one tenant-in-common continuously for a long period without any claim or demand by any person claiming under the other tenant-in-common is evidence from which an actual ouster of the other tenant-in-common may be presumed see the case of 1922 Bom 150 (4)."

Under these circumstances I am of opinion that the learned Munsif was justified from the facts found by him and which have not been reversed by the lower appellate Court, in coming to the conclusion that the title of the plaintiffs or of his vendor was extinguished by adverse possession. The result therefore is that this appeal is allowed and the judgment and decree of the lower appellate Court are set aside and those of the trial Court restored withcosts throughout.

K.S. *Appeal allowed.*

3. Mahendra Nath Biswas v. Charu Chandra Bose, 1928 Cal 396=107 I C 741.
4. Chandbhai Mahomadbhai Vohra v. Hasanbhai Rahimtolla, 1922 Bom 150=64 I C 205=46 Bom 213.

A. I. R. 1935 Calcutta 198

NASIM ALI, J.

Harimohan—Appellant.

v.

Dulu Miya—Respondent.

Appeal No. 2493 of 1931, Decided on 7th June 1934, from appellate decree of First Addl. Sub-Judge, Noakhali, D/- 23rd May 1931.

(a) Fraud—Party alleging it must prove that he was deceived into action by that fraud—Bond executed by minor—No evidence that he held himself out as being of age—Held there was no deception by misrepresentation—Minor.

Fraud operating to deceive must be found as a fact and whether in any particular case there was such fraud must depend on its own circumstances. It must be shown to the satisfaction of the Court by the party who alleges fraud that he was deceived into action by this fraud.

Where it was neither proved that, at the time when the minor executed the bond and received the money, he was aware that his minority was extended under the law nor that he held himself out as being of age or that the plaintiff was deceived by any misrepresentation on the part of the minor:

Held ; there was no fraud or misrepresentation on the part of the minor : 25 *Cal* 616, *Rel on.* [P 197 C 1]

(b) Contract Act (1872), S. 65—Bond executed by minor—No misrepresentations as to being of age by minor—Suit for return of money—Plaintiff held could not get any relief—Specific Relief Act (1877), S. 41 and Minor.

Where the defendant was a minor at the time he executed a bond and received money but there was no evidence as to fraud or misrepresentation by him as being of age and plaintiff sued for return of money lent.

Held : that he was not entitled to return of money either under S. 65, Contract Act, or S. 41, Specific Relief Act.

Held : further that even if it is permissible to maintain that the power to give equitable relief is more extensive in India than in England, in other words, that Courts in British India can give equitable relief apart from cases, which do not come either under S. 65, Contract Act, or S. 41, Specific Relief Act, plaintiff in the present case could not get any relief in view of the findings of fact ; *English Cases and Indian cases Reviewed.* [P 200 C 2; P 201 C 1]

Atulchandra Gupta and *Jitendrakumar Sen Gupta* for Appellant.

Shyamaprasanna Deb—for Respondent

Judgment.—This is an appeal by the plaintiff in a suit for recovery of money on a mortgage bond. The substantial defence of the defendant was that he was a minor at the time of the loan and as such plaintiff was not entitled to any relief. The Courts below have found that defendant 1 executed the mortgage bond and borrowed the money. It has been further found by the Courts below that defendant 1 was a minor at the time when the bond was executed and the money was advanced. The Courts below have also found that there had been no fraudulent misrepresentation on the part of defendant 1 about his age at the time when he executed the bond. On these findings the Courts below have dismissed the suit. Hence the present appeal by the plaintiff.

The first point urged on behalf of the appellant is that the finding of the lower appellate Court, that there had been no fraud by the minor, is wrong, inasmuch as it was the duty of the defendant to disclose to the plaintiff at the time of the transaction that his minority was extended by the appointment of a guardian under the Guardian and Wards Act. Reliance was placed on a decision of this Court in 9 I C 110 (1) in support of this contention. In 25 Cal 616 (2) Jenkins, J., held that fraud operating to deceive must be found as a fact and whether in any particular case there was such fraud must depend on its own circumstances. It must be shown to the satisfaction of the Court by the party who alleges fraud that he was deceived into action by this fraud. In the present case, it has not been found that plaintiff was not aware of the minority of the defendant at the time of the transaction. On the other hand, the finding of the lower appellate Court is that, from the circumstances of the case, it was the duty of the creditor to have inquired about the minor at the time when the money was advanced. It has not been found also that, at the time when the minor executed the bond and received the money, he was aware that his minority was extended under the law. It has not been proved in this case that the defendant held himself out as being of age or that the plaintiff was deceived by any misrepresentation on the part of defendant 1. Under these circumstances, the Courts below were right in holding that there had been no fraud or misrepresentation on the part of defendant 1. The next point urged in support of the appeal is that on the facts found by the Courts below they should have held that the defendant was bound to make restitution to the plaintiff of the benefit received by him. It is argued that, as the minor received the money under the bond which is void, he is bound to return the money which he received from the plaintiff. It is now well-settled that a plaintiff cannot base his claim for restitution under S. 65, Contract Act : see the case of 30 Cal 539 (3), 1921 Bom 147 (4) and 1929 Bom 89 (5). The plaintiff is not also entitled to get any compensation under S. 41, Specific Relief Act. S. 41 embodies the equitable principle that he who seeks equity must do equity :

> But a Court of equity cannot say that it is equitable to compel a person to pay any moneys in respect of a transaction which, as against that person, the legislature has declared to be void, (1902) 1 Ch 1 (6)."

This law has been affirmed by the House of Lords in (1903) A C 6 (7) and by the Privy Council in 30 Cal 539 (3). It was however argued, on the authority of the latter decision (1), that, in a proper case, the Court, in the exercise of its discretion, might require the minor to return the money advanced to him, under the provisions of S. 41, Specific Relief Act. In that case however the minor sought the equity. In the present case the minor does not invoke the aid of the equitable jurisdiction of the Court. Plaintiff therefore in my opinion is not entitled to get any compensation under S. 41, Specific Relief Act. It was however contended that defendant 1 was liable for damages in tort. But there can be no liability in tort in this case, as the Courts below have negatived fraud or his part. Further "you cannot convert a contract into a tort to enable you to sue an infant." 8 Term 335 (8), 3 K B 607 (9). If the tort is directly connected with the contract and is the means of effecting it and is a parcel of the same transaction, the minor is not liable in tort : see the case of 1928 Lah 609 (10).

It is however contended by the appellant, on the authority of the above decision of the Full Bench of the Lahore High Court, that the doctrine of restitution is not confined to cases under S. 41. It was contended that there was no warrant either in principle or in equity

1. Surendra Nath Roy v. Krishna Sakhi Dasi, (1911) 9 I C 110.
2. Dhurmo Dass Ghose v. Brahmo Dutt, (1898) 25 Cal 616=2 C W N 330.
3. Mohori Bibee v. Dharmodas Ghose, (1903) 30 Cal 539=30 I A 114=8 Sar 374 (PC).
4. Motilal Mansukhram v Maneklal Dayabhai 1921 Bom 147=59 I C 245=45 Bom 225.
5. Punjabhai v. Bhagwandas Kisandas, 1929 Bom 89=117 I C 518=53 Bom 309.
6. Thurstan v. Nottingham Permanent Benefit Building Society, (1902) 1 Ch 1.
7. Nottingham Permanent Benefit Building Society v. Thurstan, (1903) Ac 6=72 L J Ch 134=67 J P 129=51 W R 273.
8. Jenninjs v. Rundall, (1799) 8 Term 335.
9. R. Leslie, Limited v. Sheill, (1914) 3 K B 607 =83 L J K B 1145=30 T L R 460=58 S J 453 =111 L T 106.
10. Khan Gul v. Lakha Singh, 1928 Lah 609= 111 I C 175=9 Lah 701.

for the general rule that the relief should never be granted in a case where the infant happened to be a defendant. Shadilal, C. J., relied for this proposition on two cases : (1913) 2 K B 235 (11) and (1912) 2 K B 419 (12). So far as the first case is concerned, it appears that the ground of the decision in that case was the English doctrine of following property. The decision of Shadilal, C. J., therefore goes beyond the English doctrine. So far as the second case is concerned it would appear, from an examination of that case, that the decision in that case ultimately rested on the principle that, if there had been an independent tort, the action would succeed. Reliance was also placed upon a decision of the Madras High Court in 1930 Mad 945 (13). In that case however the minor was the plaintiff. Consequently the provisions of S. 41, Specific Relief Act, were directly attracted. On the other hand, Lord Sumner in the case of (1914) 3 K B 607 (9) observed as follows :

" So long ago as (1646) 1 Sid 258 (14) it was decided that, although an infant may be liable in tort generally, he is not answerable for a tort directly connected with a contract which, as an infant, he would be entitled to avoid. One cannot make an infant liable for the breach of a contract by changing the form of action to one ex delicto . . . . . In the case of an infant it was held for a similar reason that he could not be made liable for a fraudulent representation that he was of full age, whereby the plaintiff was induced to contract with him. . . . . If the action should be maintainable all the pleas of infancy would be taken away, for such 'affirmations are in every contract.' . . . . . It was thought necessary to safeguard the weakness of infants at large, even though here and there a juvenile knave slipped through. . . . . I think that the whole current of decisions down to 1913 apart from dicta which are inconclusive, went to show that, when an infant obtained an advantage by falsely stating himself to be of full age, equity required him to restore his ill-gotten gains, or to release the party deceived from obligations or acts in law induced by the fraud, but scrupulously stopped short of enforcing against him a contractual obligation, entered into while he was an infant, even by means of a fraud. This applies even to 3 De G and J 63 (15). Restitution stopped where repayment began. . . . . The money was paid over in order to be used as the defendant's own and he has so used it and, I suppose, spent it. There is no question of tracing it, no possibility of restoring the very thing got by the fraud, nothing but compulsion through a personal judgment to pay an equivalent sum out of his present or future resources, in a word nothing but a judgment in debt to repay the loan. I think this would be nothing but enforcing a void contract. So far as I can find, the Court of Chancery never would have enforced any liability under circumstances like the present, any more than a Court of law would have done se."

The principle of this decision was applied by the Judicial Committee to a case from the Straits Settlement where the minor mortgaged his property : see the case of 1916 P C 242 (16). There cannot be any doubt therefore that defendant 1 cannot be compelled to refund the money, which he obtained on the basis of the void contract. It may however be pointed out that in all these cases it was proved that the minor obtained the money by a fraudulent misrepresentation about his age. So far as the present case is concerned I have already pointed out that the plaintiff has failed to show that there had been any fraud on the part of defendant 1. Reliance is also placed upon another equitable principle, namely, that no man can take advantage of his own fraud and consequently it was argued that the defendant was bound to return the money which he obtained from the plaintiff. In fact, that is the principle on which Shadilal, C. J., proceeded in 1928 Lah 609 (10). The same principle appears to have been applied in 25 Cal 616 (2). Jenkins, J., in that case observed as follows :

" It is unquestionably within the power of the Court administering equitable principles to deprive a fraudulent minor of the benefits flowing from the plea of infancy, but one who invokes the aid of that power must come to the Court with clean hands, and must further establish to the satisfaction of the Court that a fraud was practised on him by the minor, and that he was deceived into action by that fraud."

It has been already pointed out that the plaintiff, in this case, has failed to show that really defendant 1 committed any fraud or that he has come to Court with clean hands. Under these circumstances, even if it is permissible, in spite of the observation of the Judicial Committee in 1916 P C 242 (16) to maintain that the power to give equitable

11. Stocks v. Wilson, (1913) 2 K B 235.
12. Cowern v. Nield, (1912) 2 K B 419.
13. Appaswami Ayyangar v. Narayanaswami Ayyar, 1930 Mad 945=129 I C 51=54 Mad 112.
14. Johnson v. Pye, (1676) 1 Sid 258.
15. In re King, Ex parte Unity Joint Stock Mutual Banking Association, (1858) 3 De G & J 63=27 L J B K 33=6 W R 640=4 Jur N S 1257.
16. Mahomed Syedol Ariffin v. Yeoh Ooi Gark, 1916 P C 242=39 I C 401=43 I A 256 (PC).

relief is more extensive in India than in England, as has been held by the Lahore High Court in 1928 Lah 609 (10) or in other words that Courts in British India can give equitable relief apart from cases, which do not come either under S. 65, Contract Act, or S. 41, Specific Relief Act, plaintiff in the present case cannot get any relief in view of the findings of fact which have been arrived at by the Courts below. The Courts below, in my opinion, were therefore right in dismissing the plaintiff's suit. The appeal is accordingly dismissed. There will be however no order for costs.

K.S. *Appeal dismissed.*

A. I. R. 1935 Calcutta 201

PATTERSON, J.

Aptabuddin Khan and *another*—Defendants—Appellants.

v.

Johar Ali Kazi and *others*—Respondents.

Appeal No. 1777 of 1930, Decided on 11th May 1934, from appellate decree of Sub-Judge. Second Court, Tippera, D/- 31st March 1930.

(a) Limitation — Obstruction to right of way is continuing nuisance—Tort, Nuisance.

Limitation does not apply in a case of obstruction to a right of way, it being a continuing nuisance: 1916 *Cal* 733, *Ref.* [P 202 C 1]

(b) Equity — Question of legal rights — Equitable principle cannot be applied.

There is no scope for the application of equitable principles to a question of legal rights. [P 202 C 1]

(c) Customary rights — Villagers having certain legal rights for long time—Court should defend and enforce them.

Where the villagers have certain legal rights in the land which they are enjoying for a long time and they have never surrendered those rights, it is the duty of the Courts to defend and enforce those rights. [P 202 C 1]

Rashindra Nath Sarkar and *Syed Forhat Ali*—for Appellants.

Upendra Kumar Roy — for Respondents.

Bireswar Chatterji—for Deputy Registrar.

Judgment.—This is an appeal by two of the defendants, and arises out of a suit brought by the plaintiffs on their own behalf and on behalf of the other inhabitants of a village called Piparia, for a declaration that a certain strip of land forms part of the village gopat, for an order on the defendants to fill up a tank that they have excavated in such a way as to block the gopat, and for certain other reliefs. The strip of land in suit lies to the west and north of the defendants charabari, and according to the defendants' case, it forms part of their charabari, while according to the plaintiffs it is the zemindar's khas land and forms part of a village gopat that has existed and has been used by them from time immemorial.

It is undisputed that a village gopat runs from south to north through the part of the village to the south of the defendants' charabari, and also that a similar gopat runs from south to north through the part of the village to the north thereof. The plaintiffs' contention was and is that these two gopats were really one and the same gopat, and that the land in suit was the portion of the gopat connecting the northern and southern portions. The defendants' case was, inter alia, that the people of the village had at most a customary right to pass across the defendants' charabari, but not by any defined path, from its south-western corner where the southern gopat ended, to its north-eastern corner where the northern gopat began and that the tank had been dug and the path diverted with the consent of all the villagers concerned, including the plaintiffs themselves.

The trial Court dismissed the suit, but the lower appellate Court decreed it, and one of the principal grounds of appeal that has been urged before this Court is that the lower appellate Court did not reverse some of the findings on the strength of which the trial Court had dismissed the suit, and in some cases did not even refer to the points to which those findings related. There is, in my opinion, no substance in this contention, for the findings of the lower appellate Court appear to me to be conclusive, and are such as to render the consideration of those of the trial Court's findings to which no reference has been made quite necessary. The lower appellate Court has found, on a consideration of all the evidence that has been adduced on both sides, including the Settlement Records and the records of the Butwara proceedings: (1) That the land in suit is a village gopat and not part of the defendants' raiyati. (2) That for a long time—(by which is evidently

meant 'from time immemorial,' to use the legal phrase),—there had been a village gopat over the land in suit connecting the northern and the southern gopats. (3) That the defendants gradually encroached on and finally appropriated the land in suit; and (4) that the villagers never gave their consent to the old gopat over the land in suit being closed, and a new path opened up. These are findings of fact which cannot be questioned on second appeal and they are, as has already been stated, conclusive.

It has been contended that the lower appellate Court ought to have considered the evidence with regard to an earlier diversion of the path that is said to have taken place some 14 or 15 years ago, and especially with reference to the question of limitation; but it has been held that limitation does not apply in a case of this sort, obstruction to a right of way being a 'continuing nuisance': 1916 Cal. 733 (1). It has further been contended that customary rights, such as the right now under consideration, must be exercised in a reasonable manner, and attention has been drawn to the finding of the trial Court to the effect that the new path provided by the defendants is quite convenient, and is in fact being used by the majority of the villagers without complaint. This contention would have had great force, if the lower appellate Court had merely found that the villagers had some sort of right of way over the defendants' land, but it becomes entirely irrelevant in view of the finding of that Court to the effect that the land in suit is a village gopat that has existed from time immemorial and that it does not form part of the defendants' raiyati at all.

As the matter now stands, it is a question of legal rights, and there is therefore no scope for the application of equitable principles. It has been found that the villagers have certain legal rights in the land in suit, and that they have never surrendered those rights, and this being so, it is the duty of the Courts to defend and enforce those rights. The result is that the appeal is dismissed with costs to the appearing respondents, and the judgment and decree of the lower appellate Court are affirmed. Leave to appeal under S. 15, Letters Patent, is refused.

K.S. *Appeal dismissed.*

1. Nazem v. Wazedulla, 1916 Cal 733=29 I C 385.

A. I. R. 1935 Calcutta 202

MITTER, J.

Sundar Ali and *others*—Defendants—Appellants.

v.

Nur Mamud and *others*—Respondents.

Appeal No. 2189 of 1931, Decided on 8th August 1934, from appellate decree of Sub-Judge, Fifth Court, Dacca, D/-27th April 1931.

(a) Appeal—Death of one of defendants-respondents pending appeal—His legal representative not brought on record—Plaintiff's suit quite all right even if instituted against only contesting defendant-respondents—Appeal held was not incompetent.

An appeal does not become incompetent by not bringing on record the legal representative of a deceased defendant-respondent pending the appeal, where the suit would have been quite all right even if it had been instituted by the plaintiffs against the contesting defendants-respondents without impleading the deceased as a defendant and there is no apprehension of there being any inconsistent decree if the appeal were to be allowed. [P 203 C 1]

(b) Landlord and Tenant—Tenancy can be proved by oral or documentary evidence.

A tenancy can be proved by documentary or oral evidence. [P 203 C 2]

(c) Landlord and Tenant—Suit by tenant against trespasser for possession—He need not prove terms of tenancy with landlord—It is enough if he proves that alleged landlord has accepted rent from him.

In a suit for possession by a tenant against a trespasser, it is not necessary that the tenant should prove the terms of the tenancy with his landlord. If he proves that the alleged landlord has accepted rent from him, that would be quite sufficient for the purpose of maintaining the suit against the trespasser. [P 203 C 2]

Bijan Kumar Mukherjee—for Appellants.

Phani Bhusan Chakravarti—for Respondents.

Judgment.—This appeal is on behalf of the defendants and arises out of a suit for possession. The plaintiffs' case is that the land in suit belonged to pro forma defendant 23 who had let it out to them. It is on the basis of this tenancy that the plaintiffs have instituted the suit for possession. The defendants in their written statement challenged the title of the plaintiffs and they further set up a right to use the land for the purpose of steeping jute, etc., a right in the nature of an easement. The Court of first instance found that the plain

tiffs had not been able to establish their tenancy under defendant 23 and also found that the contesting defendants had not been able to substantiate their claim of easement as against the landlord. In this view of the matter, it negatived the claim of the principal defendants and also dismissed the plaintiff's suit on the basis that they had no title. An appeal was preferred by the plaintiffs. The lower appellate Court found that the plaintiffs had establishsd their tenancy right and accordingly decreed the suit with a direction for ascertainment by the Court of first instance of mesne profits. Before the lower appellate Court it seems that the defendants did not reagitate their claim to easement rights. Against the judgment and decree of the lower appellate Court, the defendants have preferred this appeal.

While the appeal was pending here, pro forma defendant 23 died and no attempt was made to bring on record his legal representatives. Mr. Chakravarty who appears for the respondents accordingly urges before me a preliminary point, namely, that the appeal is incompetent by reason of the death of defendant 23 and that the plaintiffs did not bring on record his legal representatives. I do not think that there is any substance in this preliminary objection. The suit would have been quite all right even if it had been instituted by the plaintiffs against the contesting defendants without impleading this person as a defendant. There is no apprehension of there being any inconsistent decree if the appeal were to be allowed by me, on the ground that no decree had been made either in favour or against the pro forma defendant 23 and could not have been made, having regard to the frame of the suit. It is for these reasons that I overrule the preliminary objection. To come back to the merits: for the purpose of proving the tenancy, the plaintiffs produced before the Court a document which is called a Hukumnama. Both the Courts below have come to the conclusion that that document is not simply an order for delivery of possession to the defendants by the landlord but is a present demise. Both the Courts below therefore have ruled that document out of evidence on the ground that it is not registered. The lower appellate Court however has held that there is oral evidence to support the tenancy which the plaintiffs obtained from the pro forma defendant 23. In the first place, the pro forma defendant 23 filed his written statement admitting the tenancy. Secondly, there is oral evidence which has been believed by the lower appellate Court in support of the tenancy of the plaintiffs. Dr. Mukherjee who appears for the appellants urges that this oral evidence is not admissible at all. A tenancy can be proved by documentary or oral evidence. It is a suit by the plaintiffs against a trespasser and in order to succeed the plaintiffs are not bound or are required to prove the terms of the tenancy which they obtained from the pro forma defendant 23. If they could simply prove that defendant 23 had accepted rent from them, that would have been quite sufficient for the purpose of maintaining a suit against the defendant who is a trespasser. In these circumstances, I hold that the lower appellate Court is right in holding that the plaintiffs had established their tenancy right under defendant 23 by the evidence which I hold is admissible in law. The result is that this appeal is dismissed with costs.

K.S. *Appeal dismissed.*

A. I. R. 1935 Calcutta 203

MUKERJI, AG. C. J. AND S. K. GHOSE, J.

Sm. Nurannessa Khatoon and *others*—Plaintiffs—Appellants.

v.

Osman Gani and *others*—Respondents.

Appeal No. 659 of 1932, Decided on 2nd August 1934, from appellate decree of Addl. Dist. Judge, Dacca, D/- 18th July 1931.

(a) Registration Act (1908), S. 17 (1) (b)—Sale deed—Item of property mentioned in sale deed as existing in district where deed is registered, not actually existing but introduced as fictitious item—But sale-deed containing clause making it non-testamentary instrument creating vested rights—Held document was not invalid.

A clause in the sale-deed ran in these words : Be it known that if in future owing to any dispute about the above mentioned family arrangement and amicable partition it be found or become divulged that we the executants have not the entire 16 annas right in the properties sold then of the immovable properties left by our father in the district of Dacca and Goalpara and in the Garo hills including the properties given in the schedule below, the total 6 annas

4 gandas 9 kaks 2 tils inherited by us the executants from our father, will be counted as sold to you the recoipients of the deed. On the strength of this Kobala being owned and possessed of our 6 annas 4 gandas, 9 kaks 2 tils share in the immovable properties left by our father including the properties given in the schedule below, you either jointly or on partition, will enjoy and possess the same in whatever way you like down to your sons, grandsons and other heirs and legal representative."

Held : that this clause in the document satisfied the requirement of S. 17, Sub-S. (1), Cl. (b) of the Act inasmuch as the document by reason of this clause would be a non-testamentary instrument which purported to create or declare, though in future, a right vested or contingent in favour of the appellants, that being the position the document would be registrable in the district of Dacca even though as a kobala transferring the three items of property mentioned in the document it would not be so registrable.

Held further : that treated as a kobala the document could not be registered in any registration office in the district of Dacca in view of the fact that the only property which purported to have been covered by it as lying within the district of Dacca was a tinshed which had no existence whatever and in asmuch as the introduction of a fictitious item of property in the sale deed for the purpose of getting it registered at a particular place would make the registration of the document invalid. But the document regarded as a non-testamentary instrument falling within Cl. (b) Sub-S. (1), S. 17 would be registrable at a registration office in the district of Dacca and it is not invalid. [P 205 C 2]

(b) Registration Act (1908), S. 21—Document registered — Properties sufficiently identifiable—Document is operative in respect of properties found to answer discription contained in document.

Section 21 merely lays down certain particulars which have got to be complied with before a document can be accepted for registration. If the properties are sufficiently identifiable there is no reason why the document, if registered, would not be operative in respect of such properties as would be found to answer the description contained in the document. [P 206 C 1]

Radhabinode Pal and *Syed Farhat Ali* —for Appellants.

Ramendra Chandra Roy—for Respondents.

Judgment.—In this appeal the question which arises for our consideration is whether a sale-deed was invalid by reason of its being registered at a place at which it could not be registered under the law. The facts necessary to be stated are the following. The suit was instituted by the plaintiffs for partition of certain properties, six in number, described in the schedule attached to the plaint. The plaintiffs claimed certain specified properties corresponding to a share which they alleged had belonged to defendants 8 and 9. Their case was that there was a family arrangement under which the said defendants had got those properties in lieu of their undivided share in all the six properties mentioned in the plaint and that in 1926 there was a deed of sale executed by the said defendants in their favour under which they became entitled to the said specified properties. Their case further was that there was a stipulation in the said document that in case there was any difficulty in obtaining possession of the said plots on account of the fact that the family arrangement was not established then they would be entitled to the shares of their vendors in the whole lot of properties mentioned in the plaint. The trial Court made a preliminary decree for partition in the plaintiffs' favour in respect of all the properties and that decree has been reversed by the lower appellate Court on the ground that the sale-deed was invalid by reason of the fact that it had been registered at a place at which it could not under the law be registered. The lower appellate Court in dismissing the suit has observed thus :

"I would therefore if the bar of invalid registration did not arise, confirm the lower Court's decree in respect of properties other than property No. 5 only, that property being left to be shared by the legal heirs of Ahmad Ali Shah. But owing to the bar of invalid registration, the appeal succeeds and the suit must fail."

The question which requires consideration in this case is whether a particular item of property described in the sale deed, namely Item 3, can be held to have passed under it. This item concerned a plot of land on which stood a tin shed, according to the description as given in the document. The other two items of property, mentioned in the sale-deed are properties situate in the province of Assam. So far as the Item 3 is concerned it is a property which is situate in the district of Dacca. The document was presented for registration at a Sub-Registary office in the district of Dacca. The learned Judge has found that the tin-shed mentioned in Item 3 had no existence and he has referred to certain evidence in his judgment in support of this finding. This finding has not been challenged before us on behalf of the appellants. The learned Judge has also held that upon a proper reading of the description of Item 3 as contained in the document it should be held that

there was no intention that any title to the land itself should pass under it; and being of opinion that the only property which was intended to be conveyed by Item 3 was the tin-shed which had no existence he held that the document was not registrable at any registration office in the district of Dacca.

The appellants' first endeavour before us was to make out that the 'interpretation which the learned Judge has put upon the description given in the document as regards Item 3 was not correct and that on a proper reading of the said description it should be held that the intention of the parties was that the land on which the tin-shed stood should also pass under it. We have considered the arguments that have been put forward in support of this contention, but we are unable to say that the view which the learned Judge has taken is wrong. The learned Judge has referred to the fact that if the description given of Item 3 be read in the light of what has been said in connexion with the other two items of property there can be no doubt that Item 3 which was to pass under the deed was not land but only the tin-shed standing on it. The learned Judge has also relied on certain other evidence for the purpose of showing that the land as described in Item 3 would include not merely the share of the vendors but also the share of their co-sharers and that it could never have been the intention of the parties. that the share of persons other than that of the vendors would pass. We are clearly of opinion that the learned Judge was right in the view which he has taken as regards the interpretation to be put on the description contained in the document as regards Item 3. The appellants have next drawn our attention to the fact that there is a clause in the sale-deed which runs in these words :

" Be it known that if in future owing to any dispute about the above mentioned family arrangement and amicable partition it be found or become divulged that we the executants have not the entire 16 annas right in the properties sold then of the immovable properties left by our father in the district of Dacca and Goalpara and in the Garo hills including the properties given in the schedule below, the total 6 annas 4 gandas 9 kaks 2 tils inherited by us the executants from our father, will be counted as sold to you the recipients of the deed. On the strength of this Kobala being owner and possessed of our 6 annas 4 gandas, 9 kaks 2 tils share in the immovable properties left by our father including the properties given in the schedule below, you either jointly or on partition, will enjoy and possess the same in whatever way you like down to your sons, grandsons and other heirs and legal representatives."

Now this clause in the document, it has been pointed out, satisfies the requirements of S. 17, Sub-S. 1, Cl. (b), Registration Act, inasmuch as the document by reason of this clause would be a non-testamentary instrument which purported to create or declare, though in future, a right vested or contingent in favour of the appellants. It has been argued that that being the position the document would be registrable in the district of Dacca even though as a kabala transferring the three items of property mentioned in the document it would not be so registrable. We are of opinion that this contention is well-founded. It is quite true that treated as a kobala the document could not be registered in any registration office in the district of Dacca in view of the fact that the only property which purported to have been covered by it as lying within the district of Dacca was the tin-shed which had no existence whatever and inasmuch as the introduction of a fictitious item of property in the sale deed for the purpose of getting it registered at a particular place would make the registration of the document invalid. But there is yet the other contention of the appellants to which we have just referred and according to which the document regarded as a non-testamentary instrument falling within Cl. (b), Sub-S. 1, S. 17 would be registrable at a registration office in the district of Dacca. There is no question, as far as we can make out, that the value of the right such as it was was over Rs. 100. We are of opinion therefore that the learned Judge was not right in holding that the document was invalid. Inasmuch as the other findings of the learned Judge have not been challenged before us and there is no dispute whatsoever as regards the facts, we think we would be right in giving effect to the observations which the learned Judge made and to which we have already referred at the commencement of this judgment. Our attention has been drawn on behalf of the respondents to S. 21, Registration Act, which enjoins that

"no non-testamentary document relating to immovable property shall be accepted for registration unless it contains a description of such property sufficient to identify the same."

That section merely lays down certain particulars which have got to be complied with before a document can be accepted for registration. If the properties are sufficiently identifiable there is no reason why the document, if registered, would not be operative in respect of such properties as would be found to answer the description contained in the document. Our order therefore is that the appeal should be allowed, the decrees of the Courts below should be set aside and a preliminary decree for partition be entered in favour of the appellants in respect of properties other than property No. 5 only and that the other directions contained in the preliminary decree which the Court of first instance had made should form part of the decree of this Court. The appellants will be entitled to their costs in all the Courts, hearing fee in this Court being assessed at two gold mohurs.

K.S. *Appeal allowed.*

A. I. R. 1935 Calcutta 206

MUKERJI, AG. C. J. AND S. K. GHOSE, J.

Surendra Lal Chowdhury and *others*—Appellants.

v.

Sultan Ahmed and *others* — Respondents.

Appeal No. 285 of 1932, Decided on 31st July 1934, from order of Sub-Judge, Addl. Court, Chittagong, D/- 4th February 1932.

(a) Mesne Profits—Land settled with tenants—Mesne profits can be calculated on basis of rental value of land.

Where the wrong-doers have not been shown to have cultivated the lands but settled the lands with tenants, mesne profits can only be calculated on the basis of rental value of the land and must be either on the basis of such rent as they in fact received or could with ordinary diligence have received. [P 207 C 2]

(b) Civil P. C. (1908), S. 144 — Person obtaining possession by orders passed in execution proceedings on valid decree — Decree subsequently set aside — He cannot be regarded as trespasser during such period and is not liable to pay mesne profits, but only damages or compensation.

A person who obtains possession of immovable property under and by virtue of orders passed in execution proceedings, based upon what at the time was a valid decree, but has subsequently been set aside on appeal can in no sense be regarded as trespasser during such period. For that period he is liable to his opponent, the real owner, for compensation or damages and not for mesne profits in the strict sense of the expression. But since the reversal of the decree in his favour when it becomes his duty to vacate and hand over possession he becomes a trespasser and remains liable for mesne profits in such sense so long as he continues in possession. But on no principle can it be said that the measure of damages or compensation during the former period should be higher than during the latter period : 19 *Cal* 267; 12 *M I A* 244 and 3 *C L J* 182, *Ref.* [P 207 C 2; P 208 C 1]

(c) Civil P. C. (1908), S. 144—Only what person in wrongful possession has made or could have made with reasonable diligence should be considered.

It is the duty of the Court under S. 144, Civil P. C., to place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed. But in assessing what a party may have lost or of what he may have been deprived during his dispossession, the law takes into account not what he could have made, but what his opponent did in fact make or could with reasonable diligence have made. There may be cases in which in addition to mesne profits claimed on the ground of the wrong-doer remaining in possession, damages or compensation may be claimed on other grounds. [P 208 C 1, 2]

(d) Civil P. C. (1908), S. 144 — Person in possession of property by virtue of execution of decree settling lands on permanent lease and receiving premium—Decree set aside—Rent which can be realized on yearly tenancy should be calculated and not rent fixed for assessing compensation or damages or mesne profits.

Where a person who has obtained possession of property by virtue of execution of a decree settles the land on a permanent lease for which he has received a premium and rent is also fixed but the decree is set aside, the assessment of compensation or damages or mesne profits to the other party should be calculated on the basis of the rent which the former would have realized for the lands on the basis of a yearly tenancy and not merely the rent which he has received on the basis of the permanent lease. [P 208 C 2]

(e) Civil P. C. (1908), O. 2, R. 2 — Claim for mesne profits is not barred by prior application for restoration of possession.

A claim for mesne profits is not barred by the provisions of O. 2, R. 2 by a prior application for restoration of possession : 1918 *Pat* 396, *Ref.* [P 208 C 2]

Chandra Sekhar Sen and *Satis Chandra Sen*—for Appellants.

Imam Hossain Choudhury and *Bireswar Chatterjee*—for Respondents.

Judgment.—The respondents got a decree for khas possession against the appellants on 6th April 1925 and took delivery of possession in execution on 15th July 1925. That decree having been set aside on 1st August 1928, the appellants applied for restitution of the lands and they were restored to possession on 23rd August 1928. Thereafter

the appellants applied for what they called mesne profits, assessing their total claim at Rs. 978. The Courts below found that the respondents did not hold the land in khas but through tenants with whom they had settled the lands on receiving a nazar of Rs. 1,100 and at a rental of Rs. 17 a year. The said Courts have awrded the appellants Rs. 51 as the amount of mesne profits for three years during which they had remained in possession at the rate of Rs. 17 per year, on the authority of the decision in 1929 P. C. 300 (1) and 1930 P. C. 82 (2). They have taken these decisions as laying down that the criterion upon which mesne profits should be ascertained is not what the party dispossessed had lost but what the party in possession had gained. The said Court refused to give the appellants any part of the nazar of Rs. 1,100 holding that though the respondents had the use of this amount for three years they were liable for the said amount together with compensation to the tenants who would be justified in realizing the same from them.

The decisions of the Judicial Committee upon which the Court below have purported to proceed are authorities for a proposition, which must be regarded as well-settled, that the criterion for the calculation of mesne profits cannot be what the person out of possession might have got if he had been on the land. The very definition of mesne profits given in S. 2 (12), Civil P. C., makes that sufficiently clear because according to the definition it is the profits which the person in wrongful possession actually received or might with ordinary diligence have received which are to be regarded. In the former of the two cases there was no case made that the person in wrongful possession could have got more than what he actually received, and so what he actually received was what the rightful owner out of possession was entitled to. The person in wrongful possession in that case had got the lands with one Srish as a lessee on it, who was holding under a lease from the Government. His contention was:

"I am only liable for what I really got, namely, what I got from Srish; allowing Srish to go on as he had done with Government was perfectly reasonable: you cannot think that it was necessary for me to put out Srish and begin to cultivate myself and therefore I in the terms of the Code am only liable for what I really got."

In the latter of the two cases, the wrong-doers had cultivated the lands themselves and it was held by their Lordships that the cultivation profits were the primary consideration, but that the profits should not be calculated on the basis of indigo cultivation which was done for the wrong-doer's special purpose, but that the true test must be what an ordinary prudent cultivator must have grown. In the present case the wrong-doers have not been shown to have cultivated the lands and it is admitted that they had, in fact, settled the lands with tenants. In such a case mesne profits can only be calculated on the basis of rental value of the land and must be either on the basis of such rent as the respondents in fact received or could with ordinary diligence have received. In the second of the aforesaid cases their Lordships have observed:

"The appellant's first contention was that the rental value of the land * * * * was the proper criterion. This would no doubt ordinarily be so where the person charged had merely let the land out to others. In such a case the rent that he received if there was no evidence could with ordinary diligence have been obtained, would be the measure of the profits for which he would be liable."

Mr. Sen, for the appellants, has argued that it was not mesne profits as defined in the Code but compensation or damages, which words are also used in S. 144, Civil P. C., to which his clients are entitled and that such compensation or damages should be assessed on the basis of what his clients could have got if they were in possession. The true position in law is that a person who obtains possession of immovable property under and by virtue of orders passed in execution proceedings, based upon what at the time was a valid decree, but has subsequently been set aside on appeal, can in no sense be regarded as a trespasser during such period: 12 M. I. A. 244 (3), 19 Cal. 267 (4) and 3 C. L. J. 182 (5). For that period he is liable to his opponent, the real owner, for com-

1. Gurudas Kundu v. Hemendra Kumar, 1929 P C 300=121 I C 525=56 I A 290=57 Cal 1 (P C).
2. Harry Kempson Gray v. Bhagu Meah, 1930 P C 82=121 I C 540=57 I A 105=9 Pat 621 (P C).
3. Surnomoyee v. Shooshe Mukhee, (1867-69) 12 M I A 244 (P C).
4. Dhunput Singh v. Saraswati Misrain, (1892) 19 Cal 267.
5. Holloway v. Guneshwar Singh, (1906) 3 C L J 182.

pensation or damages and not for mesne profits in the strict sense of the expression. And it is also true that since the reversal of the decree in his favour when it becomes his duty to vacate and hand over possession he becomes a trespasser and remains liable for mesne profits in such sense so long as he continues in possession. But on no principle can it be said that the measure of damages or compensation during the former period should be higher than during the latter period.

Mr. Sen has drawn our attention to a number of decision in which it has been laid down that the true principle upon which Courts ought to proceed in making an order for restitution is to compensate the party injured by giving him all that was, in fact, lost to him by the erroneous decree or order and not by giving him only as much as would come within the definition of mesne profits as given in the Code. The decisions cited in this connexion are: 9 W. R. 402 (6), 23 Mad. 306 (7) and 32 All. 79 (8), (which went up on appeal to the Judicial Committee: see 1915 P. C. 92 (9) and 1932 Rang. 148 (10). There is no doubt whatever that it is one of the first and highest duties of all Courts to see that the act of the Court does no injury to any of the suitors, 3 P. C. 465 (11), and that it is the duty of the Court under S. 144, Civil P. C., to place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed: 1922 P. C. 269 (12), but in assessing what a party may have lost or of what he may have been deprived during his dispossession the law takes into account not what he could have made but what his opponent did in fact make or could with reasonable diligence have made. At first sight this might seem somewhat unjust, but it is not really so, for what the party out of possession could have made if he was left in possession is a loss which in the vast majority of cases would be hypothetical, remote and uncertain. Of course, there may be cases where such profits must necessarily have accrued to him in any case, e. g., if the lands were under a lease, with a stipulation that in all circumstances a certain rent would be recoverable. But in such cases what the party out of possession would have lost is what his opponent could have made by reasonable diligence. There may again be cases in which in addition to mesne profits claimed on the ground of the wrong-doer remaining in possession, damages or compensation may be claimed on other grounds. But the present case is not a case of that character.

In our opinion therefore in the present case the assessment of compensation or damages or mesne profits, whichever be the term or expression used, must be on the basis of rent which the defendant actually realized, unless it be that he could with ordinary diligence have realized more. Rs. 17 per year was actually realized, but that was on the basis of a permanent lease for which a premium of Rs 1,100 was also realized. The Court of first instance, in our opinion, should allow the parties to adduce evidence as to the rent which may be realized for the lands on the basis of a yearly tenancy, and such figure as is established should be the basis of assessment.

Two contentions have been put forward on behalf of the respondents for the purpose of repelling the appellants' claim. One is that the claim is barred by the provisions of O. 2, R. 2, Civil P. C., in view of the previous application for restoration of possession. This contention has no force and has been rightly overruled by the Courts below: 1918 Pat. 396 (13). Another is that the lands were in the possession of some persons as mortgagees from the appellants and so the respondents could get no actual possession. This is a new contention not noticed by us and, it may therefore be presumed, was not raised in the Courts below; and so it does not deserve any consideration. The appeal is allowed. The orders of the Courts below are set

6. Hurro Chunder Roy v. Shoorodhonee Debia, (1868) 9 W R 402=B L R Sup Vol 985.
7. Doraisami v. Annasami, (1900) 23 Mad 306=10 M L J 307.
8. Parbhu Dyal v. Ali Ahmad, (1910) 32 All 79=4 I C 376.
9. P. Prabhu Dyal v Kalyan Das, 1918 P C 92=33 I C 505=43 I A 43=38 All 163 (P C).
10. Dawood Hashim Esoof v. Tuck Shein, 1932 Rang 148=140 I C 853=10 Rang 480.
11. Rodger v. Comptoir d' Escompte de Paris, (1871) 3 P C 465=40 L J P C 1=7 Moore P C 314=19 W R 449=24 L T 111.
12. Jai Berham v. Kedar Nath, 1922 P C 269=69 I C 278=49 I A 351=2 Pat 10 (P C).
13. Krupasindhu Roy v. Mahanta Balbhadra Das, 1918 Pat 396=47 I C 47=3 Pat L J 367.

aside and the case is sent down to the Court of first instance to be dealt with in the light of the directions given above. The appellants will get their costs in all the Courts. Hearing fee in this Court is assessed at two gold mohurs.

K.S. *Appeal allowed.*

A. I. R. 1935 Calcutta 209

MITTER, J.

Nishi Chandra Sen— Plaintiff — Appellant.

v.

Romesh Chandra Majumdar and *another*—Defendants—Respondents.

Appeal No. 281 of 1932, Decided on 17th August 1934, from appellate decree of Addl. Sub-Judge, First Court, Chittagong, D/- 13th July 1931.

Grant—Noabad land — Government has right to settle it with anybody — Fact of previous possession is generally taken into account in so doing — Even if Government comes to wrong conclusion on question of possession, settlement confers title only on grantee.

The Government had the right to make settlement of Noabad lands with anybody it pleased. No doubt, in making the settlement the fact of previous possession is taken into account, but if the Government has come to the wrong conclusion on the question of possession, still the settlement made would confer a right on the grantee alone in the land. [P 210 C 1]

Chandra Sekhar Sen—for Appellant.

Narendra Kumar Das — for Respondents.

Judgment.—This appeal is on behalf of the plaintiff for declaration of his alleged 8-annas share in a certain holding and for confirmation of possession. The subject-matter of the suit is the watery portion of a tank recorded in Dag No. 1609 of the settlement map. The plaintiff's case is that the said tank was recorded as Dag No. 328 of the Chitta of 1200 M. E. in the possession of Srimanta and Kalidas. The plaintiff's further case is that on the death of Srimanta, the property was inherited by Srimanta's son Radhakrishna on whose death the same passed to Brajeswari. The plaintiff is the daughter's son of Radha Krishna. The plaintiffs further case is that Kalidas' rights devolved ultimately upon Harapriya who is defendant 1. The other defendants are the sons of Harapriya. It appears that in the 1871 Biswambar purchased at an execution sale Brajeswari's alleged right whereupon Brajeswari instituted a suit to recover possession of her alleged share challenging the decree and the execution sale. In that suit Biswambhar, Harapriya and Harapriya's husband were parties defendants. The said suit ended in a compromise in the year 1872. By the terms of the commise decree, to which Harapriya and Biswambhar were parties, the right of Brajeswari to a moiety share was recognised and the said share was leased out in Temami right for six years by Brajeswari to Lakshmi Kanta, the husband of Harapriya. The plaintiff's further case is that although Brajeswari was in possession jointly with Harapriya. Harapriya's husband Lakshmikanta who looked after the affairs fraudulently caused the name of Harapriya to be entered in the records of Fasson's survey which took place in the year 1878. It is on the basis of this record he says that the Government granted in the year 1881 a jote settlement to Harapriya. In the year 1895, there was a Cadastral Survey. Brajeswari was recorded as an under-raiyat under Harapriya, but she having repudiated through Rasik the said position, her name was removed from the record of rights and Harapriya's name alone continued to be on the record. It appears that in the year 1914, a tank was re-excavated by defendant 1 with the help of the District Board. She herself contributed a substantial sum of money. From the years 1914 to 1917 there were proceedings under S. 9, Specific Relief Act between the plaintiff and the defendants in respect of the banks of the tank and in respect of some of the proceedings the plaintiff was successful. In the year 1928 the Khas Tahsildar recorded the name of the plaintiff along with the name of Harapriya in the Government Register. It is on these facts that the plaintiff says that he has a moiety share in the jote which was created in the name of Harapriya in the year 1881. The plaintiff also based his claim to a moiety share on title by adverse possession.

The Court of first instance gave effect to some of the contentions of the plaintiff and decreed the suit. The lower appellate Court has, however, dismissed the same. It is admitted by both the parties that the tank in question apper-

tained to a Noabad taluk belonging to the Government and that the Government had the right to make any settlement it liked. It is the finding of the learned Subordinate Judge that the banks of the tank in respect of which proceedings were taken under S. 9, Specific Relief Act, do not appertain to the Noabad taluk, but they appertained to Taraf Mehals and were held under different titles. The learned Subordinate Judge points out that in the Mughi Chitta the possession of Srimanta and Kalidas was simply recorded but they had in fact at the time or thereafter no rights to the land. They assumed they had rights and on that footing dealt with the property by the transactions as mentioned above. In the year 1877, Mr. Fasson started his survey and in the course of the same it was found that Maghi Survey plot No. 328 together with some other plots was lying unsettled. The Sub-Deputy Collector Pran Krishna Das enquired into the fact of possession and came to the conclusion that Harapriya was the only person in possession and was entitled to a settlement from the Government. Accordingly, in the year 1881, the land in suit was settled with Harapriya. That settlement for the first time created a right in the lands in suit. He accordingly held that so far as title is concerned, Harapriya is alone entitled to it. On the question of possession the learned Subordinate Judge in more places than one after reviewing the evidence came to the conclusion that the plaintiff was not in possession of the land in suit for a considerable period, much more than 12 years before the suit, and therefore, held that the plaintiff's claim based on a title by adverse possession was also not substantial. In my opinion, both these findings of the learned Subordinate Judge dispose of the matter. The right to the property was first created in the year 1881. The Government had the right to make settlement of Noabad lands with anybody it pleased. No doubt, in making the settlement the fact of previous possession is taken into account, but if the Sub-Deputy Collector had come to the wrong conclusion on the question of possession still the settlement which was made with Harapriya would confer a right on her alone in the land. In this view of the matter the plaintiff cannot claim any interest in the jote so created. The mere fact that for sometime, the husband of Harapriya looked after the properties of the plaintiff would not make him a trustee so as to give to the plaintiff on equitable principles a right to the settlement made by the Government in favour of Harapriya. The plaintiffs' claim based on adverse possession must also fail on the findings that he had no possession at least after the Cadastral Settlement which was finally published in the year 1898. For these reasons, I affirm the judgment and decree passed by the learned Subordinate Judge. The appeal is accordingly dismissed with costs.

K.S. *Appeal dismissed.*

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MITTER AND NASIM ALI, JJ.

Gopi Krishna Saha— Plaintiff — Appellant.

v.

Surendra Nath Chaudhury and *others* —Defendants—Respondents.

Letters Patent Appeal No. 19 of 1933, Decided on 21st August 1934, against judgment of S. K. Ghose, J., D/- 1st June 1933.

(a) Landlord and Tenant—Claim for additional rent on ground of excess area—Onus of proving that tenant is holding excess area is on landlord.

Where a landlord sues for additional rent on ground of excess area, the burden of proving that the defendants are holding excess land for which they are liable to an additional rent is undoubtedly in the first instance on the landlord. [P 211 C 2]

(b) Practice— Finding of fact based on evidence is final.

A finding of fact arrived at by a Court of fact is final, if such finding is based on evidence. [P 211 C 2]

(c) Landlord and Tenant — Rent — Claim for excess rent for excess area—Plaintiff is entitled to benefit of presumption that standard of measurement prevalent when record of rights is finally published is also standard at inception of tenancy—Presumption is rebutted by evidence of absence of uniform standard at time of inception.

In a suit for additional rent for excess area, the plaintiff is entitled to the benefit of the presumption that the standard of measurement which was prevalent at the date when the record-of-rights was finally published, was also the standard of measurement at the inception of the tenancy: 1933 *Cal* 617; 1927 *Cal* 15 and 2 *C L J* 125, *Ref.* [P 212 C 1]

But this presumption is rebutted by the evidence that there was no uniform standard of measurement at time of inception of tenancy.

[P 212 C 2]

S. C. Basak and *Surendra Nath Basu* (*Sr.*)—for Appellant.

Sarat Chandra Roy Chaudhury, and Nagendra Nath Chaudhury — for Respondent.

Bireswar Chatterjee—for Deputy Commissioner.

Mitter, J.—This is an appeal under S. 15, Letters Patent, from a judgment of my learned brother S. K. Ghose, J. The suit in which this appeal arises was brought by the plaintiff who is the appellant before us for additional rent for excess area. The Court of first instance dismissed the suit. The lower appellate Court gave a modified decree to the plaintiff granting additional rent for an excess of 70 bighas odd only. On appeal to this Court, S. K. Ghose, J., has allowed the appeal and has restored the decree of the Munsiff, dismissing the plaintiff's suit. Hence this present appeal under S. 15, Letters Patent.

The plaintiff's case is that he has purchased the Putni and Dar Putni rights of mouza Chatiani in the year 1334 B. S. The defendants are said to be the holders of a jote bearing rent of Rs. 34-10-8 per year. The case made by the plaintiff in the plaint further is that this rent was assessed with reference to an area of 78 bighas odd without specific boundaries on a standard of 18 inches to a cubit and that the jama was not a mokarary jama. It was furthor stated that according to the finally published record-of-rights, which records were published in 1925, the defendants are possessing an area of 180 bighas, and it is said that the defendants are liable to additional rent for excess area of 102 bighas. On this basis the plaintiff claims a sum of Rs. 126 odd per year. The defence of the defendants, in substance, is that the holding is a mokarary holding which has been held by them from very ancient times, even from before the permanent settlement of 1719 and that the existing rent is a consolidated rent and was not with reference to measurement of any particular area. It is further stated that measurement, if any, was made according to a standard of 26 inches per cubit and according to such standard of measurement the area would be 109 bighas odd. It is further said that there was no encroachment on the lands of the zamindar or the patnidars. The burden of proving that the defendants are holding excess land for which they are liable to an additional rent is undoubtedly in the first instance on the landlord.

The origin of the tenancy is lost in antiquity, and it is very difficult at this distance of time to give evidence to show as to what was the area which was actually settled with the defendants. It is said on behalf of the plaintiff that there is an admission by the defendants that there was a potta in respect of this tenancy, that, according to the case of the defendants, that potta was stolen and it would be presumed, it is said, that the potta, if produced, would have gone against the defendants. The Subordinate Judge has relied on an admission of defendant 1 in certain previous depositions, wherein it is stated that the settlement of the jote was with reference to area, and it is further stated that the area was 110 bighas measured by the standard of measurement of 26 inches to a cubit. The Subordinate Judge also rested his decision on his view with regard to the standard measurement, which he held to be 18 inches to a cubit which is also the present stannard of measurement on the basis of which lands have been surveyed by the Survey Officers in preparing records-of-rights; and on this basis, accepting the original holding to be 109 bighas, as admitted by the defendants, he has granted an enhancement in respect of the excess area, namely, 180 bighas. It was complained before S. K. Ghose, J., that the finding about this standard of measurement was based on no evidence and was therefore liable to be challenged in second appeal. That contention was accepted by S. K. Ghose, J. Before us it has been contended by Dr. Basak who appears for the appellant that the learned Judge of this Court was bound to accept the finding of fact on the question of standard of measurement, arrived at by the lower appellate Court. Undoubtedly, a finding of fact arrived at by a Court of fact is final, if such finding is based on evidence. In the present case the position is this: the plaintiff is entitled to the benefit of the presump-

tion that the present standard of measurement was the standard which obtained at the time of the inception of the tenancy. There are authorities to that effect in the books. Reference may be made to a very early case, namely, 2 C L J 125 (1) where Ashutosh Mookerjee, J., stated this (at p 132):

"Here the plaintiff alleges that the standard of measurement now prevalent is a cubit of 18 inches, and that this measure was in use when the leases were granted in 1859. The defendant asserts, on the other hand, that the standard of measurement prevalent in 1859 was a cubit of 20 inches. Of this he gives no evidence; the District Judge has accordingly held that the measure now in use, was also in use in 1859. It is disputed that whichever measure be adopted, the land within the boundaries would be in excess of the area mentioned as that with reference to which the rent was fixed at the inception of the tenancy; the only question, therefore is as to the quantity of this excess. It is impossible to say that the District Judge has under circumstances just stated erred in holding that the state of things now in existence may be presumed to have existed also in 1859."

The same view was also taken by B. B. Ghose, J. and Panton, J., in 1927 Cal 15 (2). There the learned Judges observed this:

"With regard to the question of standard of measurement the presumption must be that the standard of measurement at the time of letting out was the same as it is now unless anything to the contrary is proved. As there is no proof to the contrary it must be presumed that the same standard has continued. It is not a case of letting out by a statement of the area, and if the area is found to be in excess of what was let out the landlord is evidently entitled to increase of rent for such increase of area."

And in a very recent case, Mallik, J., was inclined to take the same view: see: 1933 Cal 617 (3). Following these authorities, undoubtedly the plaintiff in this case is entitled to the benefit of the presumption that the standard of measurement which was prevalent at the late when the record-of-rights was finally published, was also the standard of measurement at the inception of the tenancy. But in the present case, that presumption has been rebutted by the evidence which has been afforded by Thuller's Manual of Surveying, 1875 Edition, at p. 402, from which it would appear that on account of the difficulties arising out of the varying standards of measurement, the Government laid down a uniform standard of measure in 1849; and this has been referred to by the Munsif in his judgment at p. 7 of the paper-book. The presumption which we could carry back beyond 1849 has been rebutted by the evidence in this particular case, that there was no uniform standard of measurement prior to 1849. The cases in which the presumption has been pleaded are all cases after the year 1849. Besides in those cases the Courts had not the evidence which has been placed before them, that the Government had introduced a uniform standard of measurement after 1849 so far as the measures with which the Government had to deal were concerned. We are therefore of opinion that the learned Judge of this Court has rightly stated that there is no proof as to what was the standard of measurement beyond the year 1849. There is no doubt that this tenancy was created nearly half a century before 1849. Therefore the basis on which the lower appellate Court came to the conclusion that the plaintiff had proved that the standard of measurement at the time of the inception of the tenancy was 18 inches to a cubit, as false, and the learned Judge of this Court was right in interfering with that finding which was based on no evidence in the case. In these circumstances we are of opinion that the plaintiff has failed to discharge the burden of proof for establishing the excess of area for which he claims additional rent. The appeal accordingly fails and it is dismissed with costs.

K.S. *Order accordingly.*

1. Ishan Chandra Mitter v. Ramranjan Chakravarti, (1905) 2 C L J 125.
2. Birendra Kishore v. Bhola Mia, 1927 Cal 15= 97 I C 385.
3. Sasanka Kumar Nayak v. Hitlal Sow, 1933 Cal 617=145 I C 856=60 Cal 434.

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COSTELLO AND LORT-WILLIAMS, JJ.

Shailabala Dasee— Plaintiff—Appellant.

v.

Gobardhandas Ladsaria— Defendant—Respondent.

Appeal No. 28 of 1934, Decided on 20th June 1934, from original Suit No. 941 of 1931.

Res judicata—Suit dismissed under Ch. 10, R 36—Plaintiff is not barred from bringing fresh suit - Calcutta High Court Rules and Orders (Original Side), Ch. 10, R. 36— Civil P. C. (1908), O. 9, R. 9.

On general principles, there is nothing to prevent a plaintiff, whose suit has been dismissed for want of prosecution, from instituting forthwith a suit against the same defendant upon the same cause of action; and, in the absence of any

rule made by the Court to deal with such a state of affairs. Where the suit is dismissed for want of prosecution under the provisions of Ch. 10, R. 36 the plaintiff is at liberty to bring a fresh suit if he be so minded. [P 216 C 2]

Pugh, N. C. Chatterjee and *S. K. Basu* —for Appellant.

Roy, S. R Das and *S. K. Ray Chaudhuri*—for Respondent.

Costello, J.—In this appeal from a judgment of Buckland, J., dated 24th January 1934, a point of considerable importance arises. The learned Judge himself said :

"In this case a preliminary point of considerable importance has been raised, on behalf of the defendant, by the learned Advocate-General."

The suit was brought to recover a sum of Rs. 50,000 or such damages as the Court might allow, for breach of a covenant contained in a lease, whereby the defendant covenanted to return the property demised by the lease in good order and condition. It appears that a suit, which admittedly was precisely the same as the present suit (the previous suit being numbered 1771 of 1928) was instituted by the same plaintiff against the same defendant and on the same cause of action; that is to say, Shailabala Dasee was the plaintiff in Suit No, 1771 of 1928 and she is the plaintiff in the present suit, and Gobardhandas Ladsaria was the defendant in Suit No 1771 of 1928, and he is defendant in the present suit. On 22nd May 1930 Suit No. 1771 of 1928 was dismissed by an order of Lort-Williams, J., under the provisions of Ch. 10, R. 36 of the Rules of this Court. There was no appeal from that order, but an application was made, said to be by way of review, to have that order set aside. It so happened that that application came before me. I say "it so happened," but I recollect that the reason why it came before me was (as was in effect admitted at the time) that the parties, or rather the plaintiff of set design waited until Lort-Williams, J., had proceeded on leave and until there was another Judge dealing with the interlocutory matters. The application for review was dismissed by me on 6th August 1930 and again there was no appeal from that order. The present suit was instituted on 2nd May 1931 and as I have stated, the cause of action and the issues in this suit are identical with those of the 1928 suit. The learned Judge says in his judgment :

"In these circumstances, it is contended, on behalf of the defendant, that this suit cannot proceed, upon the ground of res judicata, but not upon the limited grounds which are to be found in S. 11, Civil P. C., but upon the broader principles which were referred to and recognised by their Lordships of the Privy Council in 1921 P C 11 (1). Reliance is also placed upon the inherent powers of the Court which are preserved by S. 151, Civil P. C , and I have also been referred to the judgment of Sir Francis Maclean, C. J., in 10 C W N 529 (2) in support of the proposition that the plaintiff, having elected to proceed, as she did, by applying to have the order of dismissal set aside and having failed on that application, is not entitled now to litigate the matter afresh by a separate suit."

The learned Judge stated the point which he had to determine, briefly and concisely, in these terms,

"whether an order of dismissal under Ch. 10, R. 36 of the Rules of this Court operates as a bar to a fresh suit."

The rule in question runs thus :

"Suits and proceedings, which have not appeared in the Prospective List within six months from the date of institution, may be placed before a Judge in Chambers, on notice to the parties or their attorneys, to be dismissed for default unless good cause is shown to the contrary, or be otherwise dealt with as the Judge may think proper."

The authority of that rule was challenged, in the year 1924, in 1924 Cal 1025 (3) where however Sir Lancelot Sanderson, C. J., held that the rule is not ultra vires and that the Court has jurisdiction to dismiss a suit for default when it appears on the Special List. It was also held in that case that the decision of a Judge on the Original Side of the High Court dismissing a suit for want of prosecution under Ch. 10, R. 36 of the Rules of the Court, is a judgment within the meaning of Cl. 15 of the Letters Patent and, accordingly, an appeal lies from that decision. It is obvious therefore on the authority of that case, that it would have been open to the present plaintiff had she so chose to have appealed against the order of my learned brother Lort-Williams, dated 22nd May 1930. Buckland, J., came to the conclusion that, once a suit has been dismissed under the provisions of Ch. 10, R. 36 it is not open to the plaintiff to bring a fresh suit on the same cause of

1. Hook v. Administrator-General of Bengal, 1921 P C 11=60 I C 631=48 I A 187=48 Cal 499 (PC).
2. Ram Gopal Mazumdar v. Prasunna Kumar Sanial, (1905) 10 C W N 529=2 C L J 508.
3. Udoy Chand v. Khetsidas Tilokchand, 1924 Cal 1025=81 I C 1048=51 Cal 905.

action. He expressed his opinion quite definitely in these words :

" I have no reasonable doubt that the object and intention of the rule is to enable the Court, finally, to dismiss such a suit unless the Judge is satisfied that there are grounds for allowing it to proceed."

It was pointed out that, on notice being sent to the parties, they have an opportunity to, and frequently do, appear. Thereupon, the Judge can take into consideration any affidavits filed, and anything that counsel may put before the Court on behalf of the parties. The learned Judge has given a number of reasons as to why he comes to the conclusion that once a suit is dismissed for default under Ch. 10, R. 36 of the Rules of this Court, the plaintiff is not entitled to bring a fresh suit on the same cause of action. I am bound to say that, with the reasoning of the learned Judge, so far as it goes, I respectfully and entirely agree. As a matter of common sense and of first impression, one cannot fail to be of opinion that it is undesirable that a plaintiff should be allowed, in circumstances such as the present, to suffer no greater penalty and incur no more serious handicap than the payment of certain costs to the defendant.

It has been pointed out by the learned Judge, in his judgment, and emphasized by the learned Advocate-General in his address to us, that a plaintiff of means might use the procedure of the Court as an instrument of oppression and that, having launched his suit against any person, he might delay the prosecution of that suit so that it ultimately appeared on the Special List, as it has been called, and the suit was dismissed. Forthwith he might launch a fresh suit and indeed a succession of suits at any rate until the alleged cause of action became no longer available by reason of the operation of the statute of limitation. I wholly sympathize, if I may use the term, with the expression of opinion given by the learned Judge in his judgment. But we have to consider whether that judgment is justified by any provision in law. It is admitted by the learned Advocate-General that neither the precise terms of S. 11, Civil P. C., nor the general principles of the doctrine of res judicata, as explained in a number of decisions of their Lordships of the Judicial Committee of the Privy Council, including the cases of 1931 P C 114 (4) and 1932 P C 161 (5) are of any avail to the defendant in the present proceeding. It is undoubtedly right to say that here there is no case of res judicata, because the original Suit, No. 1771 of 1928, was never heard and determined, and in no sense could it be said that the plaintiff's case had been disposed of on its merits. We have therefore to see whether there is any other principle or provision, either in the general adjectival law or in the rules of this Court, which prevents the plaintiff from proceeding with the suit, out of which this appeal arises. The learned Advocate-General has sought to rely on a number of orders and rules contained in the first schedule to the Civil Procedure Code, but none of them, in my opinion, are really material for our present purpose. He has also argued that the provisions of S. 12, Civil P. C., do not stand in his way : That section lays down that :

" Where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of such cause of action in any Court to which this Code applies."

As far as one can see the rules in Sch 1, Civil P. C., which do bar a fresh suit in respect of the same cause of action, are these : O. 2, R. 2, O. 9, R. 9, O. 22, R. 9 and O. 23, R. 1. None of these have any application to the present circumstances. In my opinion, S. 12 operates against the contention of the defendant in the present suit. Mr. Pugh argued that we must deduce from it that, unless there is a rule either in the Code of Civil Procedure or in the Rules of this Court, there is nothing in the general provisions of law to prevent the plaintiff instituting a fresh suit, after the former suit has been dismissed under the provisions of Ch. 10, R. 36 of this Court. It is to be remembered that R. 36, Ch. 10 of the Rules of this Court is apparently designed to serve the same purpose as R. 12, O. 36 of the Rules of the Supreme Court in England, and to a large extent Ch. 10, R. 36 of this Court is analogous to O. 36, R. 12 of the English procedure, one of the main differences being however that in this Court

4. Munni Bibi v. Tirloki Nath, 1931 P C 114=132 I C 598=58 I A 158=53 All 103 (PC).
5. Maung Sein Done v. Ma Pan Nyun, 1932 P C 161=137 I C 328=59 I A 247=10 Rang 322 (PC).

the Registrar takes the initiative on finding that suits are not being prosecuted with due vigour and diligence, whereas under the English Procedure it is left to the defendant to stimulate the activities of the plaintiff either by himself causing the action to be set down for trial, or by taking out a summons asking that the action may be dismissed for want of prosecution. There is no very direct, certainly no very modern decision, as to what precisely is the effect of an order made under the provisions of O. 36, R. 12 as regards the rights of the plaintiff to bring a fresh suit.

We find in the notes in the Annual Practice of 1934, at p. 2213, a statement to the effect that, where an action has not been set down for trial under O. 36, R. 32 the effect of a dismissal is not clear. The note seems to be based upon the judgment of Sir George Jessel M. R. in 12 Ch. D. 681 (6) and the judgment of Kay, J., in 36 W. R. 602 (7).

The case of 12 Ch. D. 681 (6) was decided in the year 1879. There it was held that where an action has been commenced against a company and continued by leave after a winding-up order, and before trial an order had been obtained to dismiss the action for want of prosecution, the plaintiff in the action was not debarred from bringing forward a claim in the same matter in the winding up. Sir George Jessel M. R. said at p. 682 of the report :

"It is very much to be desired that a new rule should be made to meet cases of this kind. But in the meantime the former practice applies except so far as it has been altered by the Judicature Act and the rules of Court, and I find nothing in them which varies it on this point.

Formerly a man could abandon his action by not taking any further steps in it, whether it were brought at Common Law or in Chancery. In the former case the defendant signed judgment of non-pros., which they exactly described what had happened ; in the latter case he would have the bill dismissed for want of prosecution, but in either case the plaintiff could bring a new action for the same matter, with this exception only, that in Chancery, if the cause had been set down to be heard, the dismissal of the bill for want of prosecution, was equivalent to dismissal on the merits, and was a bar to a new action."

"In this case, if the action had been set down for hearing, there might have been a question whether the former rule of Common Law or that of the Court of Chancery ought to prevail. But in a case where, as here, the action had not been set down, there was only one rule, namely, that a fresh action might be brought. If the new rules had been intended to make an alteration in this respect, it would have been so expressed. But that has not been done, and consequently the practice is the same as it was before the rules were made."

As far as one can ascertain, the position in this Court seems to be the same as it was in England at the time when the 12 Ch. D. 681 (6) was decided. A year or two later, and in between 12 Ch. D. 681 (6) and 36 W. R. 602 (7), there was the case of 30 W. R. 815 (8). There, by a Master's order, an action was to be dismissed, unless notice of trial were delivered by a certain day. Through a mistake of the solicitor's clerk, notice of trial was not delivered within the required time. The Judge in Chambers refused, in the exercise of his discretion, to extend the time fixed by the Master's order. On appeal, the Court declined to interfere with the Judge's discretion. Grove, J., in his judgment observed :

"I am of opinion that this is a case in which we should not interfere with the discretion of the learned Judge. (1880) 6 Q. B. D. 116 (9), on which the plaintiffe' counsel relies, is the exact converse of the present case. There the learned Judge thought fit to vary the Master's order, and the Court of appeal, as well as the Divisional Court, refused to interfere with his discretion. If this were a solitary instance of an application of this kind, we might be inclined to grant the indulgence asked for ; but cases of this kind are becoming too common, and in the interests of clients this carelessness on the part of solicitors and their clerks must be put a stop to. If we encouraged such conduct we should practically be abolishing the rules made under the Judicature Acts, and a negligent party might postpone a case day after day, and set all the rules at defiance, if he knew that he could be reinstated in the position which he had lost by his own carelessness or intentional disobedience of the rules merely by payment of the costs."

Then the learned Judge continued in the words following and they are the important part of his judgment for our present purpose :

"A new writ may be issued immediately in this case, so that the right of the plaintiff is not lost, as he merely has to pay the costs incurred so far as a penalty for his carelessness, and begin over again."

Then we come to the case of 36 W. R. 602 (7) which was decided in the year 1888. In that case, there was a consent order, dismissing an action for want of prosecution, and it was held that, unless

6. In re, Orrell Colliery and Fire-Brick Co., (1879) 12 Ch D 681=48 L J Ch 655.
7. Magnus v. National Bank of Scotland, (1888) 36 W R 602=57 L J Ch 902=58 L T 617.
8. Gilder v. Morrison, (1882) 30 W R 815.
9. Carter v. Stubbs, (1880) 6 Q B D 116=50 L J Q B 161=29 W R 132=43 L T 746.

it proceeded upon a compromise of the cause of action, there was no bar to another action between the same parties for the same matter. The former practice of the Court of Chancery on this point is unaffected by the rules of Court under the Judicature Act. The plaintiffs in the action, having made default in making discovery and answering interrogatories, told the defendants they intended to abandon the action, and would pay their costs. Not having done this, the defendants issued a summons to dismiss the action for want of prosecution. The plaintiffs, thereupon, paid the defendant's costs, and at the hearing of the summons they appeared, and consented to an order dismissing the action as against the defendants. The plaintiffs then brought a fresh action against the same defendants for the same matter, whereupon the defendants raised the question of law whether the plaintiffs were not estopped, by reason of the order on the summons. The Court held that the order, not having proceeded upon a compromise of the cause of action, was no bar to the fresh action. The judgment of Kay, J., is very illuminating upon the point which is now before us. He is reported, at p. 604 of the report, as saying :

" Now if that consent order had proceeded on a compromise of the cause of action, it would have been an absolute bar to a new action. But here the order was made on a summons to dismiss for want of prosecution, an order on which would not be a bar, and therefore, unless it is shown that the consent proceeded upon the compromise of the cause of action, I cannot see how it is possible to say this would be a bar. Can it be said that when you attend on a summons to dismiss for want of prosecution, and submit to an order by consent, that order is a bar to another action ? That seems to me against all the rules of the Court. There is a great deal more in this than mere technicality, because the principle of the Court is that unless the merits of the case have been dealt with, the dismissal of one action is not a bar to another action of the same kind. That is a very ancient rule of the Court of Chancery which I should be sorry to see disturbed."

A little lower down in the judgment, the learned Judge said :

"The object of this summons to dismiss for want of prosecution was to prevent the plaintiffs going on with that action. Everybody knows that would not prevent another action being brought. Of course the plaintiffs were compelled by the terms of the order to pay all the costs of that action."

Now, on the authority of the three cases, to which I have referred, it seems to me that on general principles there is nothing to prevent a plaintiff, whose suit has been dismissed for want of prosecution, from instituting forthwith a suit against the same defendant upon the same cause of action and, in the absence of any rule made by the Court to deal with such a state of affairs, it is clear that, in circumstances such as the present, where the suit was dismissed under the provisions of Chap. 10, R. 36, the plaintiff is at liberty to bring a fresh suit if he be so minded. I feel impelled to say that, unlike Kay, J., I should not be sorry to see the practice altered and an appropriate rule made by this Court negativing, or at any rate circumscribing, the right of the plaintiff to bring one or two and possibly more actions against the same defendant on the same cause of action, where the first and the second or the subsequent action has been disposed of under the provisions of the rule which we are now considering. I go further than that and say that, in my opinion, it is highly desirable that a rule of that character should be made by this Court, unless the matter is dealt with by other authority and suitable provisions inserted, either in the body of the Civil Procedure Code or in the rules contained in the schedule to that Code. We have now however only to administer the law as we deem it to exist at the present time. For the reasons which I have given, we are compelled to come to the conclusion that this appeal must be allowed. The result is that the case must go back to be disposed of on its merits. The appellants will have the costs of this appeal. The cost of the Court below will abide the result of the further proceedings.

Lort-Williams, J.—The subject for consideration in this appeal is the effect of the dismissal of a suit for want of prosecution under R. 36, Chap. 10 of the rules of this Court on the Original Side.

The learned Judge (Buckland, J.) has decided that the plaintiff is precluded by such dismissal from bringing a fresh suit upon the same cause of action. I cannot understand upon what principle of law such a decision can be supported. This is a very drastic rule, which provides that a Judge may dismiss for default any suit which has not appeared in the Prospective List within six

months from the date of institution. Such orders are sometimes necessarily made in a somewhat summary way, and I am surprised to find that it has been suggested, nay more, decided that the effect of the many decisions which I have given under the provisions of this rule was to deprive the plaintiffs for ever of the right to agitate their claims.

Of course, there are well-known principles of law which preclude the plaintiff from bringing a fresh suit upon the same cause of action, e. g., the principle of res judicata. But no one has suggested that, in the circumstances of such a dismissal for default, there has been anything in the nature of a trial or decision upon the merits.

And of course, where special rules have been made by or for the Court, which forbid the bringing of a fresh suit the plaintiffs are bound by them so long as these rules are intra vires of the rule-making authority; such, for example, are to be found in O. 9, Civil P. C. But there is no similar provision in R. 36, or elsewhere in the rules of this Court, or in the Code of Civil Procedure, which is relevant to the present discussion. On the contrary, S. 12, of the Code provides that :

" Where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of such cause of action in any Court to which this Code applies."

Inferentially it seems to follow that where no such rules exist, no such preclusion is intended to apply. In the absence of such rules, I know of nothing to prevent a plaintiff, whose suit has been dismissed under the provisions of R. 36, from bringing a fresh suit upon the same cause of action, except the law of limitation. The law upon this subject has been clearly stated by Sir George Jessel M. R. in 12 Ch. D. 681 (6) as follows :

" Formerly a man could abandon his action by not taking any further steps in it, whether it were brought at Common Law or in Chancery. In the former case the defendant signed judgment of non-pros., which exactly described what had happened ; in the latter case he would have the bill dismissed for want of prosecution, but in either case the plaintiff could bring a new action for the same matter, with this exception only, that in Chancery, if the cause had been set down to be heard, the dismissal of the bill for want of prosecution was equivalent to dismissal on the merits, and was a bar to a new action."

And by Kay, J., in 36 W. R. 602 (7) as follows :

" The practice in this Court was well settled long before I went to the bar. In Lord Redesdale s book I find the law thus stated on p. 238 of the original edition : " A decree or order dismissing a former bill for the same matter may be pleaded in bar to a new bill, if the dismission was upon hearing, and was not in terms directed to be without prejudice. But an order of dismission is a bar only when the Court determined that the plaintiff had no title to the relief sought by his bill, and therefore an order dismissing a bill for want of prosecution is not a bar to another bill." .... There is a great deal more in this than mere technicality, because the principle of the Court is that unless the merits of the case have been dealt with, the dismissal of one action is not a bar to another action of the same kind. That is a very ancient rule of the Court of Chancery which I should be sorry to see disturbed .... The object of this summons to dismiss for want of prosecution was to prevent the plaintiffs going on with that action. Everybody knows that would not prevent another action being brought. Of course, the plaintiffs were compelled by the terms of the order to pay all the costs of that action."

In Seton's " Judgments and Orders," Edn. 7, 1912, Vol. 1, at p. 136, it is stated upon the authority of these decisions that where an action has been dismissed for want of prosecution, the plaintiff must pay the costs of the old one first ; and a similar statement appears in Daniell's Chancery Practice, Edn. 8, 1914, Vol. 1, at p. 474.

In my opinion, it would be difficult to support the making of any rale, which, in such circumstances, would preclude the bringing of a fresh suit upon the same cause of action, unless the first suit had been set down for trial. If that has been done, the plaintiff cannot complain that he has not had an opportunity of having his case heard, and if he fails to proceed with the prosecution of his claim, and it is dismissed for default, the Court, in such circumstances, would be justified in making a rule that no fresh suit should be brought upon the same cause of action. In a case, such as the present, where there has been a dismissal of the suit, but not upon the merits, I think it ought to be provided that no fresh suit shall be instituted until all costs incurred in the first suit have been paid by the plaintiff to the defendant. I agree with my learned brother that this appeal must be allowed with costs.

L.G./R.K. *Appeal allowed.*

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COSTELLO AND LORT-WILLIAMS, JJ.

Ranjit Ray—Appellant.

v.

D. A. David—Respondent.

Appeal No. 100 of 1933, Decided on 1st June 1934, from Original Suit No. 20 of 1932.

Companies Act (1913), S. 109 (d)—Assignment of book debt by company as security for securing existing debt is mortgage of that debt—Unless it is registered, it is inoperative as against liquidator and creditors of company—Transfer of Property Act (1882 as amended by 20 of 1929), Ss. 130 and 134.

An assignment of a book-debt as security for the purpose of securing an existing debt constitutes a mortgage of that debt and unless it is registered as required by the provisions of S. 109 (d), Companies Act, the assignment will be inoperative as against the liquidator and the creditors of the company : *Saunderson & Co.* v. *Clark*, (1913) 29 *T L R* 579, *Rel. on.*

[P 222 C 1, 2]

S. M. Bose and *A. N. Bose*—for Appellant.

Sudhish Ray—for Respondent.

Costello, J.—The facts of the case out of which this appeal arises are fairly simple. The point of law which has to be determined upon a consideration of those facts is however one of some difficulty. A suit was brought by the liquidator of the Co-operative Hindusthan Bank Limited to recover from certain persons, who are the Wardens of the Armenian Church, a sum of money for work and labour done on behalf of the Wardens of the church by a firm named Carr, Morrison & Co., Ltd. That firm has gone into liquidation and the liquidator of it, Mr. G. C. Read, is a party to this suit. The Wardens of the Armenian Church, so far as these proceedings are concerned, have in effect called upon the other two parties to interplead. They have paid into Court a sum of Rs. 2,971-12-9 which was the amount ultimately agreed as being owing in respect of the work done by Carr Morrison & Co. The conflict of claims between the liquidator of the bank and the liquidator of Carr Morrison & Co., arises from the fact that Carr Morrison & Co. borrowed from the bank the sum of Rs. 3,000 and executed in favour of the bank a promissory note, dated 8th July 1930. In addition, the company assigned two bills, or rather 'invoices,' which were made out by Carr Morrison & Co., as builders and contractors, addressed to the Wardens of the Armenian Church of Calcutta. One of those bills was for a sum of Rs. 5,737-10-0 and the other bill was for Rs. 6,985-3-0. The bills were numbered respectively 166 and 167 and they were both dated 5th July 1930. On the same date, a letter was addressed by Carr Morrison & Co., to the Wardens of the Armenian Church in these terms:

Re: No. 2, *Middleton Row.*

We beg to hand you herewith our final bills in respect of the above work (repairs, sanitary and plumbing), for favour of payment, at your early convenience.

The enclosed bills aggregate Rs. 12,720-13-0, against which you have, from time to time, advanced the sum of Rs. 7,000 only, leaving a balance of Rs. 5,720-13-0 still due.

These final bills cancel the running bills previously issued, viz., Nos. 122, 123, 125 and 126.

These bills are assigned and endorsed for valuable consideration to the Co-operative Hindusthan Bank, Ltd., Calcutta, and we will thank you to make payment to them direct to our a/c, at 12-2, Clive Row, Calcutta . . . .

Upon the back of the bills there was the following endorsement:

Please pay to Co operative
Hindusthan Bank, Ltd.,
Carr Morrison & Co., Ltd.,
(Sd.) P. M. Morrison,
Managing Director.

Carr Morrison, & Co., Ltd.,
(Sd.) C. Carmichael,
Managing Director.

The position therefore was that by the endorsement on the back of the bills, coupled with the notification contained in the letter of the same date, Carr Morrison & Co., assigned to the bank the benefit of the debt then owing to them by the Wardens of the Armenian Church. The bills and the letter of 5th July were sent through the bank and, on 8th July, were forwarded by the bank to the Wardens of the Armenian Church, under cover of a letter, which is in these terms:

Please receive the following bills which have been endorsed to this bank for valuable consideration and the cheque for which when passed should be drawn in favour of this bank and sent to us for credit of the account of Carr Morrison & Co., Ltd., with this bank.

At the foot of the letter, there is a tabular statement in the following form:

No.	Drawer.	Currency.	Amount.
			Rs. as. p.
26-493 ..	Yourselves ..	D ..	5,720 13 0

Enclosures—

(1) One letter dated 5th July 1930 of Carr Morrison & Co., Ltd.

(2) Bills Nos. 166 and 167 dated 5th July 1930 for Rs. 5,737-10-0 and Rs. 6,985-3-0.

Certain correspondence passed between the bank and the Wardens of the Armenian Church, in which it appears that the Wardens of the Church disputed the amount said to be due from them to Carr Morrison & Co., but ultimately, after two of the Wardens had gone into the matter, they admitted liability to the extent of Rs. 2,971-12-9, which, as I have already said, is the amount claimed in the suit, out of which this appeal arises.

The defendants, Carr Morrison & Co. (in liquidation), by their liquidator, G. C. Read, contended in the suit that the plaintiff, as the liquidator of the Co-operative Hindusthan Bank, was not entitled to recover the amount from the Wardens of the Armenian Church and that the sum owing by the Wardens of the Armenian Church should be treated as a debt due to Carr Morrison & Co. (in liquidation), and the liquidator of Carr Morrison & Co., took the point that the assignment of the debt due from the Wardens to the bank was of such a nature that we ought to treat it as if it were a mortgage and being a mortgage, it ought to have been registered under the provisions of S. 109 (d), Companies Act. That section provides that certain mortgages and charges are to be void, if not registered. The words of the section, so far as material for our present purposes, are these:

"Every mortgage or charge created . . . . by a company and being either a mortgage or charge on any book-debts of the company, shall so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company, unless the prescribed particulars of the mortgage or charge, together with the instrument (if any) by which the mortgage or charge is created or evidenced, or a copy thereof verified in the prescribed manner, are filed with the Registrar for registration . . . . . within twenty-one days after the date of its creation, but without prejudice to any contract or obligation for repayment of the money thereby secured, and when a mortgage or charge becomes void under this section, the money secured thereby shall immediately become payable."

Then there are certain provisos which are not relevant to our present inquiry. The liquidator of Carr Morrison & Co., contended that the assignment constituted by the letter of 5th July 1930, and the endorsement on the bills dated 5th July 1930, was of such a nature that it ought to be considered as a mortgage and therefore subject to the provisions of S. 109 which I have just read. The learned Judge at the trial, by his judgment dated 31st May 1933, stated the point which he had to determine in this form:

"He (i. e., the liquidator of Carr Morrison & Co.) puts in issue the validity of the alleged assignment of the plaintiff bank. He says that ths assignment was not absolute but was by way of charge and that, inasmuch as it was not registered, it is inoperative against the defendant company by reason of S. 109 (1) (d), Companies Act . . . . . "

The matter falls to be decided upon a consideration of the provisions of S. 130, T. P. Act, which by sub-S. (1) provides that:

"The transfer of an actionable claim, whether with or without consideration, shall be effected only by the execution of an instrument in writing signed by the transferor or his duly authorized agent . . . . . , shall be complete and effectual upon the execution of such instrument, and thereupon all the rights and remedies of the transferor, whether by way of damages or otherwise, shall vest in the transferee, whether such notice of the transfer . . . . . be given or not."

It seems clear that in this case there was a transfer by Carr Morrison & Co., to the bank of an actionable claim and that such transfer was by an instrument in writing signed by the transferors. It follows therefore that the transfer was complete and effectual upon the execution of the instrument in writing, that is to say, the letter of 5th July, taken in conjunction with the endorsements on the two bills Nos. 166 and 167. It also follows that on the execution of those documents all the rights and remedies of the transferors, that is to say, Carr Morrison & Co., vested in the transferees, the Co-operative Hindusthan Bank, Ltd. Actually in the present case, notice of the transfer was given to the debtors by the letter of 8th July 1930, which I have already quoted. Sub-S. (2), S. 130 provides that:

"The transferee of an actionable claim may, upon the execution of the instrument of transfer . . . , sue or institute proceedings for the same in his own name without obtaining the transferor's consent to such suit or proceedings and without making him a party thereto."

It is manifest from the judgment of the present Chief Justice in 1923 Cal. 719 (1) that S. 130, T. P. Act, contains a special scheme which has some of the

1. Sadasook Ramprotap v. Hoare Miller & Co., 1923 Cal 719=80 I C 632.

features both of the English common law and of the principles of equity and it is analogous to the provisions which are contained in S. 25 (b), Judicature Act, 1873, which are now enacted in S. 126, Law of Property Act, 1925. It is unsafe however to endeavour to decide the point of the kind now before us by any extensive reference to the English authorities. For the purpose of the present case, it is important at the outset to recall that the Judicial Committee have decided that the assignment of an actionable claim, such as debt, although absolute in form may nevertheless in its effect operate by way of security only. The authority for that proposition is to be found in the judgment or Lord Moulton in 37 Bom. 198 (2), where his Lordship said:

"The appellant bases his claim on an assignment in writing . . . . . dated 13th August 1909. It is in form an absolute assignment and was according to the evidence given under pressure from the appellant to whom Dwarkadas Dharamsey was then indebted in a much larger sum. The validity of the assignment is therefore established. It may well be that although absolute in form it was intended to be only by way of security so as to be subject to a right of redemption, but this does not affect the rights of the parties under the circumstances of the present case."

The assignment effected by the letter and the endorsement of 5th July 1930, was apparently intended to operate as an absolute assignment so as to pass to the bank the whole of the rights and interest of Carr Morrison & Co. It may be that, upon a scrutiny of the exact language used in the letter of 5th July 1930, it was the intention of Carr Morrison & Co. that the whole of the amount properly recoverable by them from the Wardens of the Armenian Church should be paid to the bank and credited to the account of Carr Morrison & Co., with the result that if the amount paid by the Wardens of the Armenian Church was in excess of the amount owing by Carr Morrison & Co., to the bank on their overdraft, the balance would remain to the credit of the account of Carr Morrison & Co. But it is not possible for us to consider or even to speculate as to what the result would have been upon the adoption of that view of the transaction, because the learned Judge found as a fact that the debts were assigned not as an out-and-out transaction but merely as security for the overdraft. The relevant passage in the judgment is in these words:

I should hold that the words were sufficient to effect a transfer of the debt to the bank, even if any of the parties were at liberty in view of their pleadings to dispute that proposition—a matter of some doubt. The question then is whether evidence is admissible to show a collateral agreement between the parties that the assignment of the debt was not absolute but was by way of security for the loan by the bank. The evidence on which the liquidator relies and which the bank seeks to exclude is contained in a letter of 2nd March 1931, written by the bank's solicitor and stating that the bills were assigned by Carr, Morrison & Co. to the bank for security. It has also been pointed out that when the Wardens questioned the amount of the bills, the bank declined to discuss the question without reference to Carr, Morrison & Co, Ltd., thereby admitting that Carr, Morrison & Co., Ltd., had still an interest in the debt. I am prepared on the letter to say that the issue of fact raised by Carr, Morrison & Co., Ltd., should be decided in their favour. I am of opinion that there was an agreement between Carr, Morrison & Co., Ltd., and the bank that the debts were assigned not as an out-and-out transfer but as security for an overdraft. I have now to decide whether evidence is admissible in proof of an oral agreement to this effect having regard to the language of S. 92, Evidence Act.

We have not to concern ourselves in this appeal as to whether the learned Judge was right in resorting to the letter of 2nd March 1931, and the course of dealings between the parties subsequent to the assignment, in order to arrive at a decision as to what in substance was the nature of the transfer effected by the endorsement of 5th July 1930, because no objection has been taken on that score and moreover the learned counsel who appeared for the liquidator of the bank have conceded that the assignment was by way of security only, even though in form it may have been an out-and-out transfer of all the rights and interest of Carr Morrison & Co. in the book-debt in respect of the liability of the Wardens of the Armenian Church towards Carr Morrison & Co. We, therefore, have to decide the matter on the footing that there was an assignment of a book-debt by way of security to ensure repayment by Carr Morrison & Co. to the bank of the overdraft. Put into figures, the position was that there was an assignment of the debt due on a bill for Rs. 5,720-13-0 in order to secure repayment of a debt to the amount of Rs. 3,500. In those circumstances,

2. Mulraj Khatau v. Vishwanath Prabhuram, (1913) 37 Bom 198=17 I C 627=40 IA 24 (PC).

S. 134, T. P. Act, comes into action if I may so put it. S. 134 says:

> Where a debt is transferred for the purpose of securing an existing or future debt, the debt so transferred, if received by the transferor or recovered by the transferee, is applicable, first, in payment of the cost of such recovery; secondly, in or towards satisfaction of the amount for the time being secured by the transfer; and the residue, if any, belongs to the transferor or other person entitled to receive the same.

Briefly stated, the effect of that section is this: that if a debt is transferred by way of security, the transferee is entitled to discharge the debt due by the transferor to him. Then, if there is any residue, that is after payment of the cost of recovery and the amount actually due by the transferor to the transferee, that belongs to the transferor. The position created by the precise language of S. 134 seems to be somewhat anomalous, because where there is a transfer under S. 130, all the rights and remedies of the transferor vest in the transferee. The expression "all rights" must of course include the right of ownership, and yet S. 134 says that the residue, if any, belongs to the transferor which is only another way of saying that if there is anything left over, after the debt between the transferor and the transferee is satisfied, the transferor is the owner of the balance whatever it may be. The anomaly consists in this, that there is a contradiction between the provisions of S. 130 and those of S. 134. One would have expected that instead of saying any "residue belongs to the transferor," the section would have said "the residue, if any, shall be retransferred by the original transferee to the original transferor." However, it seems reasonably clear that what is intended is that where a debt is transferred for the purpose of securing an existing debt then the whole matter should be interpreted, as far as possible, upon the analogy of a mortgage of any other kind of property. That the transferor still has some residuary interest in the transfer is clear from the fact that under the terms of S. 134 it would be possible for him to receive the original debt, and as I have already pointed out the residue actually belongs to him. It seems to me, therefore that even if there had been in form an absolute assignment and subsequently the transferor pays off his debt to the transferee then the transferor would be in the position of being entitled to receive from his debtor the whole amount of the debt which had been transferred upon the basis that in those circumstances the residue would, in fact, be the whole debt. I have no doubt whatever, even without referring to the marginal note, that this S. 134 is intended to deal with a case of mortgage debt.

The main difficulty which confronts us in the present instance is to determine whether an assignment for the purpose of securing an existing debt is a mortgage of such a character as falls within the ambit of S. 109 (d), Companies Act. To put the matter tersely, the difficulty which I first felt in the matter is the determination of the question whether or not an assignment of a book-debt is really a mortgage of that book-debt, but I think that difficulty is entirely solved by the judgment of Lush, J. in 29 T. L. R 579 (3). In that case, a limited company, in consideration of an advance from their bankers, executed an assignment which, after reciting that the company were entitled to £80. 7s. from the defendant, that it had been agreed that that debt should be assigned to the bankers, and that by a letter of even date the defendant had been directed by the company to pay the debt in question to the bankers, assigned unto the bankers so much of the defendant's debt "as may be necessary to indemnify "the assignees" for the amount advanced by them to the company. After executing that deed, the company wrote to the defendant requesting him to pay the debt due to them to the bankers. A few days later the company went into voluntary liquidation. The assignment to the bankers was not registered. The liquidator claimed to recover the debt from the defendant on the ground that the assignment to the bankers, being unregistered, was void as against him, but the defendant insisted upon paying the debt to the bankers. It was held that the liquidator was entitled to recover, inasmuch as by S. 93, Companies (Consolidation) Act 1908, the unregistered assignment was void as against him, and because it was impossible for the parties to a transaction by way of mortgage or charge to alter the effect of S. 93, Com-

3. Saunderson & Co. v. Clark, (1913) 29 T L R 579.

panies (Consolidation) Act 1908, by adopting a form which does not accord with the real transaction between them. S. 93, Companies (Consolidation) Act 1908, was the section corresponding to S. 109, Companies Act. The corresponding provisions of the English Law are now contained in S. 79, English Companies Act (1929). The passage in the report of the judgment of Lush,J., which has most bearing on the present problem occurs at p. 580 and is in these words:

> Mr. Schiller on behalf of the defendant had contended that the deed operated as an absolute assignment of the book-debt, a sale in fact, in consideration of the advance. He (Lush, J.,) did not think that the deed was capable of that construction. The recital appeared to suggest it, but the operative part treats the book-debt as given only as an indemnity, which must mean as a security, and it provides for payment of interest by the company on the advance, thus treating them as debtors. Moreover, it had been given along with a director's guarantee, and the banking account, which was in evidence, showed that the company were debited as debtors with the amount of the advance. The bankers themselves called their interest in the book-debt a charge in a letter they wrote to the defendant, dated 4th January 1910.

In passing I may recall that the bankers in the present case in their letter of 2nd March 1931, described the assignment as being a further security. Lush, J., continued thus:

> The legal effect of the deed of 24th December 1909 therefore was thus. The company. accepting the loan as a loan to themselves, transferred their interest in the book-debt to the bankers as a security, and were consequently entitled to a re-transfer on paying off the loan. In other words, they mortgaged the book-debt to secure an advance. On 1st January 1910, the company went into voluntary liquidation, and the mortgage therefore became subject to the provisions of the Companies Act 1908, S. 93.

The words of Lush, J., to my mind indicate that if there is an assignment of a book-debt as security (to use the words of S. 134) for the purpose of securing an existing. debt, then that constitutes a mortgage of that debt. Therefore the provisions of S. 134 are applicable and the matter must be dealt with as directed by that section. The moment one comes to the conclusion that a mortgage has been effected by means of an assignment, even though the transfer might in form be an absolute assignment, it inevitably follows that the transaction should have been registered as required by S. 109, Companies Act ; or to put the matter the other way round it follows that unless it is registered as required by the provisions of that Act, the assignment will be inoperative as against the liquidator and the creditors of the company. In that view of the matter, and having regard to the fact that counsel for the appellant admitted that this was an assignment by way of security, it follows that the decision arrived at by the learned Judge was correct and this appeal must be dismissed with costs. As regards payment of costs in this appeal, we make the appellant liable personally.

Lort-Williams, J. — I agree. But I desire to say that, in my opinion, the letter of 2nd March 1931, upon which Panckridge, J., has relied, was not admissible in evidence within the meaning of S. 92, proviso (2), Evidence Act, or otherwise. The three documents dated 5th July 1930, coupled with the covering letter dated 8th July 1930, in my opinion, are unambiguous, and amount to an absolute transfer of the debts to the bank, and not one by way of security only. The agreement sought to be established by reference to the letter of 2nd March is inconsistent with these documents and may not be proved. If and when the bank had collected the debt, they would have become the debtors of Carr Morrison & Co., to the extent of the sum collected, subject of course to the state of Carr Morrison & Co.'s account, and to whether they were in debt or credit at that time.

In view however of the fact that counsel for the bank has conceded, for the purpose of the decision in this case, that the documents amount to a transfer by way of security, such as is contemplated by S. 134, T. P. Act, and that, in my opinion, such an assignment is a mortgage of book-debts within the meaning of S. 109, Companies Act, and is void against the liquidator unless resistered, this appeal must be dismissed with costs.

K.S. *Appeal dismissed.*

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MUKERJI AND S. K. GHOSE, JJ.

Mir Abi Mahammad Ahasan and *another*—Appellants.

v.

Abu Nasar Mahammad Eusufali and *others*—Respondents.

Appeals Nos. 432 and 469 of 1930, Decided on 29th June 1934, against order of Dist. Judge, Bakargunj, D/- 26th June 1930.

Guardians and Wards Act (1890), Ss. 47 (1) and 7 (1)—Interlocutory order—Application for being appointed guardian—Court refusing application but keeping case pending for considering appointment of Court of Wards or other guardian—Order is interlocutory and hence not appealable.

Where on the application by a person for being appointed a guardian, the Court passes an order refusing the application, but the proceedings are kept pending for further orders after consulting the Collector for the appointment of the Court of Wards or some other person as guardian, the order is interlocutory and not final according to S. 47 (1) or S. 7 (1) and as such no appeal should be filed till a final order is passed. [P 223 C 2]

S. C. Basak, Diptendra Mohan Ghose, Fazlal Huq and *Radhikaranjan Guha*—for Appellants.

Fazlal Huq, Radhikaranjan Guha, S. C. Basak and *Diptendra Mohan Ghose*—for Respondents.

Judgment.—Two gentlemen of whom the appellant is one applied to be appointed guardian of the properties of a certain minor each to the exclusion of the other. The District Judge on taking evidence came to the conclusion that neither of these two gentlemen was fit to be so appointed and he accordingly refused their applications to be appointed as such guardian. He further observed thus :

"I intend first of all to consult the Collector as to whether the personal properties of the minor can be taken over by the Court of Wards. If this cannot be done, I shall endeavour to appoint a third party acceptable to all contestants."

From the order refusing his own application to be appointed guardian, the appellant has preferred this appeal. A preliminary objection has been taken to the competency of this appeal. S. 47, Guardians and Wards Act, lays down in Cl. (a) :

"An appeal shall lie to the High Court from an order made by the Court under S. 7 appointing or declaring, or refusing to appoint or declare, a guardian."

The other clauses of this section are not relevant for the present purpose. The only sub-section of S. 7 which is relevant here is sub-S. (1). It runs thus :

"Where the Court is satisfied that it is for the welfare of a minor that an order should be made, (a) appointing a guardian of his person or property or both, or (b) declaring a person to be such a guardian, the Court may make an order accordingly."

The order to which we have referred is not an order coming within the purview of sub-S. (1), S. 7 of the Act. By that order, no guardian has been appointed of the person or property of the minor, nor has a person been declared as such guardian. Nor have the proceedings relating to guardianship in respect of the minor that were started in the Court of the learned District Judge come to an end by any order appointing or declaring or refusing to appoint or declare a guardian of the minor. All that has been done by the learned Judge is that the proceedings have been kept pending and the applications of the appellant and of another gentlemen have been refused because they have been found incompetent. The order from which the appeal has been taken is in our opinion, an interlocutory order passed at an intermediate stage of the proceedings and we are of opinion that no final orders coming within the purview of S. 7, sub-S. (1) or S. 47, Cl. (a) have yet been passed. We are of opinion therefore that the present appeal is incompetent. It appears that after this appeal was preferred to this Court there was certain crrespondence between the District Judge and the Collector of the district, and from certain letters which appear to have been received by the District Judge from the Collector it would appear that the properties of the minor should be taken by the Court of Wards subject, of course, to the sanction of the Board of Revenue. It appears further that certain terms as regards the moneys which would be paid to the minor during the time that the estate remains under the management of the Court of Wards have also been proposed in one of these letters.

It has been stated on behalf of the appellant that there is some misapprehension as regards the amount which the minor has been drawing from the wakf properties the said amount is stated in one of the letters to be Rs. 300, but the appellant says that the amount

is much less. These are matters of detail which may very well be considered by the learned District Judge, and will certainly be taken into consideration by the Collector when the proposal for taking over the management by the Court of Wards proceeds further and on a proper application being made before the learned District Judge in that behalf. They are not matters which we are called upon to deal with at the present moment.

We therefore think that we must dismiss this appeal and send the case back to the Court of the learned District Judge in order that the proposal to make over the properties to the Court of Wards may be proceeded with. In the event of this proposal falling through, and of the learned District Judge being required to proceed with the guardianship proceedings any further and in the event of his appointing or refusing a guardian in respect of the minor as the final result of such proceedings, it will be open of course to any party aggrieved to prefer an appeal to this Court from such final order.

L.G./R.K. *Appeal dismissed.*

A. I. R. 1935 Calcutta 224

MUKERJI AND S. K. GHOSE, JJ.

Nirendra Lall Bhattacharyya and *another*—Plaintiffs—Appellants.

v.

Bepin Chandra Bhattcharyya and *others*—Respondents.

Appeal No 292 of 1933, Decided on 29th June 1934, from appellate order of Addl. Sub-Judge, Chittagong, D/- 9th March 1933.

(a) Civil P. C. (1908), O. 32, R. 15—Person not adjudged to be of unsound mind—O. 32, R. 15 is applicable only when after inquiry it is found that by reason of his unsoundness of mind he is incapable of protecting his rights as plaintiff or defendant.

In order that O. 32, R. 15, should be applicable in the case of a person who has not been adjudged to be of unsound mind, it is not enough to find after an inquiry that the person is of unsound mind. It is also necessary that person should be found to be incapable of protecting his rights as plaintiff or defendant by reason of such unsoundness of mind or mental infirmity. [P 224 C 2]

(b) Civil P. C. (1908), O. 32, R. 15—Procedure—Suit brought on behalf of person alleged to be of unsound mind and tried without inquiry of his unsoundness of mind—On appeal lower appellate Court directing inquiry by trial Court—Inquiry held ought to be held by lower appellate Court itself as it was not lengthy—If unsoundness of mind be made out as required by O. 32, R. 15, it should hlod that trial in Court of first instance was in order and dispose of appeal on merits—In absence of unsoundness of mind as above, proceedings would be not in accordance with law and decree would be nullity.

Plaintiff instituted a suit on behalf of a person alleged to be of unsound mind. The trial Court passed a decree in favour of the plaintiff without inquiring as required by O. 32, R. 15. The defendant thereupon filed an appeal. The lower appellate Court passed an order directing the trial Court to hold an inquiry.

Held: that the inquiry should have been made by the appellate Court itself as the inquiry was not a lengthy and protracted one. If on the result of the inquiry the appellate Judge thought that such unsoundness of mind as is required by O. 32, R. 15 had been made out, he should hold that the trial held in the Court of first instance was in order and should go into the merits of the appeal in order to dispose of it. If he did not think so he should hold that the proceedings were not in accordance with law and the decree should be held as nullity. [P 225 C 1]

Nripendra Chandra Das—for Appellants.

Chandra Sekhar Sen — for Respondents.

Judgment. — The substance of the contention that has been urged on behalf of the appellant in this appeal relates to the question whether there should now be an enquiry such as is contemplated by R. 15, O. 32 of the Code. The learned Judge was of opinjon that inasmuch as there has been no adjudication of the question of soundness of mind of the plaintiff who has not been adjudged to be of unsound mind, there must be an enquiry for the purpose of determining whether by reason of unsoundness of mind or mental infirmity the said plaintiff was incapable of protecting his interests as plaintiff. It is true that there is some evidence in the shape of statements that are to be found on the record which would indicate that it was the case of the defendants as well as that the aforesaid person was of unsound mind. But the words of the rule require something more, namely that it should be found on enquiry that by reason of unsoundness of mind or mental infirmity the person is incapable of protecting his rights as a plaintiff or as a defendant. Such a finding will have to be arrived at and it mnst be arrived at upon an enquiry properly held. This disposes of the

main contention that has been urged in support of this appeal. But even though that contention is disposed of against the appellant the question that arises further is what should be the order which should be made in this case. We think it is not necessary that the enquiry in this case should be held by the trial Court and we are of opinion that the directions which the learned Subordinate Judge has given as regards the course to be adopted on the completion of enquiry are not correct. We are of opinion that the enquiry under R 15, O. 32 should be held by the learned Subordinate Judge himself In our opinion, such an enquiry should be held by the learned Subordinate Judge himself because we do not apprehend that the enquiry is likely to be a lengthy or a protracted one.

We are further of opinion that if on the result of such enquiry the learned Judge thinks that such unsoundness of mind as is required by the rule has been made out he will hold that the trial that was held in the Court of first instance, although there was no express order appointing Narendra Lall Bhattacharyya, father of the plaintiff, as his next friend was in order, and in that case it will bo necessary for the learned Judge to go into the merits of appeal in order to dispose of it. If, on the other hand, he comes to be of opinion that such unsoundness of mind as is contemplated by the rule has not been made out, it will have to be held that the plaint that was presented was not in order and as a necessary consequence of such a finding it will have to be held further that the proceeding that followed were not proceedings taken in accordance with law and consequently the decree that was passed in the suit will have to be held as a nullity. In the latter event, it will, of course, be open to the representatives of the alleged lunatic to institute a fresh suit, subject, of course, to any just exception as to limitation or otherwise that may be taken thereof. Costs of this appeal will abide the result, hearing fee two gold mohurs.

R.K. *Order accordingly.*

A. I. R. 1935 Calcutta 225

MUKERJI, AG. C. J. AND MITTER, J.

Krishna Chandra Bhoumick — Judgment-debtor—Appellant.

v.

Pabna Dhanabhandar Co. Ltd.—Decree-holder—Respondent.

Appeal No. 465 of 1932, Decided on 21st August 1934, from original order of Sub-Judge, Pabna, D/- 27th September 1932.

(a) Civil P. C. (1908), O. 21, R. 19—Executing Court can entertain claim to set off.

An executing Court can entertain a claim to set off (O. 21, R. 19), and although a particular case does not come within the strict terms of O. 21, R. 19 on general principles and in the exercise of its inherent power such a Court can give effect to such a claim. [P 226 C 2]

(b) Insolvency—Mutual dealings between insolvent and creditor—Execution—Set off—Account has to be taken of what is due from one to other in respect of such mutual dealings *Obiter*) **Mutual dealings include claim for unliquidated damages also.**

Where there are mutual dealings between an insolvent and a creditor, an account has to be taken of what is due from the one to the other in respect of such mutual dealings and the balance of the account and no more is to be paid by the one to the other.

Obiter. — The term "mutual dealings" includes not only the case where a person owes a debt to the insolvent but also where there is a claim for unliquidated damages. Damages for breach of covenant can be set off under the said provisions against a claim for rent: (*English cases referred.*) [P 227 C 1]

(c) Civil P. C. (1908), O. 21, R. 19—Decree for costs awarded by trial Court set aside on appeal to High Court—Appeal to Privy Council dismissed with costs—In execution of a decree for costs in Privy Council, judgment-debtor is entitled to set off costs in trial Court realized by decree-holder—Limitation Act (1908), Art, 181.

Where a decree for costs passed by a trial Court is vacated by the High Court on appeal and on appeal to the Privy Council the appeal is dismissed with costs, in execution of the decree for costs of Privy Council. the judgment-debtor is entitled to set off the costs realized before three years by the decree-holder in execution of decree for costs awarded by trial Court but vacated by High Court. [P 227 C 2]

Atul Chandra Gupta, Dinesh Chandra Roy and *Nagendra Nath Bose*—for Appellant.

Krishna Kamal Maitra—for Respondents.

Mitter, J.—This appeal is on behalf of the judgment-debtor whose objection under S. 47, Civil P. C., has been rejected by the learned Subordinate Judge of Pabna. The appellant purchased on 26th June 1924, at a revenue sale, a zamindary which belonged to the Pakrasis. The Pabna Dhanabhandar Co. Ltd.

which had not then gone into liquidation, had before the revenue sale advanced money to the Pakrasis on a mortgage of the said zamindary. At the date of the revenue sale and at all material times the position of the respondent company was that of a mortgagee. The appellant paid the whole of the purchase money which remained in deposit in the Pabna Collectorate.

The respondent company instituted on 7th July 1925 a suit to set aside the revenue sale. To the said suit the appellant was defendant 1 and the Pakrasis defendants 2 to 11. The learned Subordinate Judge decreed the suit with costs against the appellant, which costs was assessed at Rs. 989-11-0. The appellant before us preferred an appeal to this Court which was dismissed on 23rd May 1928, subject to the modification that the decree for costs against the appellant was set aside. An appeal was taken to His Majesty in Council by the appellant but it was dismissed and the appellant was directed to pay to the respondent £247-16s-3d as costs. The net result was that the revenue sale was declared invalid, the decree for costs passed against the appellant by the Subordinate Judge was vacated and the appellant was directed to pay £247-16s-3d as cost incurred by the respondent in England in resisting the appeal to His Majesty in Council. Shortly after obtaining the decree from the Subordinate Judge the respondent company applied for executing the decree for costs passed by the Subordinate Judge. The appellant moved this Court for stay. The material portion of the order passed on 18th February 1927 by this Court on the said application is in these terms:

> "The opposite party will be entitled to execute this decree for costs as against the petitioner before us to be recovered out of the money now in deposit in the Collectorate, which the petitioner paid as purchase money for the sale of the property which has not been set aside, the money being now held to the credits of the petitioner."

The respondent company accordingly withdrew on 12th July 1927 from the said deposit a sum of money sufficient to cover their decree for costs, giving security for the due performance of the decree that may be passed by this Court. The appellant also paid revenue and cess amounting to Rs. 543-5-6 that fell due from the date of his purchase at the revenue sale. The respondent company has since gone into liquidation. The said company represented by the liquidator applied on 30th May 1932 for execution of the decree for costs awarded by His Majesty in Council. The appellant preferred objections under S. 47 of the Code and of the many objections he preferred, only one is now for consideration before us, namely whether he is entitled to claim a deduction of the sum of money recovered on account of the decree for costs awarded by the Subordinate Judge, which decree was ultimately reversed, and of the sum of money paid by him on account of revenue and cess with interest. The Subordinate Judge overruled this claim assigning two reasons for his decision. He held that the appellant ought to have filed an application for restoration as soon as the High Court set aside the decree for costs passed by the Subordinate Judge and his claim was barred by limitation. He further held that the fact that the respondent company had gone into liquidation had introduced a complication and to allow the claim of the appellant would be to give him a preference.

The appellant has urged before us that both the grounds mentioned by the Subordinate Judge are erroneous. The advocate for the respondent, besides supporting the reasons of the Subordinate Judge, has urged before us a further ground, namely that the claim of the appellant is in substance a claim to a set off which, he says, an executing Court cannot entertain. We consider the last point urged by him to be of no substance. If an order for restoration had been passed the executing Court would have been bound to give the appellant credit for the sum of money recovered by the respondent in execution of the Subordinate Judge's decree under O. 21, R. 18 of the Code. The legislature has recognized the principle that an executing Court can entertain a claim to set off (O. 21, R. 19), and although the case before us does not come within the strict terms of O. 21, R. 19 we are of opinion that on general principles and in the exercise of its inherent power such a Court can give effect to such a claim. We do not also consider that the winding up of the respondent company has any effect on the claim of the appellant and that if he is otherwise entitled to have

credit for the moneys paid by or recovered from him, the fact that the company has gone into liquidation would not stand in his way.

Long before the making of statutory provisions on the subject it was the practice in bankruptcy, where there was debtor and creditor account between the bankrupt and another person, to take the account between them and to adjust the balance, provided that the debts were connected with each other: see 1 M. I. A. 87 (1). The statutory provisions on the subject extended the same rule to cases where the debts were unconnected with each other. This statutory extension is that where there are mutual dealings between an insolvent and a creditor an account has to be taken of what is due from the one to other in respect of such mutual dealings and the balance of the account and no more is to be paid by the one to the other. These provisions are based on manifest justice; otherwise the receiver in insolvency would be able to recover the full amount due to the insolvent leaving the other person to take a pro rata dividend only. S. 46, Provincial Insolvency Act, and S. 47, Presidency Towns.Insolvency Act deal with this matter in the way indicated above. In (1900) 1 Q. B. 546 (2) it was argued that the trustee in bankruptcy could recover 20 shillings in the pound from Messrs. Mant and say that Messrs. Mant must be content with a dividend on the debt due to them from the bankrupt, but Lindley, M. R. repelled the contention as unarguable. The term 'mutual dealings' has been given by the decisions a very extended meaning. It includes not only the case where a person owes a debt to the insolvent but also where there is a claim for unliquidated damages. Damages for breach of covenant can be set off under the said provisions against a claim for rent and in the law reports diverse other cases can be found: see 9 A. C. 434 (3), (1910) 1 K. B. 745 (4) and 28 Mad. 240 (5). S. 229, Companies Act, makes these principles applicable to a company in liquidation. The only exception to these rules is the case of a contributory. A share-holder of a limited company, who is also a creditor of the same, in the event of the company being wound up, is not entitled to set off the debt due to him against the calls, nor set off against the calls a dividend which may come to him thereafter: (1866) 1 Ch. A. 528 (6). We are accordingly of opinion that the second ground assigned by the Subordinate Judge for overruling the claim of the appellant cannot be sustained.

The rejection of his claim on the ground of limitation cannot also in our opinion be sustained. The ownership of the money in deposit in the Collectorate, from which the respondent withdrew a sum of money to satisfy his decree for costs, was not set at rest till the decision of the Judicial Committee. If the sale had been affirmed the surplus would have belonged not to the appellant but to the Pakrasis. If the decree setting aside the sale stood confirmed then and then only the said surplus would have belonged to the appellant and could have been regarded as his money. During the pendency of the appeals or before filing them the appellant could not have withdrawn the same without seriously imperilling his appeals. If after the decree of the High Court he had made the application to get the money back from the respondent his position would not have been happier. We think that in the circumstances of this case the right to apply accrued to the appellant under Art. 181, Lim. Act, when the Judicial Committee disposed of his appeal. We accordingly hold that the appellant is entitled to set off against the respondent's claim the sum of Rupees 989-11-0, which the respondent took out of the surplus sale proceeds.

The claim for the sum of money paid by the appellant on account of revenue and cess stands on a different footing. The respondent who was a mortgagee was not under a liability to pay the same. The liability is an eventual lia-

1. Young v. Bank of Bengal, (1875) 1 M I A 87=1 Sar 97 (P C).
2. In re, Daintry Ex parte Mant, (1900) 1 Q B 546=69 L J Q B 207=7 Manson 107=82 L T 239.
3. Mersey Steel & Iron Co., Ltd. v. Naylor, Benzon & Co., (1884) 9 A C 434=53 L J Q B 497=32 W R 989=51 L T 637.
4. Tilley v. Bowman Ltd., (1910) 1 K B 745=79 L J K B 547=54 S J 342=17 Manson 97=102 L T 318.
5. Reference under Presidency Small Cause Courts Act, (1905) 28 Mad 240.
6. In re, Overrend Gurney & Co., Grissel's case, (1866) 1 Ch A 528=35 L J Ch 752=14 W R 1015=14 L T 843.

bility of the Pakrasis. We accordingly modify the order passed by the Subordinate Judge and allow the appellant credit for the aforesaid sum of Rs 989 11.0 only. The parties to bear their respective costs throughout.

Mukerjee, Ag. C. J. — I entirely agree.

K.S. *Order modified.*

A. I. R. 1935 Calcutta 228

HENDERSON, J.

Jnanana Prasanna Bhaduri and *others* —Defendants—Appellants.

v.

Hemendra Nath Roy Choudhury and *others*—Plaintiffs—Respondents.

Appeal No. 1878 of 1931, Decided on 11th June 1934, from appellate decree of Sub-Judge, 3rd Court, Mymensingh, D/- 23rd December 1930.

(a) Limitation Act (1908), Arts. 142 and 140—Life estate granted by agreement by *B* to his adoptive mother—Dispossession of latter—*B* predeceasing mother *A* adopted by *B's* widow—Suit by *A* after attaining majority for declaration of title and recovery of possession on ground of dispossession of grandmother—Held Art. 142 and not Art. 140 applied—Onus of proving date of attaining majority held was on *A* - Evidence Act, S. 101.

The plaintiff's grandfather was the proprietor of the Zemindari and died in 1846. He was succeeded by his widow who had the estate of a Hindu widow. In the year 1848 she adopted *B*. After attaining majority *B* executed an ekrarnama in favour of the lady by which he gave her a life interest in the estate. This document was executed in 1865. The lady was dispossessed in 1878. *B* died in 1887 and the lady died in 1905. She was succeeded by *B's* widow *D* who had the estate of a Hindu widow who adopted the plaintiff. Plaintiff filed a suit, after attaining majority for declaration of title and recovery of possession on ground of dispossession of his grandmother.

Held: that as dispossession took place while grandmother was in possession of a life estate under the deed of agreement executed by *B*, *B* would have after the death of the lady to institute a suit Art. 140 would apply. But as he predeceased her, she was succeeded not by the reversioner of *B* but by another lady with the estate of a Hindu widow. The result of this was that time had not begun to run until the plaintiff acquired this estate and that the suit was governed by Art. 142 and not by Art. 140 and that the plaintiff had three years after the attainment of his majority.

Held further: that it was clearly for the plaintiff to show on what date he attained his majority. [P 229 C 2]

(b) Bengal Estates Partition Act (1876), S. 149—Partition of defendant's estate—Partition officer taking action under S. 112 and allotting to defendant part of ijmali chaks lying between plaintiff's and defendant's estates—Suit for declaration of title and recovery of possession by plaintiff on ground of dispossession alleging that part allotted to defendant did not form part of ijmali chak but his own and as such not liable to partition—Suit held not barred by S. 149.

The estate of the defendants was under partition; but there were certain ijmail chaks which were held jointly between their estate and the plaintiff's estate. It was therefore necessary for the partition officer to take action under S. 112 and allot a certain portion of the joint lands to the estate which was being partitioned. The lands which were the subject matter of this suit were in fact allotted to the defendants. [P 230 C 1]

Plaintiff filed a suit for a declaration of title and recovery of possession of property so allotted to defendant on ground of dispossession, further alleging that the portion formed part of his own estate and was not liable to partition.

Held: the suit was not barred under S. 149: 1928 *Cal* 41, *Ref.* [P 230 C 2]

Sarat Chandra Basak, Jatindra Nath Sanyal and *Probodh Nath Sanyal*—for Appellants.

Asita Ranjan Ghose—for Respondents.

Judgment.—This appeal is by defendants 1 to 6. The plaintiff instituted the suit for a declaration of his title to and to recover khas possession of certain lands as appertaining to his Zemindari. The appellants, who were the contesting defendants, are the proprietors of another Zemindari. The plaintiff's case is that his grandmother was dispossessed by the predecessor in interest of the defendants in the year 1285. The learned Munsif decreed the suit in part. The present appellants appealed. The learned Subordinate Judge came to the conclusion that the plaintiff had not established his title to some of the lands decreed in his favour and allowed the appeal in part. The defendants have now appealed to this Court. The plaintiff has filed a cross-objection in which he contends that the decree of the plaintiff should be restored. Three points have been taken on behalf of the appellants: (1) that the suit is barred by limitation; (2) that it is barred under S. 149, Estates Partition Act, 1876 and (3) that when the learned Subordinate Judge did not accept the plaintiffs story with regard to dispossession he should have dismissed the suit.

In order to understand the argument with regard to the point of limitation it is necessary to set out certain facts. The plaintiff's grandfather Goloke Nath Roy

Choudhury was the proprieter of the Zemindari and died in the year 1846. He was succeeded by his widow Janhavi Choudhurani who had the estate of a Hindu widow. In the year 1848 she adopted Baikuntha Nath Roy. After attaining majority Baikuntha executed an ekrarnama in favour of the lady by which he gave her a life interest in the estate. This document was executed in 1865. The lady was dispossessed in the year 1878. Baikuntha died in 1887 and the lady died in 1900. She was succeeded by Baikuntha's widow Rani Dinamoni Choudhurani who had the estate of a Hindu widow. She adopted the plaintiff in 1914 and died in 1918. It is thus clear that the plaintiff got an absolute estate in the year 1914. He alleges previous possession and dispossession and on these facts Art. 142, Limitation Act, would apply. Mr. Ghose, however, has argued that Art. 140 applies in view of Ex. 4 which is a document executed by the natural father of the plaintiff in favour of Dinamoni. Dr. Basak has contended on the other side that this document does not affect the period of limitation for three reasons. The first reason is that no such case was ever made in the plaint. The suit was prima facie barred by limitation. It was therefore for the plaintiff to set out the facts on which he relied to show that the suit was not barred. This part of his case will be found in para. 3 of the plaint. It sets out that though he had obtained an absolute estate he was a minor and Dinamoni continued to hold possession of the property as his guardian. If he had intended to make out a case that Art. 140 applied in view of the document Ex. 4 he should have definitely raised the question in his plaint.

The second ground alleged is that Ex. 4 did not create any life estate in favour of Dinamoni. This document was executed by the plaintiff's father in favour of Dinamoni and really contains the terms of the agreement made between him and Dinamoni with regard to the adoption of the plaintiff It is obvious that such a document could not in itself create any estate in favour of Dinamoni. The executant had no interest in the property at all and it was not possible for him to carve a life estate out of an absolute estate which did not exist and might never come into existence. The plaintiff can only succeed if it can be shown that although no estate in favour of Dinamoni was created he is prevented from questioning the agreement made with her by his father. It is clear that no case of estoppel can arise as the plaintiff does not claim the estate through his father. Mr. Ghose contended that what the father was really doing was to make a contract for the benefit of his minor son, who is therefore bound by it. There can be no question that the son was benefited by it. This aspect of the matter was considered in the case reported in 1927 P C 139 (1). The relevant portion of the judgment is to be found at p. 263 (of 54 I A) where it is pointed out "that the adoption cannot be undone; it cannot thorefore be conditional." I am therefore clearly of opinion that Ex. 4 did not create any life estate in favour of Dinamoni.

The third ground taken is that the claim had already become time-barred before the plaintiff was adopted. I have already noted that dispossession took place while Janhavi Choudhurani was in possession of a life estate under the deed of agreement executed by Baikuntha, if Baikuntha would have lived twelve years after the death of the lady to institute a suit, as in his case Art. 140 would apply; as a matter of fact, he predeceased her. She was succeeded not by the reversioner of Baikuntha but by another lady with the estate of a Hindu widow. The result of this is that time had not begun to run until the plaintiff acquired this estate. This contention therefore has no substance in it. The result of these findings is that the suit is governed by Art. 142 and the plaintiff had three years after the attainment of his majority. The question therefore arises on what date he obtained his majority. The learned Munsiff came to a finding that this happened in the month of Aswin. This finding serves no useful purpose because if the plaintiff attained his majority in the first part of Aswin the suit is barred; if otherwise, it is not. There is, in fact, no evidence at all on the point and the plaintiff did not even set out in his plaint the date on which he attained his majority, nor did he give any evidence. The explanation

1. Krishnamurthi Ayyar v. Krishnamurthi Ayyar, 1927 P C 139=101 I C 779=54 I A 248 =50 Mad 508 (PC).

possibly is that in the original Court the suit appears to have proceeded upon the basis either that Art. 140 applied or that time began to run from the date when the Court of Wards made over possession of the estate. It was clearly for the plaintiff to show on what date he attained his majority and as he did not do so the suit is barred.

I will now deal with Dr. Basak's third point that the learned Subordinate Judge should have dismissed the suit when he did not accept the plaintiff's story of dispossession. What the learned Subordinate Judge did was to assume that the dispossession was at the latest in the year 1278 and to find that even then the suit was not barred. But the fact is that the plaintiff never did make out a story of dispossession in the ordinary sense of the term. His case was that the lands were unfit for actual possession and that as soon as they became fit for cultivation they were seized by the predecessor of the appellants. He did not allege any actual acts of possession by his own predecessor but based his claim to possession on the doctrine that possession must follow title when the land is incapable of being possessed in any way. There is therefore nothing in this point. It remains to consider whether the suit is barred under S. 149, Partition Act. The principles which apply are clearly laid down in the case reported in 1928 Cal 41 (2). In the present case the plaintiff's estate was not subject to partition at all; the estate of the defendants was under partition; but there were certain ijmali chaks which were held jointly between their estate and the plaintiff's estate. It was therefore necessary for the partition officer to take action under S. 112 and allot a certain portion of the joint lands to the estate which was being partitioned. The lands which are the subject matter of this suit were in fact allotted to the defendants. So far as the Collector is concerned, the effect of this is that instead of the whole of the ijmali chak lands being charged jointly with the revenue of both these estates the present lands are charged only with the revenue of the defendant's estate.

In order to see whether the present suit is barred, it is necessary to examine the case which the plaintiff makes. If his case were that these lands were included in one of the ijmali chaks and were wrongly allotted to the estate of the appellants the suit would clearly be barred, but that is not his case; on the contrary he alleges that these lands were really included in certain chaks appertaining to his own estate and were not liable to partition at all. If his contention is well founded the Deputy Collector certainly had no right to include them in the partition. No doubt, as the Secretary of State has not been made a party to the suit, any decree passed would not bind him or any future auction purchaser at a revenue sale. It would be open to them to show that these lands really were included in the ijmali chaks. But it is quite clear that so far as the plaintiff is concerned this present suit is not barred.

The cross-objection must fail on my finding that the suit is barred by limitation and on the merits it is concluded by the finding of fact of the lower appellate Court. The result is that this appeal must be allowed. The decrees of both the lower Courts are set aside and the suit is dismissed with costs in all the Courts. The cross-objection is dismissed without costs. Mr. Ghose asks for leave to appeal. No doubt important questions are raised in connexion with the effect of Ex. 4; but the decision is only obiter dictum in this appeal because the document was not even made a ground of the plaintiff's case in the plaint. The leave asked for is therefore refused.

K.S. *Appeal allowed.*

2. Matangini Ghose v. Mon Mohini Ghose, 1928 Cal 41=105 I C 149=55 Cal 392.

A. I. R. 1935 Calcutta 230

MUKERJI, AG. C. J. AND S. K. GHOSE, J.

Rafatulla Farazi — Judgment-debtor —Appellant.

v.

Kundarmal Agarwalla and *another*— Decree-holders—Respondents.

Appeal No. 389 of 1933, Decided on 16th July 1934, from appellate order of Special Sub-Judge, Assam Valley Districts, D/- 31st March 1933.

Civil P. C. (1908), S. 11—Execution application—Exparte finding that application is within time — Application dismissed both parties being absent—Subsequent application —Judgment-debtor can raise objection that

first application is not within time— Execution—Estoppel.

Where an execution application was prima facie barred by time, the decree-holder was asked to show that it was within time. On the evidence of the decree-holder, an exparte finding was recorded that it was not barred by time and notice was sent to the judgment-debtor. Both parties being absent, the application was dismissed. The decree-holder filed a second application whereupon the question of limitation of the first application was taken by the judgment-debtor.

Held : that exparte order that the execution was within time did not operate as res judicata or by way of estoppel and that the judgment-debtor could raise that the first application was barred by time. [P 231 C 2]

Nagendra Kumar Dutt — for Appellant.

Judgment. — This appeal must be allowed. The judgment-debtor is the appellant in this appeal. He objected to the execution that was being taken against him on the ground that the execution was barred by limitation. The facts necessary to be stated are that on the second occasion when the decree was sought to be executed the application for execution was filed on 1st September 1931 a date which was prima facie 13 days beyond three years from the date on which the first application for execution was disposed of. On receipt of this application for execution the executing Court made an order on the decree-holders asking them to show that the application was not barred by limitation. On the date fixed for the aforesaid purpose one of the decree-holders was examined and the Court recorded an order that "limitation had been prima facie proved," obviously meaning that the application was not barred by limitation. At the same time the Court issued notice to the judgment-dobtor to show cause why the execution should not be proceeded with against him and the fixed the case for 28th November 1931. On the date last mentioned an order was recorded in the order-sheet which shows that the notice which had been issued on the judgment-debtor had been served but the judgment-debtor did not appear and that the decree-holders also were absent and had taken no steps.

The Court on those facts made an order dismissing the second application for execution. The present execution case was then started by filing an application on 9th January 1932. On the facts stated above the judgment-debtor's contention was that the second application for execution had been filed beyond the period of limitation which would be allowable under the law. The Courts below have concurrently overruled this objection holding that by reason of the order which the executing Court had made on the second application the plea that the second application was barred by limitation is no longer open to the judgment-debtor. We are of opinion that this view of the Courts below cannot possibly be supported. The finding that a prima facie case had been made out showing that the application for execution was not time-barred was a finding arrived at exparte. It was after that finding that notice was served on the judgment-debtors. But neither of the parties thereafter came to Court and got any decision on the question of limitation which arose. The exparte order which had been recorded against the judgment-debtor and which was to the effect that the application for execution was prima facie within time cannot. in our opinion, be taken to operate as res judicata or by way of estoppel on any principle analogous to it.

The result is the question whether the second application for execution was within time or not is a question which can be raised by the judgment-debtor even on the present application. The appeal is accordingly allowed and the decisions of the Subordinate Judge and of the Munsiff are set aside and the case is sent back to the Court of first instance so that the parties may now be given an opportunity to produce such evidence as they may desire to do in support of their respective contentions as regards the second application for execution being time barred or within time. Costs of this appeal, hearing fee being assessed at two gold mohurs, will abide the result.

K.S. *Appeal allowed.*

A. I. R. 1935 Calcutta 231

CUNLIFFE, J.

Mousell & Co., Ltd.—Plaintiff.

v.

Ghanshyamdas Jamnadas — Defendant.

Suit No. 1009 of 1933, Decided on 2nd August 1934.

(a) Legal Practitioner — On premature threat from Bench, legal practitioner should

protest then and there but should not take pusillanimous attitude.

It is the duty of the members of the Bar, if their clients are threatened prematurely from the Bench, not to adopt an attitude which may be described as pusillanimous, but to protest then and there that they resent such observations; and after consulting with their attorney instructing them, it may become necessary for them to apply for a transfer of the case to the list of another Judge. [P 233 C 2]

(b) Compromise — On premature threat from Bench, pleader agreeing to settlement of case Counsel held intimidated and Court had inherent power to set aside settlement.

Where soon after the premature threatening of his clients by the Bench, the pleader consented to settle the case.

Held: that the counsel was not free to consider the whole aspect from an unbiased point of view but was intimidated and that the Court had inherent power to set aside the settlement. [P 234 C 1]

(c) Practice—Suitors should have feeling that Court does not decide as to veracity of witnesses before they are seen in witness-box.

It is of cardinal importance that suitors in Courts of justice should enter and leave the Court with a feeling that whatever may be the upshot of actions which are commenced and fought out, the Court at any rate does not make up its mind as to the truth or untruth of their witnesses before the witnesses have been seen in the witness box. [P 234 C 1]

B. C. Ghose—for Plaintiff.

P. N. Sen—for Defendant.

Order. — This is a somewhat embarrassing petition which arises out of a suit for the sale between the parties of a consignment of imported saris. In actual fact there was a cross action on the part of the defendants who were to take delivery of the goods, but at the hearing of, what I may call the main action, after the plaintiffs had called their evidence, the learned Judge presiding over the trial thought fit to make certain observations. They concerned the defendant and consisted, broadly, of a threat to sanction the defendant's prosecution for perjury if he gave evidence along certain lines. There are various descriptions of what happened during this incident. In the petition which is before me, which asks for the setting aside of the decree and for a new trial, this is how the incident was described:

Paragraph 9.—" That after the witnesses on behalf of the plaintiffs were cross examined by my counsel, the learned Judge without giving your petitioners an opportunity to state their case, threatened to send your petitioners to jail, as soon as your petitioners would step into the witness box, whereupon your petitioner's counsel, Mr. P. N. Sen consented to a decree being passed for the full amount of the claim and costs."

In the affidavit which supports that petition what occurred is referred to as follows:

" With reference to the statements contained in para. 4 of the plaintiff's affidavit I repeat that the learned Judge did not give me any opportunity to place my case; whilst the cross-examination of the plaintiff was going on, the learned Judge threatened to send the deponent to jail as soon as he got me into the witness box. As a matter of fact the learned Judge told counsel for the deponent that his Lordship would himself be able to give sanction to prosecute under S. 476, Criminal P. C., and asked the assistance of the Registrar of this Court to have the Penal Code and the Criminal Procedure Code ready."

Then the respondent's version of what occurred is in the affidavit of Mr. Fritz Grellsamer He says this:

" After the cross-examination of myself and a broker witness counsel for the plaintiff company closed their case and thereupon Mr. P. N. Sen called a witness from the customs office to prove certain letters which were being proved when the Judge asked Mr. Sen as to whether he intended to call his client into the box. Mr. Sen said that he did upon which the learned Judge asked whether his client was going to deny the agreement spoken to by myself and the broker witness on behalf of the plaintiff to which Mr. Sen said that that was so. Thereupon the learned Judge said that if on hearing the evidence given by Mr. Sen's client his Lordship came to the conclusion that he was not speaking the truth, his Lordship would not hesitate to take proceedings for the sanction of the prosecution of the witness. After that Mr. Sen was asked to proceed with the case and he did so to some extent."

It is not disputed that Mr. Sen did settle the case on behalf of his client. In my opinion the offer for settlement came from Mr. Sen and not from the other side. The description of the settlement is by no means accurately set out in the petitioner's affidavit. It was a partial not a full settlement; and although the petitioner now denies that he gave any authority to Mr. Sen to take this course or that his attorney did either, in my view both the attorney and petitioner acquiesced in what Mr. Sen was doing. It is of course exceedingly difficult, on affidavit evidence only untested by cross examination, to come to an exact conclusion as to what actually took place. In the circumstances described I think it will be safer in considering what the learned Judge said and the effect of his words upon counsel for the defendants, the petitioners here, if I rely solely on the version given by the plaintiffs-respondents. Their seems

to be an honest affidavit. There is no attempt to deny that the outburst from the learned Judge did in fact take place nor is there a denial that the negotiation for settlement followed very closely upon the outburst in question.

It is argued on behalf of the petitioners that this settlement was no settlement in that the settlement was brought about without proper freedom on the part of the counsel for the petitioners. Reference has been made to a well-known English case and an equally well-known case in this province which deals with the scope and limit of the authority of counsel to settle cases in Court when there is some dispute about what occurred as the instructions given to them by their professional or lay clients but these cases do not seem to me to have an exact bearing upon the problem before me. The question is, should this settlement be set aside because, to use the words of a very learned Judge of this Court, (the late Sir Ashutosh Mukerjee) the consent here could not be deemed to be free and fair and might well be regarded as a constrained and involuntary acquiescence in the mode of trial which the Court had decided to adopt? I shall refer to that case again in a moment; but I mention it here because the language which the late learned Judge used in deciding that case is in my opinion singularly apposite to this case. Of course it is exceedingly unfortunate, and I said so during the hearing, that Mr. Sen himself is instructed to appear before me to day to argue in support of this petition. It is quite obvious why it is undesirable that counsel in such circumstances should appear once more, because it was hardly possible for Mr. Sen to put his client's case before the Court without giving evidence himself, and this he proceeded to do. I believe that in truth and in fact he was intimidated into taking the settlement course by what the learned Judge said—intimidated in the sense that he was apprehensive on behalf of his client; and I cannot help observing, and I do not wish to be harsh in any way, that such an avowal is not in the ordinary course of things quite creditable to a member of the Bar.

The circumstances here were however, very peculiar. There was little time to make up his mind. Counsel was appearing for a person who was, I think, without much education and without perhaps an exact appreciation of what was going on. It cannot however be too strenuously insisted on in similar circumstances that it is the duty of members of the Bar, if their clients are threatened prematurely from the Bench not to adopt an attitude which may be described as pusillanimous, but protest then and there that they resent such observations; and possibly after consulting with their attorney instructing them it may become necessary for them to apply for a transfer of the case to the list of another Judge. In my opinion the settlement here was not a free settlement.

The only decision which has been cited to me that has any bearing on the particular facts of this case is that of 1920 Cal. 150 (1). That was a case which was tried by the late Chief Justice of this Court sitting as a puisne Judge on the Original Side of this Court. It was a suit under S. 14, Arbitration Act, and when counsel was arguing before the learned Judge, the head note sets out that he held that the suit did not lie and declined to entertain the hearing of the application except on the basis that he treated both the trial and the application as a petition under the Act. Under the mistaken impression that counsel on both sides had consented to this view, he proceeded to hear the matter on affidavits and then dismissed both the action and the motion with costs. Dealing with that aspect of the case the late Sir Ashutosh Mukerjee on appeal said:

"Even if the minute book has shown the factum of consent, it could not be treated as consent freely given by counsel in the exercise of his discretion as an advocate invested with a general control over the conduct of the case of his client. The learned Judge states in his judgment that the consent (which he thought was given) was accorded only when he intimated that he would otherwise decline to entertain the motion. If counsel had consented, after the expression of such determination by the Court, the consent could not be deemed free and fair and might well be regarded as constrained and involuntary acquiescence in a mode of trial which the Court had decided to adopt."

Now although this case so far as the facts are concerned is in no way analogous to that case, it does seem to me that this settlement would never have

1. Radha Kissen v. Luchmichand Jhawar, 1920 Cal 150=56 I C 541.

been proposed had the learned Judge not made the observations that he did. It was brought about in my opinion by a form of judicial coercion. Counsel for the defendants was not prepared to take the risk of putting his client into the box to support his pleaded case. The learned Judge without seeing his client had said that if he, the defendant gave evidence to support his written statement he was prepared to go to the length of recommending the prosecution of the defendant for perjury. If I think that counsel was intimidated and was not free to consider the whole aspect of the settlement from what I may call an unbiased point of view, I apprehend that I have an inherent power to set aside this settlement. I propose to do so. It is unfortunate that this application was not made to the learned Judge himself before he laid down his office, but it is of cardinal importance that suitors in Courts of justice should enter and leave the Courts with a feeling that whatever may be the upshot of actions which are commenced and fought out, the Court at any rate does not make up its mind as to the truth or untruth of their witnesses before the witnesses have been seen in the witness box.

I consider that the setting aside of this decree based on the settlement is in the public interest, the highest interest which can be considered in a Court of justice. I shall make no order as to costs in favour of the petitioner here. The respondents will have the costs of this petition in any event. I am not concerned with the question of costs already incurred which I think will be better dealt with by the Judge who tries the case at the new trial.

K.S. *Petition allowed.*

A. I. R. 1935 Calcutta 234

NASIM ALI, J.

Purna Chandra Choudhury — Defendant—Appellant.

v.

Sarojini Choudhurani — Plaintiff — Respondent.

Appeal No. 2131 of 1931, Decided on 31st May 1934, from appellate decree of Sub-Judge, Dinajpur, D/- 20th April 1931.

(a) Contract Act (1872), S. 16—No domination of will—Relationship is not unequal—Pardanishin lady.

Where the relationship of the transferee with the transferor, who is a pardanishin lady, is not such as would enable him to dominate the will of the transferor, it cannot be said that the relation between the parties at the time of the transaction is such as would suggest that they are not on equal terms. [P 237 C 1, 2]

(b) Contract Act (1872), S 16—Independent advice—Pardanishin lady intelligent—Near relation to assist her—It cannot be said that she has no independent advice—Pardanashin lady.

Where a pardanishin lady is intelligent and it is not difficult for her to understand the transaction and the nature and effect of the transaction upon her interest in the property and besides she has her father, brother and intelligent neighbours to assist her in the matter, it can be said she has no independent advice. [P 237 C 2]

(c) Contract Act (1872), S. 16—Fair bargain—Plea of unfair bargain must be specifically raised in plaint.

Where a transaction is attacked on the ground that it is an unfair bargain a plea to that effect ought to be made specifically in the plaint so as to enable the other party to show that it is not an unfair one. [P 238 C 1]

(d) Contract Act (1872), S. 16—Fair bargain—Circumstances at time of transaction and not subsequent events are to be considered.

Whether a transaction is one that should be set aside as inequitable depends upon the circumstances at the time when it is made and not upon subsequent events. [P 238 C 1, 2]

(e) Practice—Duty of Court — Plaintiff's practically whole case rejected — Court is not justified in proceeding on equitable grounds to grant plaintiff relief without considering risk taken by defendant.

A Court is not justified in rejecting practically the whole of the plaintiff's case as made out in the plaint and then in proceeding to give her some relief on equitable grounds without taking into consideration the risk which the defendant was taking in the transaction. [P 238 C 2]

S. C Basak and *Gopendra Nath Das*—for Appellant.

Rajendra Chandra Guha, *Nalini Kumar Mukherjee* and *Mahendra Kumar Ghose*—for Respondent.

Judgment.—This is an appeal by the defendant in a suit for a declaration that the darpatni patta granted by the plaintiff to the defendant is invalid and inoperative and for a permanent injunction restraining the defendant from taking possession of the property leased out by the darpatni patta. The plaintiff's case briefly stated is as follows: Jadab Chandra Chowdhuri, the plaintiff's husband, died in 1323 B. S. leaving two widows, the plaintiff and Indureka and a daughter by Indurekha who has been married to one Ghanashyam. Indu

Rekha subsequently died, consequently the plaintiff became the 16 annas malik of the property left by her husband. One of the properties left by her husband is Jalkar which was acquired by the plaintiff's husband on payment of Rs. 1,000 as Nazar on an annual rental of Rs. 180. After the death of the plaintiff's husband the plaintiff and her co-wife Indurekha were in possession of all the properties left by her husband. Ghanashyam managed these properties after the death of the plaintiffs husband. After the death of Indurekha in 1332 B. S. Ghanashyam went to Gaya to perform her sradh. At that time the plaintiff was in her father's house. During the absence of Ghanashyam the defendant, who is a cousin of her late husband, proposed to the plaintiff that he should be made her Ammukhtear to realize the income from the Jalkar.

The plaintiff at first suggested that the matter should be postponed till the return of Ghanashyam as her father was insane and unfit to advise her in the matter. The defendant however told the plaintiff that the matter did not admit of any delay and that there was no harm in giving him an Ammukhtearnama as she would thereby get rents without any trouble. The plaintiff being an ignorant, illiterate pardanashin womam ultimately agreed to the proposal. The defendant thereupon brought the plaintiff to Dinajpur on the second Aghrayan and took her to the house of a stranger, produced a document previously prepared and took her thumb impression thereon. The plaintiff did not receive any consideration for the lease. The defendant then took her back to her father's village and left her at her father's house. The plaintiff's son-in-law Ghanashyam, on his return from Gaya, came to see her and the plaintiff related the whole thing to him. Thereupon he became anxious to know the nature of the document and went to the defendant and demanded to see the document. The defendant however refused to shew him the document. Thereafter Ghanashyam came to Dinajpur and took a copy of the document from the Registrar's office. The plaintiff then came to know that the defendant, in order to get the whole of her valuable property, had practised a fraud upon her and had got a darpatni lease fraudulently executed by her.

The plaintiff never agreed to settle the Jalkar in Darpatni right with the defendant at an annual rental of Rs. 200 with a selami of Rs. 425. The darpatni patta was never read over and explained to her. The plaintiff had not any opportunity of consulting her well-wishers and near relations. She did not receive a single pice as Nazar for the darpatni lease. The defendant taking advantage of the ignorance and helpless condition of the plaintiff got fraudulently the darpatni lease registered by undue influence. The recitals in the patta about the plaintiff's ill-feeling with her son-in-law and about her being deprived of the income of her husband's property left by her husband were falsely made in order to secure the darpatni lease of the plaintiff's valuable property at a nominal rent. The darpatni lease is therefore absolutely void and the plaintiff is in possession of the property as before. The plaintiff is therefore entitled to get a declaration from the Court that the darpatni patta is null and void.

The defence of the defendant in substance is that the plaintiff has executed the darpatni of her own free will on receipt of a selami of Rs. 425, that the darpatni lease was for a consideration and was not obtained by fraud, misrepresentation or undue influence, that as a matter of fact the plaintiff on the death of her husband lived for some time in her husband's house and during that time Ghanashyam gradually got hold of her entire property left by her husband, and in 1316 B. S. during the minority of the plaintiff got certain kobalas of certain Jotee executed in favour of his son, that the plaintiff being unable to stay on there on account of the oppressions of Ghanashyam and her mother-in-law Indurekha left her husband's house and came to live at her father's house, that Ghanashyam never gave anything to the plaintiff for her maintenance. It was alleged by the defendant that as the plaintiff was getting no income from her husband's property, and as she was completely dispossessed of her husband's estate, she of her own accord, in consultation with her father and near relations, granted the darpattani lease, and that

Ghanashyam finding that the darpatni lease would be binding against his sons, that is the reversionary heirs, had got the suit instituted. The defendant also pleaded that the selami mentioned in the darpatni patta was paid to the plaintiff before the Registrar and that the document was read over and explained to her before execution.

The learned Munsif who tried the suit found that at the time of the lease the plaintiff was not on good terms with Ghanashyam, and that she was really kept out of possession of the property left by her husband, that Bhabananda the plaintiff's father, was insane, and that the document was never explained to her before execution. The learned Munsif also found that the plaintiff did not know the difference between a darpatni lease and an ammukhtearnama and that it was doubtful whether the selami money which was brought before the Sub-Registrar and paid to her in the presence of the Sub-Registrar actually remained with her. The learned Munsif further held that even if the consideration had been paid it was an unfair bargain. He accordingly decreed the suit.

On appeal by the defendant to the lower appellate Court the learned Judge has found that there was no talk about an ammukhtearnama, that no influence was acquired or abused by the defendant Purna, that no confidence was reposed in or betrayed by him, that the plaintiff contracted to grant the defendant a darpatni lease and that she accordingly executed the patta with full knowledge and understanding of what she was about to do and that she had it registered. The learned Judge has further found that she was not living in her husband's house but was living with her father who was maintaining her with great difficulty and that it was natural for the plaintiff and her father to dispose of some property to relieve the plaintiff from the distress to a certain extent to fight Ghanashyam who had usurped the whole inheritance. The learned Judge was also of opinion that though there was no direct evidence that the plaintiff had independent and disinterested advice in the matter, she had her father, brother and intelligent neighbours to assist her and as she was in need of money she was willing to part with a portion of the property to get some money in cash and something like an annuity. The learned Judge however, was not satisfied that the bargain was fair. He was also of opinion that it was the duty of the defendant to disclose the real income of the property at the time when the terms of the lease were settled. In this view of the matter the learned Judge allowed the appeal in part and passed the following decree:

"That on the plaintiff's paying into the lower Court to the credit of the defendant Rs. 425 within a month from date with interest at 6 per cent per annum from 2nd Aghrayan 1332 B. S. to the date of the payment the decree will stand good. In default it will be regarded as reversed and the suit dismissed. As both sides are to blame there will be no costs to either side in any Court."

Hence the present appeal by the defendant. There is however no cross-objection by the plaintiff. The learned advocate for the appellant contends that on the facts found by the lower appellate Court it should have dismissed the plaintfff's suit. In my judgment this contention must prevail. From what has been stated above it is clear that the allegations in the plaint on which the plaintiff claimed relief had been disbelieved by the lower appellate Court. The effect of the finding of the lower appellate Court is that the plaintiff understood the transaction and that she had full knowledge of the nature and effect of the document she executed in favour of the defendant. In other words the judgment of the lower appellate Court clearly shows that the disposition made by the plaintiff was substantially understood and that it was really her mental act as the execution of the document was her physical act. It was contended by the learned advocate for the respondent on the authority of the decision of the Judicial Committee in 1931 P. C. 303 (1), that it was the duty of the defendant to disclose to the plaintiff the real income of the property at the time when the selami and the rent were settled and if knowledge had been kept from her by the defendant the transaction should not stand as equity and good conscience had always been the pillars of administration of justice in India. The learned advocate for the

1. Tara Kumari v. Chandra Mauleshwar Proshad Singh, 1931 P C 303=134 I C 1076=58 I A 450 (PC).

respondent drew my attention to the following passage in the above decision:

"If knowledge had been kept from her by the creditor, if there was any ground for suspicion that he was over-reaching her, if she had no independent advice, and the relations between them were such as to suggest that they were not on equal terms, it would be impossible for a Court to affirm with any certainty that had she known the full truth, as she was entitled to know it, she would have completed the transaction. It would only be upon this hypothesis that the lady could be held bound by the mortgages though not by the accounts. It is no doubt impossible to lay down any hard and fast rule for such cases, each must depend upon its own facts and the dividing line may often be difficult to draw. There is no doubt, their Lordships think as to the principle to be applied. They are not merely deductions from the law as to undue influence which finds a place in S. 16, Contract Act, as has been suggested by counsel for the respondent. They are founded upon the wider basis of equity and good conscience which have always been pillars of the administration of justice in India."

The facts of the case which was before their Lordships would go to show that the person who obtained the document (that is the mortgagee) from the pardanashin lady was her creditor, that the accounts upon which the mortgage was based had not been explained to her and that various items were included in the mortgage for which the lady was not at all liable. In this case it was suggested by the plaintiff that the defendant was a relation of the plaintiff and that taking advantage of her relationship the defendant went to the plaintiff and proposed to save her from the clutches of Ghanashyam and as the plaintiff had no good feeling towards Ghanashyam she readily accepted the proposal. The learned Judge however has recorded the following finding in this connexion;

"In 1314 B. S. or thereabout Jadab and his cousin, Purna, who were joint in property, divided the joint property. Thereafter and before Jadab's death there were disputes among them. Some time before his death Jadab removed from the ancestral home in Bonhara to Balahar where Indurekha's father lived. Sarojini was about 26-27 years of age at the time of the trial. It is her deposition that Purna did not look after her after her husband's heath. She was a mere child when Purna and Jadab separated. It does not appear that there was any association between her and Purna and they knew one another by appearance before the proposal about the disputed transaction."

From this finding of the learned Judge it is clear that the relationship of the defendant with the plaintiff was not such as would enable him to dominate the will of the plaintiff. Under such circumstances it cannot be said that the relation between the parties at the time of the transaction was such as to suggest that they were not on equal terms. It was however contended by the learned advocate for the respondent that in this case the plaintiff had no independent advice. The learned Judge has however negatived the plaintiff's case on this point. The following observations were made by their Lordships of the Judicial Committee in 36 All. 81 (2), in this connexion :

"The possession of independent advice, or the absence of it is a fact to be taken into consideration and well weighed on a review of the whole circumstances relevant to the issue of whether the grantor thoroughly comprehended and deliberately and of her own free will carried out the transaction. If she did, the issue is solved and the transaction is upheld ; but if upon a review of the facts—which include the nature of the thing done and the training and habit of mind of the grantor, as well as the proximate circumstances affecting the execution if the conclusion is reached that the obtaining of independent advice would not really have made any difference in the result then the deed ought to stand. Their Lordships, as already mentioned, have fully in view the fact that the lady was a pardanashin lady, but the evidence as to her strength of will and business capacity, and the fact that the deed as granted is not in the circumstances of her life in any way an unnatural disposition of part of her property, go far, taken together with the evidence in this case, to convince them that the deed was granted by her as the expression of her deliberate mind and apart from any undue influence exerted upon it In short their Lordships' view is that if independent outside advice which is an essentially different thing from independent outside control had been obtained the lady would have acted just as she did. Much as their Lordships support and approve of the protection given by law to a pardanashin lady they cannot transmute such a legal protection into a legal disability."

In this case the learned Judge has found that the plaintiff's deposition shows that she is intelligent and it was not difficult for her to understand the transaction and the nature and effect of the transaction upon her interest in the property. Further as has already been pointed out she had her father, brother and intelligent neighbours to assist her in the matter. There is therefore no force in this contention of the learned advocate for the respondent. It was next urged that the learned Judge has found that the bargain was not a fair bargain and consequently on equitable

2. Kali Baksh Singh v. Ram Gopal Singh, (1913) 36 All 81=21 I C 985=41 I A 23 (PC).

grounds the transaction should not stand. It appears however that this ground was not made a specific ground of attack in the plaint. No specific issue was joined on this point though it appears to have been argued in the Courts below. The learned Judge's finding on this point is as follows:

"I am however not satisfied that the bargain was fair. According to the collection papers produced by Ghanashyam the aggregate of the rentals payable in 1332 B. S. by the tenants in the fishery was Rs. 624—the amount realized in 1331 B.S. was Rs. 324—and that in 1332 B.S. was Rs. 290. Much reliance cannot be placed upon these papers as no tenant was cited to corroborate them and in his deposition Ghanashyam did not say anything more about them except that those papers were in his hand-writing. But it is in defendant's deposition that according to the enquiry made by him the profits from the fishery amounted to Rs. 300 to Rs. 350 after deducting the overhead rent. Making allowance for the collection charges at 10 per cent the net profit would come up to Rs. 270 to Rs. 315 a year. A sum of Rs. 425 as premium and an annuity of Rs. 20 is a very inadequate consideration for the transfer of such a property even when the transferor is out of possession."

Now it appears that this property was acquired by the plaintiff's husband on payment of selami of Rs. 1,000. The selami paid for the darpatni was Rs. 425. The capitalised value of the annuity of Rs. 20 would be about Rs.400. Consequently she was getting about Rs. 825 by this transaction. Further she was a Hindu widow, and the lessee evidently took some risk in taking a permanent lease from her. She was also out of possession. In these circumstances it cannot be said that the bargain was an unconscionable bargain particularly in view of the fact that she was willing to sell this fishery to one Hazi Mahammad and she agreed to an offer of Rs. 300 as price. In fact there is no evidence or suggestion anywhere in this case to show that any other person was willing to offer more favourable terms than what the defendant did. If she really wanted to attack this transaction on the ground that even in the circumstances which then existed the transaction was not a fair transaction at all she ought to have made a specific case in the plaint and ought to have joined an issue on the point in order to enable the defendant to show that the transaction was not an unfair one. Whether the transaction was one that should be set aside as inequitable would depend upon the circumstances at the time when it was made and not upon subsequent events : see 23 Cal. 15 (3). In my judgment the lower appellate Court was not justified in rejecting practically the whole of the plaintiff's case as made out in the plaint and then in proceeding to give her some relief on equitable grounds without taking into consideration the risk which the defendant was taking in this transaction.

It was also urged by the learned advocate for the respondent that it was the duty of the respondent to disclose to the plaintiff the real income of the fishery at the time when the darpatni patta was executed. The law does not lay down any statutory duty on the lessee. It was however argued that as the plaintiff was a pardanashin lady it was the duty of the defendant to disclose the facts to her, but it would appear from the deposition of the plaintiff herself that she was fully aware of the income of the property at the time she agreed to grant the darpatni lease. Consequently it cannot be said that the defendant had taken any undue advantage of the position of the plaintiff. In these circumstances there cannot be any doubt that there was no fraud or misrepresentation or undue influence in this case. The learned Judge's own finding would go to show that the defendant had succeeded in showing that the plaintiff was fully aware of the nature of the transaction, that she received the selami for the lease, and that her deposition shows that she had no regard for truth. The learned Judge has further observed :

"Her going over to Ghanashyam's side within a short time after the completion of the deed is not difficult to understand. Ghanashyam deposed that after his return from Gaya he paid the plaintiff Rs. 100 and gave her some cloth. That was sufficient inducement to her as she has no regard for truth and had nothing to lose, but had something to gain by changing sides. Ghanashyam was in urgent need of propitiating the plaintiff, for the patta questioned the legality of the purchases by his sons also."

It appears to me that this is really Ghanashyam who is fighting this case in the name of the plaintiff. In these circumstances this is not a fit case in which it can be said that the transaction is an unconscionable one, or that the defendant has obtained any undue advantage by this transaction over the plaintiff. The result therefore is that

3. Ganga Baksh v. Jagat Bahadur Singh, (1896) 23 Cal 15 = 22 I A 153 = 5 Sar 643 (PC).

this appeal is allowed and the plaintiff's suit is dismissed. In view of the facts and circumstances of the present case however the parties will bear their own costs throughout. Leave to appeal under Cl. 15, Letters Patent, has been asked for in this case and is refused.

R.K. *Appeal allowed.*

A. I. R. 1935 Calcutta 239

MITTER, J.

Mahammad Mia Pandit and *others*—Plaintiffs—Appellants.

v.

Osman Ali and *others*—Defendants—Respondents.

Appeal No. 259 of 1932, Decided on 6th August 1934, against decree of Sub-Judge, 2nd Addl. Court, Noakhali, D/- 13th August 1931.

(a) Civil P. C. (1908), S. 104 (2)—No second appeal from order recording disputed compromise.

There is no second appeal from an order recording a compromise when the factum or legality of the compromise is questioned. [P 240 C 1]

(b) Civil P. C. (1908), S. 96 and O. 23, R. 3—Decree passed on compromise is consent decree.

Where a Court finds that there has been a compromise a decree passed thereon is still a consent decree whether the compromise is admitted by both parties or disputed by one of them. [P 240 C 2]

(c) Civil P. C. (1908), S. 96 (3)—Undertaking by parties that decision by third person to be final—Appeal therefrom is violation of good faith and should not be entertained—Award.

Where the parties say that the determination of their disputes by a third person is to be final between them, that is to be regarded as an undertaking not to appeal and an appeal preferred would be in violation of good faith and ought not to be entertained where the real merits of a case have been withdrawn from the Court : 14 *M I A* 203, *Foll* ; 29 *Cal* 306 and 1922 *Lah* 309, *hel on* ; 1928 *Cal* 108, *Disting.* [P 240 C 2]

(d) Civil P. C. (1908), O. 23, R. 3—Reference without Court's intervention in pending suit—Award is neither adjustment nor compromise.

An award made on a reference without the intervention of Court during the pendency of a suit cannot be :ecorded as a compromise or an adjustment of suit under O. 23, R. 3 [P 241 C 2]

(e) Arbitration—Decision by third person involving judicial or quasi judicial work is award.

Where parties agree to refer their dispute to a third person for decision and where that person has to do some judicial or quasi judicial work, his decision is an award : 1917 *Cal* 327, *Disting.* [P 242 C 1]

(f) Civil P. C. (1908), O. 32, R. 7—Compromise by next friend without Court's permission—Minor represented in appeal by same next friend—Compromise will not be set aside—(*Obiter.*)

Obiter.—A compromise effected by minor's next friend, without the permission of the Court as required by O. 32, R. 7, will not be set aside in appeal if the minor happens to be represented in the appeal by the same next friend who represented him in the Courts below. [P 242 C 1]

Mohendra Kumar Ghose, *Mahendra Nath Mitter* and *Nakuleswar Som*—for Appellants.

Bhagirath Chandra Das—for Respondents.

Judgment.—This appeal is on behalf of the plaintiffs and arises out of a suit for possession. There are seven plaintiffs. Of them plaintiffs 1 and 2 are adult males, Nos. 3, 4 and 7 are ladies and Nos. 5 and 6 are minors. The minors were represented in the Courts below by plaintiff 1, who also represents them in this appeal. At the instance of plaintiffs there was a local, investigation by a pleader Commissioner who submitted a report in their favour. The defendants filed an objection to the said report. At the date of the hearing of the suit, which was 15th August 1930, defendant 2 filed an application stating that the parties had agreed to the lands being measured by one Shama Charan and that if it was found by him that the lands in suit were in possession of the defendants, the plaintiffs would get a decree, otherwise the suit would stand dismissed, but the plaintiffs would be entitled to get Rs. 50 from the defendants. The said defendant further alleged that Shama Charan had measured the lands and had found that no part of the lands in suit was in the possession of the defendants. He accordingly prayed for tho said adjustment to be recorded under the provisions of O. 23, R. 3, Civil P. C. The plaintiffs denied the said agreement, but the learned Munsif after taking evidence found that the agreement was alleged by defendant 2 and dismissed the suit on the findings of Shama Charan. The attention of the Court does not seem to have been drawn to the fact that some of the plaintiffs were minors. Admittedly no leave of the Court was taken under R. 7, O. 32 of the Code. On appeal from the decree made by the trial Court, the point urged by the plaintiffs, as the appellate Court puts it, was

"whether the suit was adjusted between the parties out of Court and whether the compromise should be recorded."

The Court of appeal below however only applied its mind to the question of the factum of the agreement but did not consider whether the alleged compromise was lawful or could be recorded under the provisions of O. 23, R. 3 of the Code. It did not even advert to the fact that there were minors whose interest it was the duty of the Court to safeguard and protect. The appellate Court agreed with the first Court and remarked that the

"Munsif was justified in recording the compromise under O. 23, R. 3, Civil P. C."

The appeal was accordingly dismissed; hence the second appeal by the plaintiffs. A preliminary objection has been taken to the competency of the appeal. Mr. Dass who appears on behalf of the respondents urges firstly that the appeal being really against the order recording the compromise under O. 23, R. 3, a second appeal is barred under the provisions of S. 104 (2) of the Code. Secondly he urges that even if the appeal be regarded as an appeal from the decree, after the findings of the Court of appeal below, the decree must be taken to be a decree passed with consent of parties and S. 96 (3) of the Code, bars the appeal. In the course of the argument I indicated that possibly the preliminary objection was a sound one. On that the advocate for the appellant asked me to interfere in revision in case I held that no appeal lay. As I considered that the case was a fit one for interference under the revisional jurisdiction I heard the learned advocates at length who presented their cases from all aspects and I must acknowledge the great assistance I have derived from them in the case which has engaged my anxious consideration. After having heard the learned advocates I have come to the conclusien, though not without hesitation, that no appeal lies. But I am at the same time quite convinced that I have power to interfere in revision and should so interfere in this case.

My reasons for giving effect to the preliminary objection are as follows: (1) The Code provides for one appeal when the factum of legality of a compromise of adjustment of a suit is questioned. The Court of appeal below has arrived at a finding that there was a compromise as pleaded by defendant 2. To allow the same matter to be reagitated in an appeal from the appellate decree would be to allow two appeals when the Code gives one. (2) A decree passed is still a decree passed by consent, whether the compromise is admitted by both the parties or disputed by one of them and the Court finds that there was one. (3) Where the parties say that the determination of their disputes by a person is to be final as between them, that is to be regarded as an undertaking not to appeal, and an appeal preferred would, as James, L. J., observed in 14 M. I. A. 203 (1), be in violation of good faith and ought not to be entertained where the real merits of the case have been withdrawn from the Court. The same principle has been formulated though in different language by Rampini and Pratt, JJ., in 29 Cal. 306 (2) where they observe that parties 'are equitably estopped' from resiling from and impugning the decree which was given by the Court in accordance with the finding on the issue which they agreed to refer to the decision of a third person. In 1928 Cal. 108 (3) there is an observation which apparently seems to militate against the view I am taking but an examination of the case leads me to think that the point which I have been called upon to decide did not really arise in that case. The observation is of Roy, J. and occurs at p. 356. It is as follows:

"Certain preliminary objections were taken by the learned vakil for the respondents. They are not serious: one was that no appeal lay from a decree which is based on a compromise. The contention of the plaintiff is that the whole compromise has been struck out. The dispute is over the nature of the compromise and the plaintiff has the right to show what the compromise was."

I must first of all remark that the said case came up on first appeal to this Court, but I am not placing much importance on the said fact for distinguishing the said case. From the report it appears that the plaintiff claimed a share in two villages appertaining to Touzi No. 1760/28. The contesting de-

1. Moonshee Amir Ali v. Mahoranee Inderjit Singh, (1870-72) 14 M I A 203.
2. Bahir Das v. Nobin Chandra, (1902) 29 Cal 306 =6 C W N 121.
3. Dwarka Nath v. Atul Chandra, 1928 Cal 108 =105 I C 616.

fendants denied the title of the vendor of the plaintiff and the vendor challenged his conveyance to the plaintiff. Issues were framed and the plaintiff was being examined on commission. At that stage a petition of compromise was presented to the Commissioner. By the compromise the plaintiff gave up his claim on the basis of his purchase; the said two villages were to be partitioned between the plaintiff and his cosharers (not parties to the suit) on the one hand and the defendants on the other according to the shares recorded in the Record of Rights by an arbitrator Sarat Chandra Bhattacharjee and that after the division by him the plaintiff was to withdraw the suit.

No order was obtained from the Court for appointing Sarat Chandra as arbitrator. Sarat Chandra later on refused to act and on the application of the plaintiff the Subordinate Judge appointed another person as arbitrator under the provisions of para. 5, Sch. 2, Civil P. C. This person made the division and submitted an award and inspite of the objection of the defendants that there was no reference to arbitration under para. 2 of the said schedule the Subordinate Judge made a decree in conformity with the award. His successor however deleted the so-called award from the decree and the final decree that was made was one simply allowing the suit to be withdrawn without liberty to the plaintiff to bring a fresh suit. It was pointed out by this Court that the compromise between the parties was not simply that the suit was to be withdrawn but was to be withdrawn on the happening of certain contingencies, i. e., the division of the lands by Sarat Chandra. The final decree therefore was one that was not passed in accordance with the consent of the parties and hence S. 96 (3) was out of the way. The question raised before me has however been considered by the Lahore High Court in 1922 Lah. 309 (4). The said Court held in circumstances somewhat similar to the present case that the appeal was incompetent and I agree with the said judgment. But as I have said before my decision on the preliminary point does not dispose of the case. I am still to see if the Courts below had jurisdiction to pass an order under O. 23, R. 3 of the Code.

My view is that the agreement which both the Courts below have found to be established amounts to a reference to arbitration without the intervention of the Court of the subject matter of a pending suit and the decision of Shama Charan really amounts to an award on such a reference. Mr. Dass who appears for the respondent has contended before me that the decision of Shama Charan does not amount to an award, but is to be considered as an adjustment of the suit which the Courts below have rightly recorded under O. 23, R. 3 and in support of his contention he has referred me to the cases of 1924 All. 570 (5) and 1932 All. 166 (6). Before I examine these cases I may observe that so far as our Court is concerned it is now settled law that an award made on a reference without the intervention of the Court during the pendency of a suit cannot be recorded as a compromise or adjustment of the suit under O. 23, R. 3. The Bombay, Madras, Patna and Rangoon High Courts have however, taken a diffi-rent view. The divergence of opinion is due to the different interpretations put upon the words "any other law for the time being in force" occurring in S. 89 of the Code, (See the cases collected in 1934 Cal. 643 (7) as also 1932 Pat. 205 (8) and 1931 Rang. 58 (9). I am bound to follow the course of decisions of our Court and if the decision of Shama Charan is an award the Courts below had no jurisdiction to record the decision of Shama Charan as an adjustment of the suit under O. 23, R. 3.

This leads to the question whether the said decision is an award. The cases of the Allahabad High Court cited by Mr. Dass are distinguishable. In those cases the parties to the suit agreed to be bound by the statement of a person named by them. The nominee made a certain statement and the question raised was whether the suit could

4. Guru Charan Singh v. Shibdev Singh, 1922 Lah 309=66 I C 253=3 Lah 175.
5. Himanchal Singh v. Jatwar Singh, 1924 All 570=80 I C 16=46 All 710.
6. Basdeo Singh v. Ram Raj Singh, 1932 All 166 =137 I C 263.
7. Rohini Kanta v. Rajani Kanta, 1934 Cal 643 =151 I C 661.
8. Ramadhar Rai v. Subedar, 1932 Pat 205=138 I C 82=11 Pat 237.
9. Laljee Jesang v. Chandar Bhan, 1931 Rang 58=131 I C 57=9 Rang 39.

be disposed of in accordance with the statement so made. Sulemain and Kanhaiyalal, JJ., base their decision firstly on S. 20, Evidence Act, and secondly on the judgment of the Madras High Court in 1920 Mad. 800 (10). The Madras case proceeds on the view that an award in a pending case made by an arbitrator appointed without the intervention of the Court can be recorded under O. 23, R. 3, a view which as I have said is against the decisions of our Court, and S. 20, Evidence Act, cannot have any possible application to the case before me. Nor does the case of 1917 Cal. 327 (11) support the contention of the respondent. There no judicial or quasi judicial work had to be done by the person nominated who was only to see with his own eyes a certain state of things, e. g. existence of furnace, bellows, etc., in the defendant's house and make a statement in Court. I hold that Shama Charan had to do some work which was in the nature of judicial work and that his determination is an award and that the Courts below had no jurisdiction to pass a decree which is in accordance with the decision of Shama Charan under the colour of exercising the powers under O. 23, R. 3. In the view I have taken it is not necessary to consider the other contentions raised by the appellants. If I had held that the case came under O. 23, R. 3, I would not have set aside the decree of the Courts below so far as the minors are concerned seeing that they are appearing even in this Court by plaintiff 1 as their next friend but would have made the same reservations in their favour as were made by the Acting Chief Justice in 1931 Cal. 211 (12). The result is that the appeal is dismissed, but the decrees of the Courts below are set aside and the learned Munsiff is directed to proceed with the suit. I make no order as to costs.

R.K. *Decree set aside.*

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10. Chinna v. Venkataswami, 1920 Mad 800=51 I C 827=42 Mad 625.
11. Khobhari Sah v. Jhaman, 1917 Cal 327=34 I C 220.
12. Golnur Bibi v. Abdus Samad, 1931 Cal 211=130 I C 209=58 Cal 628.

A. I. R. 1935 Calcutta 242

GUHA, J.

R. C. Curties—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 385 of 1934, Decided on 6th August 1934, from Addl. Presidency Magistrate, Calcutta.

(a) Bengal Motor Vehicles Tax Act (1932), S. 9—It is for person paying tax to obtain delivery of token — Taxing officer is not bound to send it to tax-payer if latter fails to obtain delivery of same — Non-exhibition of token in car by such person is offence.

It is for the person paying the tax to obtain delivery of the token, at the time when tax is paid to the Taxing Officer under the Bengal Motor Vehicles Tax Act 1932. So far as the Taxing Officer is concerned, the requirements of the law are fulfilled if he does anything which has the effect of putting the token in the possession of the person paying the tax or of any person authorised by him. It is not intended by the provisions of the statute, and the Rules framed under the statute, that the Taxing Officer is to send the token to the person paying the tax. Hence the failure on the part of a person to exhibit the token on the car resulting from his not obtaining delivery of the same from the Taxing Officer after tax had been paid is an offence under the law. [P 243 C 1, 2]

(b) Bengal Motor Vehicles Tax Act (1932), Rules under — Rr. 10, 12 and 13 are not ultra vires of Local Government.

There is nothing contained in Rr. 10, 12 and 13 of the Rules which is ultra vires of the Local Government. [P 243 C 2]

N. K. Bose and *Sudhangsu Sekhar Mukherjee*—for Petitioner.

Probodh Ch. Chatterjee—for the Crown.

Order.—The petitioner was tried before the Additional Presidency Magistrate, Calcutta, for having committed an offence on account of contravention of Rules 12 and 13, Bengal Motor Vehicles Tax Rules, 1933, in not exhibiting the token as enjoined by those rules on a motor car. The Magistrate found him guilty of breach of Rr. 12 and 13, and sentenced the petitioner to pay a fine of Rs. 10. According to the Magistrate, there was, on the evidence, an omission on the part of the petitioner, and a neglect of obvious duty in not demanding the token from the person by whom tax was paid on the petitioner's behalf, and which tax was accepted by the Taxing Officer; the petitioner should have demanded the token from the person who paid the tax on his behalf, within a reasonable time and exhibited the same on the car as required by the Rules. On the findings arrived at by

the Magistrate, the delivery of the token was not taken, after payment of tax ; and the token was not exhibited on the car in question as required by the Rules,

This Rule was issued by this Court, calling upon the Chief Presidency Magistrate, Calcutta, to show cause why the conviction of and sentence passed upon the petitioner should not be set aside. The grounds urged in support of the Rule were that the Magistrate was wrong in law in holding that a person is guilty of breach of Rr. 12 and 13 even where no token has been delivered to him, on payment of the tax, and that even if the Magistrate's interpretation of Rr. 12 and 13 were correct they would be ultra vires of the Local Government, having regard to Ss. 9 and 12, Bengal Motor Vehicles Tax Act 1932. The decision of the questions arising for consideration in the case therefore depends mainly, if not solely, upon the interpretation to be put on the words "shall deliver" as used in S. 9 of the Act and R. 10 of the Rules framed by the Local Government. Was there any duty cast upon the person paying tax to obtain delivery of the token, which the Taxing Officer is required to deliver ? There is no question that the person paying the tax is entitled to get a receipt as also a token from the Taxing Officer, as soon as payment has been made. Delivery of the token might be made by doing anything which had the effect of putting the same in the possession of the person paying the tax, or of any person authorised by him to receive delivery. In the case before me, the person paying the tax did not obtain delivery of the token at the time when the tax was paid, resulting in the fact that delivery of the token was not and could not be made by the Taxing Officer. The token not having been obtained, its delivery not having been taken, it could not be, and was not exhibited on the car as required by Rr. 12 and 13.

In my judgment, it was for the person paying the tax to obtain delivery of the token, at the time when tax was paid to the Taxing Officer under the Bengal Motor Vehicles Tax Act 1932. So far as the Taxing Officer was concerned, the requirements of the law were fulfilled if he did anything which had the effect of putting the token in the possession of the person paying the tax or of any person authorised by him. It was not intended by the provisions of the statute and the Rules framed under the statute, which were not in any way ultra vires, that the Taxing Officer was to send the token to the person paying the tax. I am clearly of opinion as already indicated above, that there is nothing contained in Rr. 10, 12 and 13 of the Rules which is ultra vires of the Local Government, having regard to Ss. 9 and 12, Bengal Motor Vehicles Tax Act 1932, by which it is clearly intended that delivery of the token has to be obtained, and the token exhibited on the car, in the manner provided by the Rules. In the above view of the questions arising for consideration in the case before me, the failure on the part of the petitioner to exhibit the token on the car resulting from his not obtaining delivery of the same from the Taxing Officer after tax had been paid, was an offence under the law, and the petitioner was rightly convicted by the Magistrate for breach of Rr. 12 and 13, Bengal Motor Vehicles Tax Rules 1933. The Rule is discharged. The conviction of the petitioner and the sentence passed on him are affirmed.

K.S. *Rule discharged.*

A. I. R. 1935 Calcutta 243

COSTELLO, J.

Rash Behari Sanyal—Appellant.

v.

Gosto Behari Goswami—Respondent.

First Appeal No. 182 of 1934, Decided on 28th August 1934.

Calcutta Improvement Act (4 of 1911), S. 77 (1) (b)—Property sold by widows subsequently acquired—Claim to compensation by reversioners and purchaser—Appeal from decision of President is not appeal against order relating to compensation—S. 7 iv (c) applies—Court-fees Act, Ss. 7 (iv) (c).

Where a property which has been sold by a widow is acquired compulsorily and the reversioners and the purchaser claim to take the compensation of the money, and the President decides under S. 77 (1) (b), an appeal from his order is not an appeal against an order relating to compensation and hence S. 8 is inapplicable. It falls under S. 7 (iv) (c), Court-fees Act.

[P 245 C 1]

Satindra Nath Mukherjee and *Satischandra Munshi*—for Appellant.

Bijan Kumar Mukherjee — for the Crown.

Order.—This matter arises in connexion with an appeal sought to be filed by one Rash Behari Sanyal under S. 3 (1), Calcutta Improvement (Appeals) Act, 1911, from a decision of the President of the Calcutta Improvement Tribunal sitting alone by virtue of provisions of S. 77 (1) (b), Bengal Act 5 of 1911. Of the parties to the appeal the appellant and the second and third respondents had been the claimants before the President of the Calcutta Improvement Tribunal in a case in which the question at issue was whether or not a sale which had been made by a lady Bhuban Mohini Debi of certain immovable property in Calcutta, had been made by her for legal necessity and so passed an absolute right in the property to the purchaser who was Gosto Behari Goswami, the first respondent to the appeal. The property which is the subject-matter of the proceedings had been acquired by the Calcutta Improvement Trust compulsorily and a sum of Rs. 6,339-6-0 had been awarded to Gosto Behari Goswami as the owner of the property at the time when it was acquired, as compensation. The Sanyals claimed in the proceedings before the President of the Tribunal that they were the reversioners of Bhuban Mohini's husband, and therefore entitled to the property in question, or to the proceeds of the sale of it after the death of Bhuban Mohini. Whether they were so entitled or not of course depended upon the question whether the sale made by Bhuban Mohini was made for legal necessity and whether it was of such a nature as to confer on the purchaser an absolute interest or merely an interest for the duration of life of Bhuban Mohini.

The claimants in the proceedings before the President of the Calcutta Improvement Tribunal, asked for a declaration that they were in law the reversioners, and consequently that the amount of the compensation money ought not to be handed over to Gosto Behari Goswami, but should be invested by the President of the Calcutta Improvement Tribunal under the provisions of S. 32, Land Acquisition Act, 1894. When the appeal was lodged a difference arose between the officer whose duty it is to see that the proper court-fee was paid, and the Advocate for the appellant upon the question of what the amount of that fee ought to be. The matter was then put before the Registrar of the Court in his capacity as Taxing Officer, and he was of opinion that it was of such general importance that he ought to refer it for the decision of the Chief Justice under the provisions of S. 5, Court-fees Act, 1870. Under the provisions of this section it was open to the Chief Justice to decide a matter of this kind himself or to appoint another Judge of the Court in that behalf. It is in that way that the matter comes before me for final decision.

The officer concerned with the question of court-fees who is referred to in Letter of Reference by the Registrar as the Stamp Reporter, seems to have taken the view that the question of the amount of the fee to be paid on the filing of this appeal was affected by the terms of S. 8, Court-fees Act. That section provides that the amount of the fee payable under the Act on a memorandum of appeal against an order relating to compensation under any Act for the time being in force for the acquisition of land for public purposes shall be computed according to the difference between the amount awarded and the amount claimed by the appellant. I may say at once that, in my opinion, this is not a case of an appeal against an order relating to compensation under any Act. The appeal is really against the decision of the President of the Calcutta Improvement Tribunal whereby he held that the sale by Bhuban Mohini was made for legal necessity, and therefore Gosto Behari Goswami had acquired an absolute interest in the property and so was entitled to retain for his own use the whole of the compensation money which had been awarded, and the Sanyals had no interest whatever in that money. Accordingly the President had declined to invest the money under the provisions of S. 32 and was prepared to hand it over in its entirety to Gosto Behari Goswami. If it were held that the sale by Bhuban Mohini had only resulted in a transfer of a Hindu widow's interest, the position would seem to be that the money ought to be invested so that the purchaser of the property would enjoy the interest accruing thereon, for the period of life of Bhuban Mohini, and after that the principal sum would revert to the

Sanyals. It is quite clear, in my opinion that the dispute between the Sanyals and Gosto Behari Goswami cannot in any sense be properly said to be concerned with the amount of compensation payable by reason of the compulsory acquisition of the property owned by Bhuban Mohini. The Sanyals in the proceedings before the President of the Improvement Tribunal were really asking for a declaration and some consequential relief, namely that the money should be invested instead of being handed over to Goswami. In that view of the matter this would seem to be one of that unsatisfactory class of cases, which fall within the provisions of S. 7, Sub-S. (4) (c) where the amount of fee payable is more or less left to the discretion of the plaintiff himself, in that the section provides that in suits brought to obtain a declaratory decree or order, where consequential relief is prayed, "the plaintiff shall state the amount at which he values the relief sought." This provision has recently been discussed by a Full Bench of this Court in 1934 Cal 448 (1).

Dr. Mukherjee who appears on behalf of the Crown in the matter now before me, was disposed to agree that it would not be easy to contend that in the present circumstances the matter is other than one within the ambit of the provisions of S. 7 (iv) (c) to which I have referred. But on the other hand the learned Advocate appearing for the appellant has conceded that the matter is one which may well be treated as falling within the provisions of Sch. 2, Act 17 (iii), Court-fees Act, which provides that a memorandum of appeal in connexion with a suit to obtain a declaratory decree when no consequential relief is prayed, must bear a definite fee of Rs. 20. One has only to put the provisions of S. 7 (4) (c) and those of Sch. 2, Art. 17 (iii) in juxtaposition to show how unsatisfactory and anomalous some of the provisions of the Court-fees Act, are. I pointed out in the judgment which I gave in the Full Bench case already referred to, that it seems desirable that the legislature should put the provisions of this Act into a more satisfactory shape. If the property acquired by the Improvement Trust had not been sold by Bhuban Mohini, it is obvious that the only question which could have been agitated by the Sanyals was the question whether or not they were in fact the reversioners.

Upon the exact phraseology of S. 7 (4) (c) and that of Sch. 2, Art. 17 (iii) respectively, I should be disposed to hold that this is a case where subject to the qualifications mentioned in the Full Bench case, the Sanyals as claimants and now as appellants could have assigned an arbitrary value to the proceedings. That is a highly unsatisfactory state of affairs for the reasons I gave in my judgment in the Full Bench case. In the present instance however having regard to the very reasonable and proper attitude taken on behalf of the appellant, I think the answer to the Reference should be that the court-fee to be paid on the memorandum of appeal is the sum of Rs. 20 as provided for in Sch. 2, Art. 17 (iii), Court-fees Act, both sides having agreed that Sch. 2, Art. 17 (vi) will not apply. The appellants have already paid a fee of Rs. 15. The deficit of Rs. 5 must be put in within a week.

K.S. *Reference answered.*

1. Narayanganj Central Co-operative Sale and Supply Society Ltd. v. Maulvi Mafizuddin Ahmed, 1934 Cal 448=149 I C 3 (FB).

A. I. R. 1935 Calcutta 245

M. N. MUKERJI, AG. C. J. AND
S. K. GHOSE, J.

Radhanath Das and *another*— Judgment-debtors—Appellants.

v.

Sadhan Chandra Dey— Decree-holder —Respondent.

Appeal No. 357 of 1933, Decided on 24th August 1934.

(a) Execution—Decree binding—Decree for khas possession of certain plot—It cannot be changed in execution.

Where a decree is passed for khas possession of certain plot, that cannot be changed at the time of execution. [P 246 C 1]

(b) Execution — Decree-holder getting symbolical possession—No objection—Subsequent execution application of decree for actual possession is not competent.

Where in execution of a decree, the decree-holder has obtained possession and there is no objection, a second application for execution of same decree is not competent on the ground that in the former application decree-holder has obtained only symbolical possession. [P 246 C 1]

Sudhir Kumar Khastagir—for Appellants.

Shagirath Chandra Das and *Jajneswar Mandal*—for Respondent.

Judgment.—This appeal in our opinion, must succeed. The decree in the present case was one for possession of a plot of land which was described therein as settlement plot No. 612, consisting of one bigha and odd of land, and tank lying within certain boundaries. It was executed as a decree for khas possession. The writ issued was in accordance with O. 21, R. 35 and that writ being executed, a receipt was given on behalf of the decree-holder stating that possession to the exclusion of others had been received. No objection to the delivery of possession was taken either by the decree-holder or by anybody else and the Court made the following order:

"Possession delivered on 10th May 1931. No objection put in. No other steps taken. Order that the execution case is dismissed on part satisfaction."

Part satisfaction was recorded because the decree as to costs was yet unrealised. Thereafter the present execution has been started by the decree-holder in respect of the same decree, and the substance of his case is that he now wants to have khas possession of the decretal lands by ousting the judgment-debtors because as he alleges, on the previous occasion only symbolical possession was asked for by oversight, that it was only such possession thatwas given and that in the previous petition for execution the decretal land had been wrongly described as dag No. 612 in the place of dag No. 577. The Courts below have ordered the execution to proceed. The allegations on which the present case is founded are not true; the decree was in respect of dag No. 612, the writ issued was for khas possession and it was khas possession that was delivered. To let the present petition proceed would be clearly to go behind the decree, and to allow the decree-holder to execute the decree a second time for getting the same kind of possession that he has admitted he got. If dag No. 612 and not No. 577 was the correct number of the dag or if only symbolical possession was what was delivered, his remedy does not lie in a second execution, whatever other remedy if any he may have. The appeal is allowed, and the orders of the Courts below being set aside it is ordered that the execution petition be dismissed with costs in all the Courts, hearing fee in this Court being assessed at one gold mohur.

K.S. *Appeal allowed.*

A. I. R. 1935 Calcutta 246

NASIM ALI, J.

Girin (Girindra) Das Gupta and *others* —Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1114 of 1934, Decided on 2nd January 1935.

Criminal P. C. (1898), S. 514 (5)—Accused absconding but rearrested — Amount of surety forfeited excessive—Portion of penalty may be remitted.

Under S. 514, Cl. (5) the Court may, at its discretion, remit any portion of the penalty mentioned in a bail bond and enforce payment in part only. It can do so where the accused has been subsequently arrested and the amount forfeited is excessive and the surety is unable to pay : 1933 *Lah* 42 and 1927 *All* 831, *Rel on.* [P 247 C 2]

S. C. Talukdar—for Petitioners.

Order.—The facts which give rise to this Rule are as follows:

One Bhudeb Mukherjee, Sub-Deputy Magistrate, was an accused in a case under S. 409, I. P. C., before the District Magistrate of Dacca. He was absconding. A non-bailable warrant was issued for his arrest on 28th February 1934. This was followed by proclamation and attachment issued on 22nd March 1934. He was arrested by the police on 3rd June 1934 in a house on Strand Road in Calcutta. On that date the police addressed a petition to the Additional District Magistrate of Alipore praying that the accused should be remanded to custody for being escorted to Dacca. The second Police Magistrate of Alipore, Mr.G. R. Mukherjee, however released him on a bail on that date. The petitioners who have obtained this rule became surety for the appearance of Bhudeb before the District Magistrate of Dacca on 18th June 1934 and bound themselves in default thereof to forfeit the sum of Rs. 1,000 each of His Majesty the King-Emperor of India. On 9th June 1934 the proceedings before the Second Police Magistrate of Alipore were withdrawn by Sadar, Subdivisional Officer of Alipore, to his own file.

The learned Subdivisional Officer then cancelled the order for bail, issued a warrant for the arrest of the accused and also isssued notices on the sureties i. e.,

the petitioners, to produce the accused before him on 11th June 1934. This case after two adjournments was fixed for 18th June 1934 on which date a telegram was received from the District Magistrate of Dacca that the accused did not appear before that Court. On 23rd June 1934 the learned Subdivisional Officer drew up proceedings against the petitioners under S. 514, Criminal P. C., and asked them to show cause why their bail bonds should not be forfeited. The petitioners thereupon showed cause. The cause shown was not accepted and the learned Subdivisional Officer forfeited the entire amounts of the bonds. On appeal the learned Additional District Magistrate of Alipore held that the learned Subdivisional Officer had no jurisdiction to take action under S. 514, Criminal P. C., for failure of Bhudeb to appear on the due date before the District Magistrate of Dacca. He accordingly set aside the order of forfeiture of the Subdivisional Officer and directed a copy of his order to be sent to the District Magistrate of Dacca for his information on 21st August 1934.

On 17th September 1934 the District Magistrate of Dacca started proceedings under S. 514 and directed the petitioners to pay Rs. 3,000 (Rs. 1,000 each) or to show cause on or before 28th September 1934 why payment of the said sum should not be enforced against them. The petitioners thereupon showed cause on 28th September 1934. The main defences of the petitioners were : (1) that the Second Police Magistrate of Alipore, Mr. G. R. Mukherjee, had no jurisdiction to entertain the remand petition addressed to the Additional District Magistrate of Alipore. (2) that the Police Magistrate of Alipore had no jurisdiction to admit the accused Bhudeb to bail as the latter was arrested at Strand Road within the jurisdiction of the Chief Presidency Magistrate, Calcutta, (3) that the Subdivisional Officer of Alipore having cancelled the order for bail, the bail bonds became inoperative and consequently cannot be enforced under S. 514, Criminal P. C.

The learned District Magistrate however did not accept the defence and passed an order on 28th September 1934 directing each of the petitioners to pay Rs. 1,000 to the Crown. The petitioners thereupon obtained the present rule from this Court upon the District Magistrate of Dacca to show cause why the sentence passed on the petitioners should not be reduced on the ground that the order passed on the petitioners was too severe in view of the facts disclosed in the petition for revision filed in this Court. Under S. 514, Cl. (5) the Court may at its discretion remit any portion of the penalty mentioned in a bail bond and enforce payment in part only. The section therefore gives a discretion to the Court but does not indicate what facts and circumstances are to be taken into consideration in the exercise of that discretion.

From the reported cases however it appears that the Court remitted portions of the penalty in cases : (a) where the accused had been subsequently arrested and the amount forfeited was excessive and the surety was unable to pay : see 1933 Lah. 42 (1) (b) where the surety did not act irresponsibly and there had been no connivance or negligence on the part of the surety : see 1927 All. 831 (2). In this case it appears that the accused has been arrested subsequently. It further appears that the amount forfeited is excessive and the petitioners are liable to pay. The learned District Magistrate's reasons for enforcing the penalty in full are these :

"They stood surety without knowing anything about Bhudeb Mukherjee but say that the Sub-Deputy Magistrate who granted the bail stated that Bhudeb Mukherjee was known to him and had property. A perusal of the police report dated 3rd June 1934 which was on the file would have disclosed the fact that Bhudeb Mukherjee had been absconding and that proclamation and attachment had been issued. The sureties did not even trouble to read this."

In other words the learned Magistrate was of opinion that the petitioners did not act in the matter with due care and caution. But it appears that they are junior Mukhtears and the Magistrate who released Bhudeb on bail informed the petitioners that the accused was a Sub-Deputy Magistrate and was known to him. He further told the petitioners that the accused was accidentally involved in a criminal case and asked the petitioners to stand sureties. Under the circumstances I am inclined to think that the mere fact that the petitioners

1. Jora Singh v. Emperor, 1933 Lah 42=145 I C 967=1933 Cr C 121.
2. Probhudayal v. Emperor, 1927 All 831 = 102 I C 554=28 Cr L J 586=49 All 825.

did not look into the file would not go to indicate that they had been grossly negligent in the matter or that they acted irresponsibly. In view of the statements of Mr. G. R. Mukherji it cannot be said that the petitioners had any suspicion that the accused would abscond. In view of the peculiar facts and circumstances of the case I am of opinion that the ends of justice will be served if each of the petitioners be directed to pay Rs. 200 to the Crown within a month from this date failing which proper steps will be taken for realising the said amount from them.

K.S. *Order accordingly.*

A. I. R. 1935 Calcutta 248

MITTER AND EDGLEY, JJ.

Sm. Sarala Debi—Petitioner.

v.

President, Calcutta Improvement Tribunal—Opposite Party.

Civil Rule No. 814 of 1934, Decided on 16th August 1934, from order of President, Calcutta Improvement Tribunal, Calcutta, D/- 10th May 1934.

(a) Land Acquisition Act (1894), S. 32 — Compensation—Money invested in securities 20 years before — It is not incumbent on President to direct re-investment.

It is not incumbent on the President of the Tribunal under S. 32 to direct a re-investment in land, when the investment has been made so far back as 20 years in approved Government securities. Though the matter rests in his discretion, the discretion must be exercised on correct judicial principles. One of the elements which should be taken into account in the exercise of such discretion is as to whether he is really asked for a re-investment in land.

[P 248 C 2; P 249 C 1,2]

(b) Land Acquisition Act (1894), S. 32 — President should not exercise discretion unless he is moved by parties interested in compensation money.

The President of the Tribunal should not exercise discretion unless he is moved by the parties who are vitally interested in the compensation money: 39 *Cal* 33, *Ref.* [P 249 C 2]

Charu Chunder Biswas, Bireswar Bagchi and *Gopesh Chandra Chatterji* — for Petitioner.

Mitter, J.—This is an application under S. 115, Civil P. C., as well as under S. 107, Government of India Act, on behalf of one Sarala Debi against an order of the President of the Calcutta Improvement Tribunal dismissing her application by which she objected to the re-investment of certain Government securities which were deposited under the provisions of S. 32, Land Acquisition Act, for the purchase of land. The proceeding originated with a notice which was given by the President on 22nd March 1934 to the petitioner to the following effect:

"Whereas a sum of Rs. 33,210-15-6 was remitted to this Court by the Land Acquisition Collector, Calcutta, for deposit under S. 31, Land Acquisition Act, and whereas Government Promissory Notes for Rs. 48,600 is now held in deposit to your credit in the above case, you are hereby required to show cause on the day of 5th April 1934, why the said sum should not be applied in whole or in part, in the purchase of lands in accordance with the provisions of S. 32 of the said Act. Failing such cause being shown the matter will be disposed of in your absence. Particulars are obtainable at this office of suitable lands for investment belonging to the Calcutta Improvement Trust, and of other lands offered by parties for sale."

On receipt of this notice the petitioner who is a Hindu widow and who has got the Hindu widow's estate in the lands which were acquired and compensation money in respect whereof was not paid to the petitioner but was deposited with the President of the Improvement Tribunal raised an objection to the re-investment of the securities in the purchase of land. No notice was given to the immediate reversioner who was the petitioner's daughter and to the ultimate reversioners, namely her daughter's, sons. The President of the Tribunal by the order which is the subject matter of this rule refused the objections of the petitioner to the application of the Government securities in the purchase of lands. The learned President was of opinion that having regard to S. 32, Land Acquisition Act, he had no option but to direct a change in the investment. The President says this:

"The language of S. 32 is plain and imperative in directing the Court to invest the compensation money in land and the doing of that act is not made conditional on any action to be taken by any party. I am of opinion therefore that as suitable properties are available now, the Court must change the investment and apply the compensation money in the purchase of other land under like title and conditions of ownership as the land in respect of which such money has been deposited."

It seems to us that in issuing the notice dated 2nd March 1934 the learned President was assuming jurisdiction under a wrong view of the law. It appears from the plain reading of the statute that it is not incumbent on the learned President of the Tribunal under that section to direct a re-investment in land, the investment having been made

so far back as 20 years from now in approved Government securities. It becomes necessary to consider the language of the section for the proper construction which is to be put upon S. 32. S. 32 of the Act runs as follows:

"If any money shall be deposited in Court under sub-S. (2) of the last preceding section and it appears that the land in respect whereof the same was awarded belonged to any person who had no power to alienate the same, the Court shall (a) order the money to be invested in the purchase of other lands to be held under the like title and conditions of ownership as the land in respect of which such money shall have been deposited was held, or (b) if such purchase cannot be effected forthwith, then in such Government or other approved securities as the Court shall think fit; and shall direct the payment of the interest or other proceeds arising from such investment to the person or persons who would for the time being have been entitled to the possession of the said land, and such money shall remain so deposited and invested until the same is applied: (i) in the purchase of such other lands as aforesaid; or (ii) in payment to any person or persons becoming absolutely entitled thereto."

We are concerned in the present case with S. 32 (b) for the purchase could not be effected at the time when the compensation money had been deposited. The former President of the Tribunal directed that the money should be invested in approved securities. The question that arises is as to whether having regard to Cl. (1) (b) it can be said that as the President has said that the statute makes it obligatory on him to direct that the money be applied in the purchase of such other lands as aforesaid, that is in the manner provided for in Cl. (i). We are of opinion that there is no such obligation, for the next clause which follows Cl. (i), that is Cl. (ii), runs as follows:

"Or in payment to person or persons becoming absolutely entitled thereto."

It shows that the President of the Tribunal might wait till the reversion falls in or any person or persons becoming absolutely entitled to the money. Two alternative cases are contemplated: the security be applied either (i) in the purchase of such other lands as said in Cl. (a) or (ii) in payment to any person or persons becoming absolutely entitled to the money.

These two clauses show that a discretion is vested in the President of the Tribunal either to apply the money in the purchase of such other lands or to wait till the reversion falls in. A proper reading of S. 32 makes it clear that the view of the learned President that there is a statutory obligation for re-investment is wrong. The matter, it is true, rests in his discretion but the discretion must be exercised on correct judicial principle. One of the elements which should be taken into account in the exercise of such discretion is as to whether the parties who are vitally interested in the compensation money have really asked for a re-investment in land In the present case neither the lady, the applicant before us, nor the next reversioner, the daughter, nor the ultimate reversioners, the daughter's sons, have applied for a re-investment in land. We do not think that in the circumstances, having regard to the fact that it was considered wise by his predecessor in office that the money should remain at least for a period of twenty years in Government securities, it could be said that he was exercising proper discretion in directing them to be invested in land. The question as to whether suitable land is available or not is a question between the parties themselves. But as we have already said the learned President had no jurisdiction to issue notice to the petitioner in the way in which it has been done in this particular case. That is sufficient to entitle us to set aside his order and to entitle us to look to the facts of the case and to see if we would be properly exercising our discretion in directing a re-investment.

Having regard to the circumstances mentioned above we do not think that it would be right to direct a re-investment in lands, and more particularly, having regard to the low state of the market with regard to the value of the land. Lands do not fetch now the same value as they used to do say five or ten years ago. Mr. Biswas has contended broadly that according to the provisions of S. 32 (b) it would appear that the President of the Tribunal cannot take any action under Cl. (i) unless he is moved by the party's interest; and his argument is based on the provisions of the English statute which are said to have been reproduced substantially in S. 32 Land Acquisition Act. We are referred in this connection to a decision of this Court in 39 Cal. 33 (1) and our

1. Kamini Devi v. Pramatha Nath Mookerjee, (1912) 39 Cal 33=10 I C 491.

attention was drawn to a passage in p. 40 of the said report where it is said:

"Now in the case before us, S. 69 of the Lands Clauses Consolidation Act, 1845, upon which S. 32, Land Acquisition Act, is modelled, provides (we need only quote so much of the section as is relevant to our present purpose) as follows:

Then begins the quotation:

"Now it is said that when one looks to the language of the clause it would appear that such money may be so applied as aforesaid upon an order of the Court of Chancery made on the petition of the party who would have been entitled to the rents and profits of the lands in respect of which such money shall have been deposited; and until the money can be so applied it may, upon the like order, be invested by the said accountant general in the purchase of three per centum consolidated or three per centum reduced bank annuities, or in Government or real securities, and the interest, dividends, and annual proceeds thereof paid to the party who would for the time being have been entitled to the rents and profits of the lands."

It is contended with reference to the compensation money that such money should be applied to the purchase of lands on the petition of the parties. Only as in England and it is desirable to look to the intention of the framers of the Land Acquisition Act when enacting S. 32 (a), it is difficult in the absence of an express provision in the statute to accede to this contention. But we are bound to observe that the President of the Tribunal should not exercise discretion unless he is moved by the parties who are vitally interested in the compensation money. The whole object was to preserve the money for the benefit of the eventual reversioners. It is only reasonable to suppose that the President should not ordinarily move unless the person interested come forward and ask for re-investment of the security in land.

We are told by Mr. Biswas that the practice which is followed by the President of the Tribunal is that a list is hung up of a large number of immovable properties belonging to the Improvement Trust and also private owners as being lands suitable for investment and after that the limited owners are asked to show cause why the money should not be re-invested in such lands. To adopt a practice of the kind adopted by the President of the Tribunal would lead to harmful results if the limited owners are not allowed opportunities to closely examine their advantages and disadvantages by the intended re-investment. With these observations this rule must be made absolute and the order of the learned President dated 9th June 1934 must be set aside. We are of opinion that the moneys should lie where they are invested in Government or approved securities.

Edgley, J.—I agree.

K.S. *Rule made absolute.*

A. I. R. 1935 Calcutta 250

MITTER AND EDGLEY, JJ.

B. N. Ry. Co., Ltd.—Defendants—Appellants to England—Petitioner.

v.

Ruttanji Ramji and *others*—Plaintiffs — Respondents to England — Opposite Parties.

Privy Council Appeal No. 15 of 1934, Decided on 28th August 1934, for leave to appeal to His Majesty in Privy Council.

Civil P. C. (1908), S. 110— High Court decree modifying lower Court decree thereby reducing liability of appellant under decree —Decree is not decree of affirmance.

Where as a result of the High Court decree which modified that of the lower Court, the liability of the appellant under the decree was reduced to a certain extent :

Held: the decree of the High Court was not one of affirmance : 1925 *P C* 60 ; 1933 *Pat* 262, *Rel on.* ; 1927 *Cal* 543 and S *C W N* 294, *Ref.*

[P 251 C 1, 2]

Beagram and *Ambika Pada Choudhury* —for Petitioner.

S. M. Bose and *Pramatha Nath Mitter* —for Opposite Parties.

Mitter, J.—This is an application of the Bengal Nagpur Railway Company Limited for leave to appeal to His Majesty in Council. It appears that a suit was brought against them by the plaintiffs now respondents to recover a sum of Rs. 1,66,493 odd on account of the price of the work done by the plaintiffs as members of a joint Mitakshara family for a certain construction known as Amda-Jamda branch of the said railway. That suit was decreed in part by the trial Court. There were appeals and cross-appeals against this decision to this Court. As a result of the appeal by the Railway Company the decree against them was reduced to a certain extent. The contention of the Railway Company is that they are not at all liable for any amount claimed in the suit, and so the Railway Company is not satisfied with the reduction of the claim against them by this Court.

The decree of this Court is more (in) their favour than the decree made by the Court of first instance. The company have accordingly applied for leave. One of the points for consideration which arises is as to whether the High Court judgment is to be regarded as a judgment of affirmance seeing that the decision reducing the amount of claim against them to a certain extent was really a decision of affirmance of the judgment of the Court below with reference to the amount claimed less the amount ultimately decreed by the High Court against the company. The question really arose in view of a previous decision of this Court in 8 C W N 294 (1) where it was held in circumstances somewhat similar to the present that the decree was really a decree of affirmance and leave could not be granted unless a substantial question of law arose with regard to the application. That case has been considered by Sir George Rankin, C. J., in 1927 Cal 543 (2). The facts in 8 C W N 294 (1) were that the lower Court Judge gave an award of compensation and the High Court increased that amount. The applicant desired that the said amount might be still further increased, and it was held that the two Courts were at one on the only matter which was going to the Privy Council viz., whether beyond the amount awarded by the High Court the applicant had any claim. As has been pointed out by Sir George Rankin, C. J.

"that case is the origin of the doctrine that the language of S. 110 of the Code is to be construed with reference to the subject-matter in appeal to the Privy Council."

The reasoning of that case is that a decree which merely dismisses the appeal or confirms the decree of the immediate Court below is not the only decree of affirmance for the purposes of an appeal to the Privy Council. It has been held in a later decision of the Privy Council in 1925 P C 60 (3) that the rule which originated in the doctrine which we have just enunciated in the case of 8 C W N 294 (1) was erroneous. In view of this decision of the Privy Council we are of opinion that the decree of this Court is not a decree of affirmance. Other authorities have been cited before us to which reference may be made. We have been referred to a decision of the Patna High Court of Chief Justice Sir Courtney-Terrell in 1933 Pat 262 (4) where the same view was taken. The learned Chief Justice made this pertinent observation which may be usefully quoted here:

"It is immaterial whether the effect of the modification is in favour of the appellant or adds to his detriment that is the effect of the wording of the section. Had the legislature chosen to lay down a criterion of the right of appeal depending upon whether the appellant would suffer by the modification or not, it would have said so."

Reliance has been placed on behalf of the appellants on the case of Annapurna with reference to the observations of the Judicial Committee to which reference has already been made. In this view the judgment of the High Court is not a judgment of affirmance and there is no dispute with regard to the value of the appeal to His Majesty in Council. So we are bound to grant certificate that the case fulfils the requirements of S. 110, Civil P. C. The certificate is accordingly granted.

Edgley, J.—I agree.

K.S. *Certificate granted.*

1. Raja Sree Nath Roy v. Secy. of State, (1904) 8 C W N 294.
2. Narendra Lal v. Gopendra Lal, 1927 Cal 543=103 I C 65.
3. Anna Purna Bai v. Ruprao, 1925 P C 60=86 I C 504=51 I A 319=51 Cal 969 (PC).
4. Homesvar Singh v. Kameshwar Singh Bahadur, 1933 Pat 262=144 I C 320.

A. I. R. 1935 Calcutta 251

PATTERSON, J.

Abdul Jabbar Sarkar—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 811 of 1934, Decided on 7th September 1934.

Criminal P. C. (1898), Ss. 70, 71 and 134 (2)—Procedure under S. 134 (2) can be resorted to only if summons cannot be served in manner laid down in Ss. 70 and 71.

It is only if the order cannot be served in the manner provided for service of summons that the publication of a proclamation under sub-S. (2), S. 134 may be resorted to. [P 252 C 1]

S. C. Talukdar—for Petitioner.

Order.—This rule must, in my opinion, be made absolute not on the ground that the petitioner had no knowledge of the order in question, (for I entirely agree with the Courts below that he had such knowledge), but on the ground that the order for the disobedience of which the petitioner has been convicted had not been duly promulgated. S. 144, Criminal P. C., lays down

that an order under that section shall be served in the manner provided by S. 134, and S. 134 says that such an order shall, if practicable, be served on the person for whom it is made in a manner provided for service of summons. It is only if the order cannot be served in the manner provided for service of summons that the publication of a proclamation under sub-S. 2, S. 134 may be resorted to. The provisions regarding service of summons are found in Ss. 68 to 74, Criminal P. C. S. 69 lays down that a summons shall, if practicable, be served personally. S. 70 lays down that where a person summoned cannot by the exercise of due diligence be found, the summons may be served by leaving one of the duplicates for him with some adult male member of his family or in a Presidency town with his servant residing with him. S. 71 lays down that if service in the manner mentioned in Ss. 69 and 70 cannot by the exercise of due diligence be effected, the summons shall be served by affixing it to some conspicuous part of the house or homestead in which the person summoned ordinarily resides.

What happened in the present case was this. The constable who went to the locality to serve the order could not find the petitioner and he forthwith instead of resorting to the procedure laid down in Ss. 70 and 71, caused the order to be proclaimed by beat of drum and by attaching a copy thereof to a tree. He also took the precaution by obtaining the signature of one Kinu Mondal, who is said to be a relative and a neighbour of the petitioner, and himself one of the persons against whom the order was directed. The procedure adopted by the constable appears to have been substantially in compliance with the provisions of sub-S. (2), S. 134. But it was not, in my opinion, open to the constable to resort to that procedure, inasmuch as he had not made any attempt to serve the order through any relative of the petitioner as laid down in S. 70, or by affixing to the petitioner's house as laid down in S. 71. The constable is of course not to blame in this matter for it was not to be expected that he would be acquainted with the provisions of the Criminal Procedure Code relating to the service of an order of the kind which is at present under consideration. He ought to have been given clear directions on the point and the result of the failure to give him such directions has been that the order was not served in the manner required by law.

It is further a matter for surprise that the Magistrate at the time of issuing the order, and the local Police Officer when he received the order, did not take any steps or direct any steps to be taken for the purpose of enforcing the order in the locality, and for the purpose of preventing the mela, the holding of which the order purported to prohibit, from being held. The rule is made absolute. The conviction and sentence are set aside and the petitioner is acquitted. The fine, if paid will be refunded.

K.S. *Rule made absolute.*

A. I. R. 1935 Calcutta 252

PATTERSON, J.

Durga Pada Chatterjee and *another*—Accused—Petitioners.

v.

Nilmani Ghose—Opposite Party.

Criminal Revn. No. 793 of 1934, Decided on 6th September 1934.

Penal Code (1860), S. 339—Voluntary obstruction of vehicle is not wrongful restraint.

The voluntary obstruction of a vehicle cannot be held to amount to wrongful restraint within the meaning of S. 339, I. P. C. [P 253 C 1]

Suresh Chandra Talukdar—for Petitioner.

Order.—This Rule is directed against an order convicting the petitioners under S. 341, I. P. C., on the allegation that they had prevented the carts of one Kali Pada who had purchased some paddy from the complainant Nilmony from proceeding along the public road their object being to compel the payment to their master, the landlord of thr village, of certain so-called dues known as weigh-men's dues. It may be remarked that it is difficult to understand why the complainant Nilmony or his master Atul Pada should have felt themselves aggrieved by the alleged action on the part of the accused, for it appears that not only had Nilmony handed the paddy in question over to Kali Pada, on receiving payment of its price in full, but that he had also realized from Kali Pada the amounts claimed by the landlord's men on account of weighman's dues, although he had no intention of making

over those amounts to the landlord's men his master having expressly forbidden him to do so. If anyone was aggrieved it was Kali Pada who, according to his own showing, had purchased the paddy and paid the so called weigh man's dues, but was prevented from removing the paddy by the accused, the present petitioners. Inspite of this, for some reason which is not apparent to me, it was Nilmony and not Kali Pada who moved in the matter and who after informing the local police, instituted the present proceedings. Whatever the explanation may be, the only question which this Court is now called upon to determine is whether the action of the petitioners in preventing Kali Pada's carts from proceeding along the public road comes within the mischief of S. 341, I. P. C.

This question must, in my opinion, be answered in the negative, inasmuch as S. 341 is to be found in Ch. 16, I. P. C., which deals with offences affecting the human body, and inasmuch as it expressly makes punishable wrongful restraint of any person and not of any vehicle or anything of that sort. The definition of the offence in S. 339, I.P.C., makes the matter still clearer, the offence being defined as voluntarily obstructing any person from proceeding in any direction in which that person has a right to proceed. Having regard to the wording of the definition of the offence of wrongful restraint, it is clear that the voluntary obstruction of a vehicle cannot be held to amount to wrongful restraint within the meaning of S. 339, I. P. C. There is no evidence on the record from which it might be inferred that Kali Pada or Nilmony or the carters were themselves prevented from proceeding along the public road or wherever else they might have wished to go and this being so, it is clear that the conviction under S. 341, I.P.C., must be set aside. I am fortified in this view by the decision of this Court in 12 Cal 55 (1), and by the decision of the Bombay High Court in 19 I C 177 (2). The other allegations against the petitioners, namely the allegations of theft, mischief and so forth, have been negatived by the trial Court, and it would not be proper at this stage to consider whether or not the petitioners might have been convicted under any of these sections, or even of simple assault. The Rule is accordingly made absolute, the convictions and sentences are set aside and the accused are acquitted. The fine, if paid, will be refunded.

K.S. *Rule made absolute.*

1. Juggeshwar Das v. Koylash Chunder, (1886) 12 Cal 55.
2. Emperor v. Rama Lala, (1913) 19 I C 177=14 Cr L J 177.

A. I. R. 1935 Calcutta 253

JACK AND NAG, JJ.

Sheikh Fakir and *others*— Defendants —Appellants.

v.

Moslem Mandal and *others* — Respondents.

Appeal No. 1136 of 1931, Decided on 25th August 1933, from appellate decree of Sub-Judge, Burdwan, D/- 19th June 1930.

Easement—Prescription—Court can infer grant from immemorial user alone when user is open, as of right and without interruption.

It is open to the Court to infer a grant from immemorial user alone when such user is open, as of right and without interruption: 1931 *P C* 128 *Ref.* [P 254 C 1]

Bireswar Bagchi, *Gopendra Nath Das* and *Byomkes Basu*—for Appellants.

Pyari Mohon Chatterjee, *Bankim Chandra Roy* and *Dwijendra Nath Dutt* —for Respondents.

Jack, J.—This appeal arises out of a suit for declaration of plaintiffs right to irrigate their lands ka (1) and ka (2) of the plaint, from the tank described in Sch. kha, by easement and prescription and as an ancient grant and also for an order of permanent injunction restraining the defendants from putting obstruction and further for compensation for loss caused by the defendants not allowing the plaintiffs to irrigate their lands from the tank. The trial Court decreed the suit in part against the contesting defendants 1 to 3 and exparte against the rest, allowing the plaintiff to irrigate ka (2) land from the tank. This appeal is by the defendants as regards ka (1) land for which also the plaintiffs suit was decreed by the Court of appeal below. The lower appellate Court held that the plaintiffs were entitled to irrigate the land ka (1) in consequence of a grant from the landlord to be inferred from immemorial user, the finding being

that the land ka (1) is being irrigated from the disputed tank from time immemorial.

This appeal is argued on the ground that to prove a lost grant something more than immemorial user must be proved, viz., it must be shown that there is no other source of irrigation of that land whereas in fact, in this particular case there is another tank Nutanpukur situated very close to the plaintiffs' land and from which also they are accustomed to irrigate the land. Dattapukur from which they claim to irrigate is much further away. Further it is mentioned that the plaintiffs have not shown that they used the water of this tank as of right and there is no finding to this effect. In support of the theory that something further than immemorial user must be shown, the case of 1931 P C 128 (1) was cited but that case is no authority for this proposition. There it was held that where it was established that from a long period second crop was grown and the necessary water for it could not be had in ordinary years without erecting a dam such long continued user thus proved is sufficient to raise a presumption of a lawful origin of the right to do so in the nature of an arrangement between the parties. That is an example of how immemorial user may be proved indirectly, but it is still immemorial user from which the grant is referred; of course if long continued use may be explained in some other way than by a grant, the grant will not generally be inferred. But there is plenty of authority for holding that it is open to the Court to infer a grant from immemorial user alone when such user is open, as of right, and without interruption. In this case the finding is that this tank was re-excavated in 1322 by the defendants with whom it was settled in 1322 and the plaintiffs took water from the tank to irrigate their land both before and after this settlement and re-excavation. The fact that the plaintiffs took water after the re-excavation goes to confirm the inference that probably there was an original grant from the landlord allowed for at the settlement. It has been pointed out by the lower appellate Court that the patta by which the defendants received settlement has not been produced. It is suggested that the use may have been permissive but that does not seem very probable inasmuch as apparently there is no necessity for using the water of this tank as the closer tank could have been used. But the fact that there was no necessity does not of course show that there was no original grant.

For the defendants-appellants no alternative explanation of the immemorial user has been offered. They maintain that there was no such immemorial user but on that point we are bound by the finding of fact arrived at by the Court below. The learned Subordinate Judge relied upon the statement of P. W. 1 who spoke of user for forty years at least. His age is sixty eight and he says that from the time he reached understanding he remembers that the tank was so used. Another contention raised by the appellants is that by the re-excavation the user has been interrupted but that does not appear to have been the case because both before and after the excavation, the tank was so used and it appears that there is a channel leading from the tank up to the field though it is said that the channel was originally constructed for inflow of water from the fields to the tank.

Then it is suggested that inasmuch as on the plaintiffs land there is a pathway used by the public which is to be cut in order to irrigate from this tank, the public should have been made parties in this case as their right of way has been interfered with. But it has been found that this will not interfere with the right of the public to use the pathway and in any case the way is not a public way but rather one used by the public with the permission of the owner of the land. It is contended by the appellants that the existence of the original grants can only be presumed when there is no other way of explaining the facts. The question whether there was any other way of explaining the facts is an important one for consideration when considering whether the inference of a grant can be drawn from immemorial user. But in this case no other way of explaining the facts has been suggested. The existence of another tank closer to the land than the tank in question of course disproves any right of use by necessity.

1. Venkenna v. Swetachalapati Ramakrishna Ranga Rao Bahadur Guru, 1931 P C 128=131 I C 312=54 Mad 427=58 I A 195 (P C).

A point has been raised as to non-joinder of the daughter of the sister of the plaintiffs as a party. But it has been found that the plaintiffs sisters gave up her right on receiving Rs. 150 therefore her daughter was not a necessary party.

Finally a point was raised as to the extent of the use of the water which was allowed. The Court of appeal below finds that the depth of the tank before excavation was four cubits. In 1332 the depth of the tank was increased from four cubits to nine cubits by re-excavation. The original user was based upon the tank when it was four cubits deep. The right which is now given by the decree of the lower appellate Court is to take water from the tank when the depth of the tank at its centre is five cubits. That means the tank being now in consequence of the re-excavation nine cubits deep the plaintiffs have the right to use four cubits depth of water. Originally of course if the depth had been reduced by four cubits there would have been no water in the tank. Therefore on behalf of the appellant it is contended that the plaintiffs should not be entitled to take water from the tank so as to increase the burden on the subservient tenement. We think that there is some force in this contention. In these circumstances it will be right to allow the plaintiffs to take water from the tank at any time when its depth is six cubits or more at the centre but not otherwise. With this modification this appeal is dismissed with costs.

Nag, J.—I agree.

K.S. *Order accordingly.*

A. I. R. 1935 Calcutta 255

MITTER, J.

Debji Ghelabhai & Brothers — Defendants—Petitioners.

v.

R. D. Mehta & Co., Asansol—Plaintiff—Opposite Party.

Civil Rule No. 746 of 1934, Decided on 20th August 1934, from decree of Sub-Judge, (S. C. C. Judge), Asansol, (Burdwan), D/- 23rd February 1934.

(a) Limitation Act (1908), S. 19 — Document denying and repudiating liability to pay is not sufficient to extend limitation.

There need not be a promise to pay but the document in question must on a fair reading amount to an admission of liability, absolute or conditional, and in the latter case the condition must be fulfilled. But where the letter or the document relied upon expressly states that there is no liability and the liability is in fact denied and repudiated, it cannot be said that limitation is extended under S. 19 of the Act: 33 *Cal* 1047 (*PC*), *Ref.* [P 256 C 1]

(b) Limitation Act (1908), S. 20—Written statement cannot be called in aid for purposes of S. 20.

A written statement filed in the suit itself cannot be called in aid for the purposes of S. 20 of the Act. When the plaintiff institutes the suit beyond the period of limitation prescribed in the schedule to the Limitation Act, he has to state in his plaint the reasons why the suit is still within time. If there is no such statement the Court has to dismiss the suit. Further a suit must be tried on the cause of action as laid down in the plaint and any inherent defect of the said nature in the plaint cannot be supplied by a written statement in the suit. [P 256 C 2]

Bankim Chandra Mukherji and *Nirmal Kumar Sen* for *Santimoy Mazumdar*—for Petitioner.

Gopendra Nath Das — for Opposite Party.

Order.—The defendant has obtained this Rule under S. 25, Provincial Small Cause Courts Act, and the only point pressed on his behalf is that the plaintiff's claim is barred by limitation. The plaintiff agreed to supply to the defendant 2000 pieces of sal wood sleepers at his colliery and on 9th September 1930, delivered the same. The defendant paid to the plaintiff some money which I am told amounted Rs. 250. The suit was filed on 11th September 1933, just two days after the period of limitation. Apart from the question of limitation the case of the defendant is that out of the 2000 pieces of sleepers 800 pieces were bad and had been rejected. For the purpose of getting over the bar of limitation the plaintiff relied upon a letter written by the defendant to the plaintiff on 12th September 1930, which is in these terms:

"Dear Sirs,

We are in receipt of your letter No. nil of 7-9-30 and noted the contents thereof.

In reply was beg to inform you that as per amicable settlement between you and ourselves about 800 pieces of the sleepers purchased from you are lying rejected near our siding of our above colliery. Please therefore arrange to remove them at your earliest convenience and thereafter adjusting the account let us hear about your dues, if any.

Please note and do the needful."

The 800 pieces of sleepers mentioned in this letter were however not removed by the plaintiff and his suit includes the price of these which forms the substantial part of his claim. The letter in

answer to which this letter was sent has not been produced. The learned Small Cause Court Judge relied upon this letter as an acknowledgment of liability and has decreed the suit. In my opinion it cannot be regarded as an acknowledgment of liability in respect of the 800 pieces of sleepers but is an acknowledgment of liability in respect of the balance of the price that may be due on the accounts for the remaining 1200 pieces. Whether a particular document or letter amounts to an acknowledgment of liability or not within the meaning of S. 19, Lim. Act, must depend npon the terms thereof and other decisions cannot often be helpful. It is quite true that under the Indian statute there need not be a promise to pay but the document in question must on a fair reading amount to an admission of liability, absolute or conditional, and in the latter case the condition must be fulfilled: see 33 Cal. 1047 (1). But where the letter or the document relied upon expressly states that there is no liability and the liability is in fact denied and repudiated I do not see on what principle it can be said that limitation is extended under S. 19 of the Act. In the letter in question the defendant stated that he was under no liability for the price of the 800 pieces of rejected sleepers. I would accordingly hold that the claim of the plaintiff for the price thereof is barred by time, but the last part of the letter amounts to an acknowledgment of liability in respect of the balance of the price for the accepted 1200 pieces according to the principle laid down in 33 Cal. 1047 (1).

Mr. Dass has sought to support the decree of the lower Court on another ground. He says that the defendant paid Rs. 250 on the basis of the contract, and although at the time when that payment was made there was no writing in the hand of or signed by the defendant the fact that the defendant recited the payment in his written statement in the suit which was signed by him brings the case within S. 20, Lim. Act. I do not see my way to give effect to the said contention. The defendant has maintained in his written statement that the said payment was towards the payment of the price of the 1200 accepted pieces and his written statement cannot be dissected in the manner suggested by the opposite party. Besides I am of opinion that a written statement filed in the suit itself cannot be called in aid for the purposes of S. 20 of the Act. When the plaintiff institutes the suit beyond the period of limitation prescribed in the schedule to the Limitation Act, he has to state in his plaint the reasons why the suit is still within time. If there is no such statement the Court has to dismiss the suit. Further a suit must be tried on the cause of action as laid in the plaint and any inherent defect of the said nature in the plaint cannot be supplied by a written statement in the suit. For these reasons I overrule the said contention and make the Rule absolute in part and dismiss the claim of the plaintiff in respect of the price claimed for the 800 pieces of rejected sleepers. The advocates of parties are agreed that the decree should be for Rs. 19-1-0 which is made up of Rs. 14 and interest thereon at 12 per cent per annum from 9th September 1930 to the date of suit.. The decree of the lower Court is modified accordingly. Thr parties will bear proportionate costs in the Court below but I make no order for costs in the Rule.

K.S. *Decree modified.*

1. Maniram v. Seth Rupchand, (1906) 33 Cal 1047=2 N L R 130=33 I A 165=10 C W N 874=4 C L J 94 (PC).

A. I. R. 1935 Calcutta 256

GUHA, J.

Manindra Nath Koley and *others*—Defendants—Appellants.

v.

Sahadeb Koley and *others*—Plaintiffs—Respondents.

Appeal No. 40 of 1932, Decided on 14th August 1934, from appellate decree of Sub-Judge, 2nd Court, Hoogly, D/- 21st April 1931.

Landlord and Tenant — Denial of landlord's title followed by decree of Court affirming such denial — Denial operates as forfeiture — But for khas possession, land must be proved to belong to plaintiff — Plaintiffs and defendants cosharers — No relationship of landlord and tenant—Defendant in possession of property — Plaintiff is not entitled to khas possession — His remedy is only to sue for partition—Cosharers.

Where the denial by a tenant of his landlord's title is followed by a decree of Court affirming such denial, that denial operates as a forfeiture, and the landlord is entitled to khas possession

of the land by ejectment of the tenant. But in giving effect to a claim for khas possession on the ground of forfeiture incurred by denial of landlord's title, it must be found that the land belonged to the landlord, by whom a tenancy was or could be brought into existence. Hence where the case of the plaintiffs that there is an arrangement between cosharers by virtue of which an under-raiyati held by the defendants under them is altogether negatived and the position was that both plaintiffs is and defendants were cosharers and there was no relationship of landlord and tenant between them in any way whatsoever, the claim for possession cannot be allowed on the ground of forfeiture of tenancy. The remedy of the plaintiffs lies in having the property partitioned, and then getting possession of the share allotted to them, on partition. [P 258 C 1, 2]

Apurbadhon Mukherji—for Appellant.

Surendranath Basu (*Senior*) and *Prandhon De*—for Respondents.

Judgment. — The plaintiffs-respondents in this appeal brought the suit out of which the appeal has arisen, for declaration of their title to a two-third share of the property described in Sch. Kha of the plaint (that is the only item of property in dispute in this appeal), and for ejectment of the defendants. There was in the alternative a claim for declaration of right to receive rent, on the footing that the defendants were, by virtue of an arrangement between cosharers, the plaintiffs and the defendants, under-raiyats in respect of the property in suit. So far as the under-raiyati interest alleged to have brought into existence by virtue of an arrangement was concerned, there was a suit for contribution, suit No. 457 of 1925, brought by the plaintiffs, against the defendants, directly putting the matter in issue. The defendants denied in that suit the existence of the under-raiyati, by virtue of any arrangement between cosharers as alleged by the plaintiffs. It was decided in that suit that the story of arrangement set up by the plaintiffs had not been established. As indicated above the defendants denied the existence of the arrangement and the existence of any under-raiyati interest, and that denial was allowed to prevail. The plaintiffs asserted in the present suit that the denial in the previous suit of the existence of the under-raiyati, entitled them to get khas possession of the lands in suit, in regard to which there was an under-raiyati held by the defendants, by virtue of an arrangement. The contesting defendants denied the story of under-raiyati, as they did in the suit of 1925. They asserted that they held the lands in question in equal shares with the plaintiffs, and denied the story of arrangement between them and the plaintiffs then cosharers, of any arrangement as set up in the plaint.

The trial Court gave its decision in favour of the plaintiffs on the footing that the defendants had taken settlement of Sch. kha lands under the plaintiffs, and that they (the defendants) were under-raiyats, who had acquired rights of occupancy and were protected from eviction. The defendants were held liable by the trial Court, to pay rent to the plaintiffs in regard to Sch. kha lands or pay the same to the superior landlords, in the manner mentioned in the order portion of the judgment of the Munsif. On appeal by the plaintiffs and on cross-objection preferred by the defendants, the Court of appeal below, held that the plaintiffs were entitled to possession of their two-third share, and at the instance of the plaintiffs, passed a decree for joint possession to the extent of the plaintiffs' two-third share in respect of Sch. kha lands, the plaintiffs having represented to the Court they would be satisfied with a decree for joint possession.

In my judgment, both thé Courts below proceeded on an erroneous basis, and their decision cannot be supported. The error on the part of the Courts below is due to the fact that they altogether failed to appreciate and give effect to the decision of the previous suit of 1925. There is no question that the plaintiffs asserted in the present suit that the denial of the under-raiyati by the defendants amounted to forfeiture of the tenancy held by them, and they were therefore entitled to get possession of the lands in respect of which there was an under-raiyati interest. It would appear however from the judgment in the previous suit of 1925, that the under-raiyati interest was held to be non-existent, for the reason that the story of an arrangement between the cosharers, the plaintiffs, and the defendants, set up by the plaintiffs had not been established. In that view of the case, the position is this : The plaintiffs are cosharers of the defendants in regard to Sch. kha lands, and there

was no under-raiyati in respect of the two-third share owned by the plaintiffs. The Courts below failed to take into consideration, the questions that had to be decided, and were in point of fact decided in suit No. 457 of 1925, and by virtue of which decision, the plaintiffs could not be allowed to reagitate the question of an arrangement between themselves and the defendants by which an under-raiyati in respect of Sch. kha lands was brought into existence.

In support of this appeal reliance was placed on a decision of this Court in 3 C. L. J. 201 (1) and 2 C. W. N. 755 (2). In the first of these decisions, it was held that where the denial by a tenant of his landlord's title is followed by a decree of Court affirming such denial, that denial operated as a forfeiture, and the landlord was entitled to khas possession of the land by ejectment of the tenant. In that decision, regarding the soundness of which there can be no doubt, reliance was placed on the decision in 2 C. W. N. 755 (2), where the position was recognized that in giving effect to a claim for khas possession on the ground of forfeiture incurred by denial of landlord's title, it must be found that the land belonged to the landlord, by whom a tenancy was or could be brought into existence. As has been mèntioned already, in the case before us, the case of the plaintiffs that there was an arrangement between cosharers by virtue of which an under-raiyati held by the defendants under them, was altogether negatived in the previous suit of 1925, and that question could not be allowed to be re-opened, as between the plaintiffs and the defendants in the present litigation. The plaintiffs, by virtue of the previous judgment, were relegated to the position of cosharers of the defendants, and there was no relationship of landlord and tenant between them in any way whatsoever, so far as Sch. kha lands were concerned. The property in question therefore belonged to the plaintiffs and the defendants as cosharers, and the claim for possession of the same could not be allowed on the ground of forfeiture of tenancy, as asserted in this case. The effect of the previous judgment in the suit of 1925, was, as has been indicated already, to relegate the plaintiffs and the defendants to the position of cosharers in possession of joint property, according to their convenience. The remedy of the plaintiffs lay in having the property partitioned, and then getting possession of the share allotted to them, on partition. The decree for joint possession as made by the Court of appeal below, is wholly unsustainable, and is based upon a misconception of the rights of parties in the present case, which had to be determined on the basis of the previous judgment in suit No. 457 of 1925, which must be treated as a final decision by a competent Court, and according to which the plaintiffs could not be allowed to claim a higher right than that of cosharers, and could not have any reliefs other than those available in a suit for partition.

The result of the conclusions I have arrived at, as mentioned above, is that the decision and decrees passed by the Courts below are set aside, and the plaintiff's suit is dismissed. There is no order as to costs in this appeal. The parties are to bear their own costs throughout the litigation.

K.S. *Appeal allowed.*

1. Ramgati Mohurer v. Pran Hari Seal, (1906) 3 C L J 201.
2. Nilmadhao Bose v. Ananta Ram Bagdi, (1898) 2 C W N 755.

A. I. R. 1935 Calcutta 258

GUHA, J.

Abdul Hai—Petitioner.

v.

Abdur Rahman and *others*—Opposite Parties.

Civil Rule No. 760 of 1934, Decided on 14th August 1934, from judgment of Munsif, First Court, Kandi (Murshidabad), D/- 11th April 1934.

(a) Bengal Tenancy Act (1885), S. 26-F—Improvement in shape of removable structures on holding—It must be construed appurtenant to holding and not as separable from it.

An improvement used with reference to a holding must be considered to be appurtenant to a holding, and cannot be considered as something separable from the holding, merely because the improvement in the shape of structures on the land is removable. The holding as contemplated by the Bengal Tenancy Act, and the holding in regard to which an application under S. 26-F of the Act is entertainable, must be held to include structures raised on the same, if these structures fall within the category of improvements as contemplated by the Bengal Tenancy Act.

[P 260 C 1]

(b) Bengal Tenancy Act (1885), S. 26-F—Consideration money is purchase money in case of sales.

Consideration money as used in S. 26-F is the purchase money in cases of sales. What is to be taken into account in the matter of deposit under S. 26-F is the consideration money paid by the purchaser for which the property was sold. [P 260 C 1]

(c) Bengal Tenancy Act (1885), S. 26-F—Pre-emptor must pay purchaser all that has been paid by purchaser for transfer of entire interest of tenant.

Any person seeking to exercise the right of pre-emption in respect of the tenancy, must under the law, pay the purchaser all that has been paid by the purchaser for transfer of the entire interest of the tenant, including not only the consideration money paid by the purchaser for the property sold, land and structures, structures being appurtenant to the tenancy as improvement to the same but also other payments made by the transferee, as specified in S. 26-F (3). [P 160 C 2]

Bijan Kumar Mukherji and *Farhat Ali*—for Petitioner.

Gopendra Nath Das — for Opposite Parties.

Order.—The rule in this case was issued by this Court on an application arising out of a proceeding under S. 26-F, Ben. Ten. Act. The opposite parties in the Rule Syed Abdur Rahman and Syed Abdul Mannan filed an application before the Munsif, First Court, Kandi, District Murshidabad, to exercise the right of pre-emption, on deposit of a sum of Rs. 55 only, in regard to a sale of a holding in favour of the petitioner Syed Abdul Hai. The sale was in respect of the lands appertaining to the holding with structures standing thereon; in one part of the conveyance in favour of the petitioner, the value of the land was stated to be Rs. 50 and the structures were separately valued at Rs. 150. The consideration for the sale mentioned in the document and the purchase money paid by the petitioner was however Rs. 200. The application under S. 26-F before the Court was on the footing that the pre-emptors were only required to deposit the amount of consideration for the land appertaining to the holding sold, together with compensation at the rate of ten per cent on such amount, as mentioned in that provision of the law. The petitioner in this Court raised the objection before the Munsif, that the application under S. 26-F was not maintainable inasmuch as the pre-emptors were not entitled to get the property on depositing Rs. 55 as done by them; the petitioner's case before the Court below was that inasmuch as the entire purchase money paid by him, the amount of Rs. 200 with the amount of compensation payable under the law, had not been deposited, the application under S. 26-F must be dismissed.

The munsif, overruled the objection raised by the petitioner, on the ground that the structures on the land, although they were improvements as contemplated by S. 76, Ben. Ten. Act, could easily be dismantled, and it could not therefore be said that they were inseparable from the tenancy. The Munsif further observed that in the Kabala, the value of the land and of the structures were separately specified, showing that the structures were separable from the land. In the above view of the case before it, the Court below allowed the application under S. 26-F, Ben. Ten. Act, overruling the objection of the petitioner. The main question raised in support of the rule, was that inasmuch as the entire purchase money with the statutory compensation was not deposited, the Court below acted illegally and with material irregularity in entertaining and granting the application under S. 26-F, Ben. Ten. Act. There is no question that the consideration for the sale to the petitioner of the holding with structures standing thereon which were improvements within the meaning of S. 76, Ben. Ten. Act was Rs. 200. The value of the land and the value of the stuctures were separately stated in the concluding part of the conveyance; and the points argued before me were three in No. 1. Does a holding as defined by the Bengal Tenancy Act include structures raised on the land forming the subject of a tenancy, structures which were improvements as contemplated by S. 76 of the Act? 2. What was the significance of the words 'consideration' and 'value' as used in S. 26-F, Ben. Ten. Act? 3. Could the applicant under S. 26-F, Ben. Ten. Act get relief without depositing the entire amount of consideration money mentioned in the conveyance and compensation as provided by that section?

For the purpose of this case, the definition of 'a holding' as contained in the Bengal Tenancy Act has to be considered with the definition of 'improve-

ment' contained in that Act; and taking the two definitions together, an improvement used with reference to a holding, must, in my judgment, be considered to be appurtenant to a holding, and cannot be considered as something separable from the holding merely because the improvement in the shape of structures on the land are removable. The holding as contemplated by the Bengal Tenancy Act, and the holding in regard which an application under S. 26F of the Act was entertainable, must be held to include structures raised on the same, if these structures fall within the category of improvements as contemplated by the Bengal Tenancy Act. In regard to the second point argued before me, there appears to be no question that consideration money as used in section 26F is the purchase money in cases of sales;' the value of the property as mentioned in that section is referred to in case of exchange, gift or bequest, as specifically mentioned in S. 26D, Ben. Ten. Act. What is to be taken into account in the matter of deposit under S. 26F is the consideration money paid by the purchaser for which the property was sold. In the present case, the property was sold for Rs, 200/— the land which was subject of a tenancy was separately valued at Rs. 50/— the value of the structures standing on the land, improvements effected by the tenant, and which improvements were appurtenant to the tenancy, was stated to be Rs. 150/-. What was required to be deposited by an applicant for pre-emption under the law was the entire consideration money for the sale of the property, the tenancy including the improvements in the shape of structures standing on the land forming the subject of the tenancy.

The last question arising for consideration in the case is connected with the points already discussed above. The applicant under S. 26F could not get relief without depositing the entire amount of consideration mentioned in the conveyance, and statutory compensation. This position appears to be manifest from the provision contained in S. 26F itself. Sub-S. (2) of this section makes it incumbent upon the applicant for pre-emption to deposit the consideration money paid by the purchaser of the property, together with compensation indicating that the right of pre-emption conferred by law is exercisable only when the purchaser in the position of the petitioner, has been fully compensated for payments made by him in connection with the sale effected in his favour. Then it appears to be very significant that Sub-S..(3), 26F, makes it obligatory upon the applicant for pre-emption to deposit all further sums which the transferee has paid in respect of rent for period after the date of transfer, or as the landlord's transfer fee, or in annulling encumbrance on the property: encumbrance must here relate to all that it is appurtenant, and include structures standing on the land which is the subject of the tenancy. This provision, to my mind makes it reasonably clear that any amount paid by the transferee in connection with or for the purpose of perfecting his title to the tenancy and its appurtenances, has to be made good by a pre-emptor. The tenant of the holding after making improvements conveys his interest in the tenancy which extends to the improvements. Any person seeking to exercise the right of pre-emption in respect of the tenancy, must under the law, pay the purchaser all that has been paid by the purchaser for transfer of the entire interest of the tenant, including not only the consideration money paid paid by the purchaser for the property sold land and structures, structures being appurtenant to the tenancy as improvement to the same, but also other payments made by the transferee, as specified in S. 26F (3). In the above view of the case the intention of the legislature as expressed in S. 26F, taking that provision of the law as a whole, is clear that an application under that section could not be entertained unless the entire purchase money mentioned in the conveyance, with the statutory compensation, was deposited in Court, by the person seeking to exercise the right of pre-emption. The entire consideration money for the transfer of the tenancy, including the consideration or value of the structures standing on the same had to be taken into consideration and consideration money for structures standing on the land, which were improvements, could not be kept out of account, in the matter of making a deposit as contemplated by S. 26F, Ben.

Ten. Act. It was therefore wholly immaterial if the structures were separately valued, and the value separately stated in the conveyance. It was also of no consequence whether the structures could be easily dismantled or not.

The result of the conclusions I have arrived at, as mentioned above, is that this rule must be made absolute. The order of the Court below passed on 11th April 1934, is set aside; and the case is sent back, to that Court for calling upon the applicant under S. 26F, Ben. Ten. Act, to make further deposit in accordance with the decision of this Court for enabling them to get the relief claimed by them, in the matter of their exercise of a right of pre-emption. The entire purchase money, Rs. 200/- with the statutory compensation must be deposited within a month from the date of arrival of the record in the lower Court. On failure to make a deposit in accordance with this decision, the application before the Court below under S. 26F, Ben. Ten. Act, will stand dismissed. The rule is made absolute. The petitioner is entitled to his costs in this Court, as also his costs in the Court below. The hearing fee in this Court is fixed at 2 gold mours.

K.S. *Rule made absolute.*

A. I. R. 1935 Calcutta 261

MITTER AND NASIM ALI, JJ.

Nagendra Chandra Nag—Appellant.

v.

Purna Chandra Gupta and *others*—Respondents.

Letters Patent Appeal No. 8 of 1933, Decided on 20th August 1934, against judgment of Jack, J., D/- 9th August 1932.

(a) Lease — Meaning — Held solenama in compromise decree was lease and inadmissible in evidence being unregistered — Registration Act (1908), S. 17.

If the owner of land consents by deed that another person shall occupy the land for a certain time, that is a lease.

Held: that the solenama in a compromise decree created a lease and not being registered was not admissible in evidence. [P 261 C 1]

(b) Record of Rights — Onus of proving that it is wrong is on person asserting—Bengal Tenancy Act, S. 103-B.

The burden of proof lies on the person to establish that the Record of Rights is wrong, having regard to the presumption of correctness of the said entry, which arises under S. 103-B, Ben. Ten. Act. [P 262 C 2]

(c) Words and Phrases—'Jibka'—Meaning is equivocal.

The meaning of the expression 'Jibka' is equivocal for all maintenance grants are not necessarily limited to the grantee's life-time. [P 262 C 2]

Bijoy Kumar Bhattacharjee and *Abinash Chandra Ghose*—for Appellant.

Upendra Kumar Ray, *Nani Gopal Das* for *Suresh Chandra Majumdar*, *Sachindra Kumar Ray* and *Surajit Chandra Lahiri*—for Respondents.

Judgment.—This is an appeal under S. 15, Letters Patent, by one of the plaintiffs in a suit which was brought for confirmation of possession on declaration of title of plaintiffs' 9 annas 10 gandas share in Mouza Haria and others and for declaration that there is no 'jibka' tenure under the name of Ram Narayan Chakraburty under them and that the Record of Rights showing the existence of such a tenure is incorrect. The Courts below and the learned Judge of this Court have confirmed the proprietary title of the plaintiffs to the 9 annas 10 gandas share in the said mouzahs, but have dismissed the plaintiffs' suit in so far as they seek for a declaration that the jibka tenure is not in existence and that the Record of Rights showing the existence of a jibka tenure as a permanent rent-free tenure is wrong. It is against this portion of the decree dismissing the plaintiffs' suit that the present appeal has been directed and is brought against the decision of Jack, J., under S. 15, Letters Patent. The defendants in their defence set forth a compromise decree in a suit of the year 1880 and they have founded their claim to this tenure on that compromise decree. They also raised the questions of adverse possession and limitation. The Courts below have concurrently found that the plaintiffs have not been in possession within 12 years of the suit. It is also significant that the final publication of the Record of Rights took place on 18th April 1916 and the present suit in which this appeal under the Letters Patent arises was not brought till very near the time when 12 years expired, i. e., on 3rd April 1928.

Several contentions have been raised before us with reference to the decision of Jack, J. It is said that the solenama in the compromise decree in the suit of 1880 was not admissible in evidence, seeing that by the solenama a lease was

purported to be created as the decree was not registered and as no registered lease was forthcoming under the provision of S. 17, Registration Act, the solenama was not admissible in evidence. Jack, J , in one part of his judgment was inclined to the opinion that the solenama on its proper construction was really intended to operate as a lease in favour of the plaintiffs' (plaintiffs in the suit of 1830 and the defendants in the present suit) predecessors and that therefore it required registration and not being registered was not admissible in evidence as a lease. But after recording this opinion, the learned Judge proceeded to say that although this document does not come under the definition of 'lease' in the Registration Act so as to bring it also under Cl. (d), sub-S. (1), S. 17 of the Act, he was of opinion that this document was admissible in evidence without registration under S. 17 (1)(b), Registration Act, and in support of this view reliance was placed on the authority of the decision in 1924 Cal. 135 (1).

We have read the solenama and we are of opinion that the document as created in favour of the predecessors-in-interest of the defendants in the present suit was a lease. The word 'lease' has been defined in the Transfer of Property Act of 1882, but the solenama was prior to that date and no definition of the word 'lease' is found in the Registration Act. We have therefore to fall back upon what was understood to be the meaning of 'lease' prior to the enactment of the Transfer of Property Act. According to Stroud's Judicial Dictionary, if the owner of land consents by deed that another person shall occupy the land for a certain time, that is a lease; and reference is made to the decision of Bayley, J., in 2 B. & C. 220 (2). We are therefore of opinion that the decree created a lease and the solenama operated as a present demise in favour of the defendants, and not being registered is not admissible in evidence. This contention must therefore succeed.

The question next arises as to whether the plaintiffs' suit in so far as they seek for a declaration that there is no jibka tenure should not fail on the ground that the defendants have been asserting a right to a permanent tenure for more than 12 years before the institution of the suit. In the written statement which has been read to us, there is a plea of adverse possession for more than the statutory period; if this document stands out of the way, the possession of Ram Narayan and of those who have succeeded to his interest or of persons who have got the tenure under the will would be adverse to the present plaintiffs. They might have set up adverse possession of the fullest extent which would have been sufficient to defeat their suit. But they as a matter of fact have set up adverse possession of a limited character. It appears from the proceedings with reference to the partition of estate within which the lands in suit are situate that Ram Narayan did set up in the years 1906-1907 a niskar jibka tenure right. The Record of Rights which was published in 1916 described the tenure of the defendants as 'chirasthayee' or a permanent tenure. The burden of proof therefore lies on the plaintiffs to establish that the Record of Rights is wrong, having regard to the presumption of correctness of the said entry, which arises under S. 103-B, Ben. Ten. Act. A question arises as to what evidence the plaintiffs have given to displace the presumption which arises under the Act.

It is said on behalf of the appellant that the use of the expression 'jibka tenure' is sufficient to show that the grant was a maintenance grant and which is prima facie resumable on the death of either of the grantor or the grantee it was resumable and after the death of Ram Narain the grant might have been resumed. The meaning of the expression 'jibka,' for aught one knows, is equivocal, for all maintenance grants are not necessarily limited to the grantee's life-time. In this particular case, the very important fact that after the death of Ram Narayan which happened in January 1908, possession of the land continued with his son-in-law who had succeeded to the tenure under a will and by the transferees from the son-in-law shows that the grant, if any, was of a permanent character, or at any rate the fact that they were asserting their possession after the death of Ram Narayan is consistent with the supposition that the

1. Sarat Chandra Das v. Sarojini Rudraja, 1924 Cal 135=79 I C 257.
2. Germains v. William, 2 B & C 220.

grant was not intended to be limited to the life time of the grantee, proceeding on the assumption that there was such a grant. Moreover there was no word used in the lease limiting the grant. In this view we are of opinion that the plaintiffs have failed to displace the presumption which arises in favour of the defendants from the Record of Rights. The other questions raised in support of the appeal are not necessary to be considered in view of the fact that we are resting our decision on the adverse possession of a limited interest for more than 12 years. The result is that the appeal fails and is dismissed with costs.

K.S. *Appeal dismissed.*

A. I. R. 1935 Calcutta 263

MITTER AND PATTERSON, JJ.

Raja Jagat Kishore Acharya Chaudhury—Defendant 1—Appellant.

v.

Hemendra Kishore Acharya Choudhury and *others*—Plaintiffs—Respondents.

Appeal No. 281 of 1930, Decided on 3rd August 1934, from original decree of Sub-Judge, Second Addl. Court, Mymensingh, D/- 29th July 1930

(a) Pleadings—Parties are limited to case made in pleadings—Facts admitted therein need not be proved.

The parties are limited by the case made in the pleadings and facts which have been admitted in the pleadings need not be proved. [P 265 C 2]

(b) Contract — Compromise of doubtful right is sufficient consideration.

The compromise of doubtful rights is a sufficient basis of and forms a sufficient consideration for the agreement. [P 266 C 1]

Jogesh Chandra Roy and *Kali Kinkar Chakravarty*—for Appellant.

Radhabenode Pal and *Premranjan Roy Chowdhury* for *Hemanta Kumar Biswas*—for Respondents.

Mitter, J.—This is an appeal by defendant 1 Raja Jagat Kishore Acharya Choudhuri and arises out of a suit brought by the plaintiff now respondent for recovery of some allowance due to the plaintiff from the said defendant. The case as stated in the plaint may be briefly stated thus: The plaintiff's father the late Debendra Kishore Acharya Chowdhury brought a suit in the Court of the Subordinate Judge of Mymensingh against the defendant-appellant in the year 1880. That suit was valued at Rs. 30,00,000 (thirty laks). At the time of the institution of the suit the defendant-appellant was a minor and his property was taken possession of by the Court of Wards. That suit terminated in a compromise by which the defendant-appellant promised amongst other things to pay to the plaintiff's father a monthly allowance of Rs. 200 out of the income of the zamindari. There was a further stipulation that this allowance would be payable to the plaintiff's sons and grandsons after the death of plaintiff's father. That petition of compromise has been printed at p. 1 of the second part of the paper book. With the sanction of the Board of Revenue, the General Manager of the Courts of Wards executed a deed embodying the terms of compromise. That deed is a deed dated 8th Magh 1287 B. E. corresponding to 20th January 1881. That is printed at p. 5 of the second part of the paper book. The plaintiff's case is that the plaintiff's father used to get that allowance at the rate of Rs. 200 per month so long as the defendant-appellant was a minor. It appears that the defendant subsequently promised to pay an additional sum of Rs. 100 as a monthly allowance and also a sum of Rs. 400 per year for the pujas. By the letter of 1886 the defendant promised to pay the additional allowance of Rs. 100.

This letter is dated 8th April 1886, and is printed at p. 54 of the second part of the paper book, and from Baisakh 1294 B. E., the plaintiff's father got this monthly allowance regularly at the rate of Rs. 300. The promise to pay the additional allowance of Rs. 400 per year for the Durga Puja was made verbally by the plaintiff, and was not embodied in any deed. Defendant 1 stopped the payment of the extra monthly allowance and the annual allowance of Rs. 400 from a time prior to the year 1893, with the result that the plaintiff's father had to institute a suit which has been described as Money Suit No. 8 of 1893 in the Court of the Subordinate of Mymensingh against defendant 1 claiming the allowance at the rate of Rs. 300 per month and also the puja allowance together with the arrears of allowance then fallen due. After the trial of the suit had preceeded to some length there was a compromise between the parties and as defendant 1 admitted the claim of the plaintiff in that suit the suit was

withdrawn and since the withdrawal of that suit it is common ground that defendant 1 paid to the father of the present plaintiff the monthly allowanee as well as the puja allowance of Rs. 400 a year. The plaintiff's father died in 1901 corresponding to 1308 B.E., leaving him surviving as his eldest son and defendants 2 and 3 as two younger sons. Even after the death of the plaintiff's father, defendant 1, in pursuance of the promise used to pay the monthly allowance of Rs. 300 to the plaintiff. Then some dispute arose between the plaintiff and his two brothers defendants 2 and 3 and the allowance was stopped and a solicitor's letter was given to defendant 1 not to pay the entire sum to the plaintiff alone. The plaintiff has instituted the present suit and he has claimed the entire allowance of Rs. 300 for himself. He has brought the suit for the monthly allowance from Sraban 1331 B. S. and the puja allowance from 1332 B. S. with interest the total claim having been laid at Rs. 6,629. In his written statement defendant 1 contends that the allowance should be limited to Rs. 200 and that such an allowance is not payable to the plaintiff alone but also to the other sons and grandsons of the plaintiff's father. In other words they are payable as the events now stand to the plaintiff and defendants 2 and 3 in accordance with their shares. It is further contended that the excess allowance of Rs. 100 per month was the allowance made on the basis of the letter which has no consideration to support it and therefore the plaintiff is not entitled to claim this additional allowance of Rs. 100 per month as also the puja allowance of Rs. 400 per annum. It was also pleaded by an additional written statement filed on behalf of defendant 1 that the plaintiff took a sum of Rs. 1,000 as a loan from defendant 1 from Sravan 1331 B.E. to Pous 1331 B.E. and that defendant 1 is entitled to a set off of the sum. On this state of pleadings several issues ware raised in the suit. It is necessary to refer in particular to issue 3 which forms the subject-matter of the debate in the appeal before us. That issue runs as follows:

"Has the plaintiff any legal claim to the monthly allowance of Rs. 100 and the yearly Parbani of Rs. 400 ? If not whether he is entitled to claim that in this suit? Another issue with reference to which some argument was directed was with reference to costs. That was issue 6 which was in these words: Whether defendant 1 is entitled to get the costs of this suit from the plaintiff ?"

The Subordinate Judge has granted a decree to the plaintiff to the extent of his one-third share, he being of opinion that on the construction of the deed the compromise of 1881 was entered into between the plaintiff's father on the one hand and the General Manager of the Court of Wards on the other. The plaintiff is entitled to one-third share in the whole allowance, the allowance of Rs. 200 being distributable between the plaintiff on the one hand and his brothers on the other. On this footing he has come to the conclusion that the plaintiff shall get Rs. 1,900 as the allowance from which a sum of Rs. 1000 which has already been taken as a loan, should be deducted and that the plaintiff should be granted a decree for Rs. 900. The Subordinate Judge has disallowed the plaintiff's claim for the yearly puja allowance of Rs. 400.

It is against this decree that the present appeal has been taken to this Court by defendant 1 and the main contention is, as has already been indicated, that the Subordinate Judge has gone wrong in allowing a decree to the plaintiff on the basis that the monthly allowance is Rs. 300 per month. In other words it is contended that the Subordinate Judge has gone wrong in the award of the excess allowance to the extent of Rs. 100 per month. The foundation for this excess claim of Rs. 100 is really the settlement arrived at after the institution of the suit of 1893. That suit was based on the letter of 1886 to which reference has already been made. With reference to that suit it is necessary to reproduce the following statement in para. 8 of the plaint. Para. 8 is in these terms:

"Suddenly however defendant 1, being instigated by some selfish evil adviser and man of mean propensities, stopped paying the said increased monthly allowance of Rupees one hundred per month. And he did not pay the Puja Parbani also. The plaintiff's father not being able to understand the cause of this sudden and wonderful behaviour nor the purpose of defendant 1 waited for a short time and being fruitless in his attempt to settle the matter amicably finally brought a Suit No. 8 of 1893 in the first Court of the Subordinate Judge, at Mymensingh against

defendant 1 claiming recovery of the said Malikana monthly allowance at the rate of Rs. 300 (rupees three hundred) per month and the arrears due at the said rate of Rs. 300 (rupees three hundred) per month and the arrears due till then at the said rate together with interest and also the sum on account of Puja Parbani. Plaintiff's father, the late Debendra Kishore Acharjya Chowdhury, was the plaintiff in the aforesaid Suit No. 8 of 1893. And after his depositions as well as the depositions of some of the witnesses such as late Moharaja Surjya Kanta Acharya Bahadur and some others in the said Suit No. 8 of 1893, were recorded, and during the pendency of the suit there was compromise between the parties, and as defendant 1 admitted the claim of the plaintiff, the plaintiff's father, the late Devendra Kishore Acharya Chowdhury withdrew the aforesaid Suit No. 8 of 1893. Since then the plaintiff's father used to get till his death the monthly allowance at the rate of Rs. 300 (rupees three hundred) per month and the Puja Parbani at the rate of Rs, 400 (rupees four hundred) per annum ''

It is to be noted that this statement in para. 8 of the plaint indicating clearly that this sum of Rs. 300 was being paid as the result of the compromise between the parties in Suit No. 8 of 1893, was not challenged or traversed in any way in the written statement except by the denial in para. 9 in very general terms

"that the defendant denies all the statements made in the plaint of the plaintiff save and except those he admits in distinct terms in his written statement and the same should be taken as denied."

There is no denial of the averment made in para. 8 of the plaint and under the present Civil Procedure Code the evasive denial in para. 9 in the written statement can hardly be regarded as a denial of the statement in para. 8 of the plaint. We shall have to refer to this question again. The ground taken in this appeal is that as there is no consideration for the letter Ex. 6 of the year 1886 by which defendant 1 agreed to pay excess sum of Rs. 100 per month as allowance the judgment of the Subordinate Judge cannot be sustained there having been no compromise of doubtful rights of the parties in the suit of 1893. It has been conceded on behalf of the respondents by Dr. Pal who appears for the plaintiff that there is no consideration or permission to pay the excess sum of Rs. 100 per month. But it is said that whether there was a consideration or not a suit was brought in 1893 based on that letter Ex. 6 and the suit terminated after defendant 1 had agreed to admit the claim of the plaintiff to a larger allowance of Rs. 300 per month and that consequently the present claim of the plaintiff is really rested on the compromise which was arrived at in the suit. It has been very strenuously contended on behalf of the appellant by Mr. Jogesh Chandra Roy that no papers relating to the said compromise are forthcoming, that the plaint of Suit No. 8 of 1893 has not been filed, that the written statement in that suit is not before the Court and that the petition of compromise, if any, has not been placed before the Court. The answer to this contention is that the facts which led to the compromise of Suit No. 8 of 1893 are distinctly and clearly stated in para. 8 of the plaint, and that they have not been controverted in a written statement in the way in which they should have been and there is the well known principle that the parties are limited by the case made in the pleadings and facts which have been admitted in the pleadings need not be proved. This principle has been followed in connexion with the suit in the present case. The Subordinate Judge has founded his decision on the view that the circumstance with regard to the compromise must be taken as they are stated in para. 8 of the plaint. He points out in his judgment this:

"It is contended by defendant 1 that the plain-father brought the M. S. No. 8 of 1893, against defendant 1, claiming this extra allowance of Rs. 100 per month, for a certain period; and that that suit was dismissed (vide Ex. H), he cannot therefore claim that allowance again; the plaintiff's case is that that suit was withdrawn. In the plaint, it is alleged that by mutual compromise between the parties of that suit defendant 1 admitted the claim of the plaintiff's father, and the latter then withdrew that suit. This allegation of admission by defendant 1 is not denied by the defendant in his written statement. So it must be held that the aforesaid money suit by the plaintiff's father was withdrawn or dismissed for non-prosecution, on defendant 1's admission of the claim of that suit. In fact, we find that even after the termination of that suit defendant 1 went on paying this extra allowance of Rs. 100 regularly to the plaintiff's father and then to his son or sons.''

The last fact recited in this judgment that the allowance was paid even after the determination of Suit No. 8 of 1893 rather corroborates the existence of the circumstances which are narrated in para. 8 of the plaint. All that we have got of that suit is a certified copy of the General Register of that suit which has been printed at pages 15 to 18 of the second part of the paper book and which

has been marked as Ex. H. Taking then the facts as stated in para. 87 of the plaint we think that there was consideration for the letter Ex. 6 and that there was sufficient foundation for the claim in the present suit and that the compromise of doubtful rights has been held to be a sufficient basis of and form a sufficient consideration for the agreement. It has been argued for the appellant that then the plaintiff or plaintiff's father had absolutely no vestige of a claim with reference to the extra allowance. In these circumstances the doctrine of compromise with regard to doubtful rights is not attracted to the present case. The question really is as to whether the plaintiff or the plaintiff's father had honest belief in the claim which they were setting forth in the year 1893 on the basis of the letter Ex. 6. There is a significant statement in that letter towards the end that registration will be effected later on. Of course that letter was never registered. But that at any rate shows that defendant 1 intended to make that document an operative one. Be that as it may the suit was brought on the basis of the agreement or promise in that letter. When the suit proceeded to some length one of the witnesses the Maharaja of Mymensingh Surjya Kanta Acharya Chowdhury who was perhaps the common relation of the parties gave his evidence and after his evidence was taken the suit was compromised. The fact is that the plaintiff's father did forego some portions of his claim in which he had honest belief on the faith of the promise contained in that letter. There was therefore good ground on which the compromise can really be sustained. We have been considering recently in another case the questions with regard to the compromise of doubtful rights and we can do no better than to refer to the decisions of their Lordships of the Judicial Committee of the Privy Council in 1918 A C 869 (1) where their Lordships recited with approval the following observations of Bowen, J., in 32 Ch D 266 (2). The observations are these :

"It is a mistake to suppose it is not an advantage, which a suitor is capable of appreciating, to be able to litigate his claim even if he turns out to be in the wrong. It seems to me it is equally a mistake to suppose that it is not sometimes a disadvantage to a man to have to defend an action even if in the end he suceeds in his defence; and I think therefore that the reality of the claim which is given up must be measured not by the state of the law as it is ultimately discovered to be, but by the state of the knowledge of the person who at the time has to judge and make the concession. Otherwise you could have to try the whole cause to know if the mode had a right to compromise it, and with regard to questions of law it is obvious you could never safely compromise a question of law at all."

It is said on behalf of the appellant that under the terms of the previous deed of compromise between the Manager of the Court of Wards and the present plaintiff the monthly allowance of Rs. 200 could not be varied except by registered instrument. That is no doubt the law as was pointed out by the Full Bench in 1911, there being some conflict of authorities prior to the determination of the question by the Full Bench, in 39 Cal 284 (3). It may be that after the plaintiff's father had proceeded with the suit of 1893 he might have failed. But after all, he had honestly believed in his claim, and the compromise arrived at by Ex. 6 is binding on the parties. We are therefore of opinion that the Subordinate Judge has rightly come to his conclusion on the issue which is justified not only on the footing of Ex. 6 but also on the footing of the compromise of the suit of 1893 and we agree with him in the conclusion he has arrived at on the issue. The first contention of the appellant therefore with reference to Issue 3 must fail. With regard to the question of costs the contention of the defendant, now appellant, before the lower Court, as it has been before this Court, was that he ought to get full costs from the plaintiff. The Subordinate Judge has directed that the plaintiff and defendant 1 should bear their respective costs and the reason which he gives is that by the additional written statement defendant 1 has raised an issue that the plaintiff is not entitled at all to any share in the allowance claimed in the suit. We are in agreement with the Subordinate Judge that in those circumstances as defendant 1 has raised a large issue attacking plaintiff's claim to the allowance the ques-

1. Jayawickrune v. Amarasuriya, (1918) A C 869 =87 L J P C 165=119 L T 499.
2. Miles v. New Zealand Alford Estate Co. (1886) 32 Ch D 266=55 L J Ch 801=54 L T 582=34 W R 669.
3. Lalit Mohan Ghosh v. Gopali Chuck Coal Co Ltd., (1912) 39 Cal 284=12 I C 728 (FB).

tion of costs has been rightly decided. This ground therefore fails. The result is that the appeal fails and must be dismissed with costs. We assess the hearing fee at 5 gold mohurs.

Patterson, J.—I agree.

K.S. *Appeal dismissed.*

A. I. R. 1935 Calcutta 267

WILLIAMS AND M. C. GHOSE, JJ.

Hari Saday Saha—Plaintiff—Appellant.

v.

Mahendra Narain Raj—Defendant—Respondent.

Appeal No. 1102 of 1932, Decided on 23rd February 1934, against appellate decree of Sub-Judge, Suri, D/- 22nd January 1932.

Limitation Act (1908), Art. 11-A—Application under O. 21, R. 97—Auction purchaser present but adducing no evidence—Other party examining witness and Court passing orders—There is sufficient investigation—Civil P. C. (1908), O. 21, R. 97.

Where in proceedings under O. 21, R 97 the auction purchaser is present but does not adduce evidence and only one witness is examined by the opposite party and regarding another plot there is no opposition and the Court passes an order, there is sufficient investigation so as to bring it under Art. 11-A : 15 *Cal* 521 (*PC*) *Ref.* [P 268 C 1]

Apurbadhan Mukherjee for *Bijon Kumar Mukherjee*—for Appellant.

Hari Charan Ganguli and *Indu Prokash Chatterjee*—for Respondent.

Lort Williams, J.—This appeal arises out of a title suit brought by the plaintiff appellant after his Miscellaneous Case under O. 21, R. 97, Civil P. C., was dismissed. The only point raised before us is upon the question of limitation. The petition under O. 21 was filed on 14th May 1925. On 15th August 1925 the order-sheet shows that the opposite party was ready, but the petitioner prayed for time to produce evidence and one Sheikh Habib, a civil Court peon, was examined on behalf of the opposite party and discharged. The case was then adjourned until 5th September for hearing. On 5th September the opposite party was ready, but the petitioner again prayed for time to produce evidence and it was ordered that the case be put up on 12th September for hearing. On 12th September the order-sheet reads as follows :

"The petition of the auction purchaser as regards Lot No. 15 is not opposed. A. P. adduces no evidence as regards Lot No. 17 claimed by the O. P. Mahendra N. Raj. Ordered the petition be allowed as regards Lot No. 16 and the A. P. be put in possession of the same. The petition is disallowed as regards Lot No. 17. The opposite party will get costs with pleader's fee Rs. 4."

This order was signed by the Pleaders of the parties, Mr. G. P. Roy and Mr. D. Banerjee. The learned Advocate for the appellant has argued that this proceeding was not an investigation such as is contemplated by O. 21, Rr. 97, 98 and 99, Civil P. C., and he has referred us to several cases in which a distinction was drawn between a proceeding under these sections which was dismissed for default and one in which an order was made after investigation. He has argued further that if there has been no such investigation, then the order made must have been on default, that such an order is not one which is contemplated by Art. 11-A, Lim. Act, and therefore he is not restricted to the 12 months, mentioned in that Article, during which he must institute his suit. His argument seems to amount to this, that because the auction purchaser adduced no evidence with regard to Lot No. 17, and because his petition as regards Lot No. 16 was not opposed therefore there was no inquiry or investigation by the Court within the meanings of those sections and, in effect, the order was passed in default of appearance. I am at a loss to understand how this argument can be justified. To begin with, one witness was called and examined by the opposite party and was discharged. Further, with regard to Lot No. 16, the opposite party raised no opposition and therefore it was wholly unnecessary to hear evidence with regard to that lot. As regards Lot No. 17, the auction-purchaser himself told the Court that he did not wish to adduce evidence. Yet the learned Advocate says that unless the Court demands evidence in such circumstances, it cannot be held to be an investigation within the meaning of the section. All that I need say is that, in my opinion, in the circumstances to which I have referred, there was clearly an investigation or an inquiry by the Court and an order made thereon. The learned Advocate sought to show by the form of the order-sheet itself that his client was not present but the statement that the auction purchaser adduced no evidence clearly

means that he was present, either himself or by his pleader, and either he or his pleader told the Court that he did not desire to adduce evidence with regard to Lot No. 17. There is no substance in the contentions raised by the learned Advocate and this appeal must accordingly be dismissed with costs.

M. C. Ghose, J.—Having regard to the case of 15 Cal 521 (1), there is, in my opinion, no doubt that there was sufficient investigation in this case so as to bring it under Art. 11-A, Lim. Act. I agree that this appeal should be dismissed.

K. S. *Appeal dismissed.*

1. Sardhari Lal v. Ambika Pershad, (1888) 15 Cal 521=15 I A 123=5 Sar 172 (PC).

A. I. R. 1935 Calcutta 268

MUKERJI AND S. K. GHOSE, JJ.

Gurudas Adhya—Decree-holder—Appellant.

v.

Jnanendra Narain Bagchi and *others*—Judgment-debtors—Respondents.

Appeal No. 92 of 1933, Decided on 27th June 1934, from original order of Sub-Judge, Birbhum, D/- 21st January 1933.

(a) Civil P. C. (1908), S. 39 — Simultaneous execution is permitted—Court has jurisdiction to execute its decree and at same time send it to another Court to execute it simultaneously—Court need not go through process of sale to see whether proceeds will be sufficient to cover decree — Allegations supported by affidavit are sufficient for Court to make order of transfer.

Simultaneous execution is permitted by the Court; but in making an order for such execution, care should be taken so that there may not be any hardship on the judgment debtor. The Court has jurisdiction to execute its decree and at the same time send it to another Court to execute it simultaneously. It is not necessary for the Court to go through the process of a sale in order to find out whether, in point of fact, the proceeds of the sale would be sufficient to cover the decree; it would be enough if there are allegations made, supported by an affidavit or some other evidence on which the Court can reasonably rely, which tends to show that there are circumstances present from which it can be safely inferred that the properties within the jurisdiction of the Court would not satisfy the decree. If such circumstances are proved to the satisfaction of the Court, it would be quite open to the Court having regard to the provisions of Cl. (b), S. 39 to make an order transferring the decree for execution to another Court. [P 270 C 1, 2]

(b) Civil P. C. (1908), S. 39 and O. 21, R. 6—Court can issue certificate of non-satisfaction even when execution is pending—But order for transfer can be made only after issuing notice to judgment-debtor.

In a case where execution is pending in a Court, the Court is not deprived of the power of issuing a certificate of non-satisfaction. But the Court should before ordering transfer, issue notice to the judgment-debtor, and after hearing the judgment-debtor's objection, if any, as regards the order to be made, the Judge should proceed to consider whether sufficient cause has been made out justifying the issue of simultaneous execution. [P 269 C 2; P 270 C 1]

Bijan Kumar Mukherjee, Kumud Bandhu Bagchi—for Appellants.

Bejoy Kumar Bhattacharjee, Durga Charan Mitter for Benoyendra Prosad Bagchi—for Respondents.

Judgment.—This is an appeal by the decree-holder against an order passed by the Subordinate Judge of Birbhum on 21st January 1933. The facts which gave rise to the proceedings in which the said order was passed are as follows: The appellant obtained a decree for money on 23rd August 1932 against the respondents judgment-debtors. The amount of the decree was about Rs. 14,000 or a little more. When the suit, as a result of which the said decree was passed was pending, the appellant obtained an order of attachment of certain properties before judgment. The suit was instituted and tried in the Court of the Subordinate Judge at Murshidabad. On 24th September 1932, the appellant applied for execution of the decree and in the said application it was prayed in the first place that the properties which were under attachment and within the jurisdiction of the Murshidabad Court were to be proceeded against, and nextly it was prayed that certain other properties which the judgment-debtors had within the jurisdiction of the Court at Birbhum might be proceeded against, and that for the latter purpose the decree might be transferred to the Birbhum Court. In the application it was stated that the properties which had already been attached and were within the jurisdiction of the Murshidabad Court would not be sufficient for the satisfaction of the decree because there were certain other decrees which were for very large amounts and which were specified in the application, in consequence of which the said properties had also been attached, and that any amount which might be obtained by the sale of those properties would have to be distributed

pro rata amongst the contending decree-holders. On receipt of this application, the Subordinate Judge at Murshidabad made an order on 24th September 1932 directing the sale of the properties lying within the jurisdiction of his Court and which had been attached before judgment. So far as this sale is concerned, he ordered that no fresh attachment was necessary and he ordered notices to issue on the judgment-debtors under under O. 21, R. 66, Civil P. C., fixing 15th November 1932 for return. As regards the prayer for the transfer of the decree for execution to the Birbhum Court the learned Judge made this order.

"On the prayer of the decree-holder let a certificate under O. 21, R. 6, Civil P. C., be sent to the District Judge of Birbhum for execution of the decree in the Sub-Judge's Court of that place with the direction that the decree-holder may proceed with his execution there as well as here, but the sale at Suri may not actually be held before further direction from this Court."

It may be stated here that this order was made by the learned Judge without giving any notice to the judgment-debtors and without hearing what they had to say as to why the order should not be made. In accordance with the order transferring the decree which was passed by the learned Subordinate Judge as aforesaid a copy of the decree was sent to the Court of the Subordinate Judge at Birbhum and also a certificate of non-satisfaction in which it was stated that there had been satisfaction of the decree which was to be executed and that the claim thereunder was Rs. 15,000 odd carrying interest at six per cent per annum. On receipt of this certificate and the copy of the decree from the Court of the Subordinate Judge at Murshidabad, the Subordinate Judge of Birbhum on 27th September 1932 made an order issuing attachment under O. 21, R. 54 of the Code with regard to the properties within the jurisdiction of his Court which had been specified as being properties against which execution was to be proceeded with. Later on, on 4th January 1933, by which date the attachment ordered as aforesaid had already been effected, an objection was filed on behalf of the judgment-debtors. This objection was heard by the learned Subordinate Judge and he eventually on 21st January 1933 allowed the objection and dismissed the execution case.

The learned Subordinate Judge held that the question that arose in the case was whether the Court could hold jurisdiction to execute its decree and at the same time send it to another Court to execute it simultaneously. To this question the learned Judge gave his answsr in the negative. He held that, under S. 39, Cl. (b) of the Code, before a decree could be sent to another Court for execution a case must be made out that there was no sufficient property within its own jurisdiction to satisfy the decree and that inasmuch as in the present case the execution proceedings which were pending in the Court of the Subordinate Judge at Murshidabad had not come to an end, it was not possible for that Court to come to any such conclusion as that. He observed next that there was no provision in the Code for the issuing of a conditional certificate and that all that the Court under such circumstances could do was to issue a precept under S. 46 of the Code. He treated the transfer of the decree and the issuing of the certificate of non-satisfaction as amounting to the issuing of a precept under S. 46 of the Code; and finding that the attachment which had been made under that precept had continued for more than the period of two months which the section contemplated, he thought that the attachment must come to an end. In this view of the matter, he held that the judgment-debtors' objections should succeed and he accordingly dismissed the execution case. It is from this order order that the present appeal has been preferred.

The view which the learned Subordinate Judge has taken, namely, that the Court cannot hold jurisdiction to execute its decree and at the same time send it to another Court to execute it simultaneously, is a view which according to the authorities cannot be supported. Many of the decisions bearing upon this question were noticed in 1927 Cal. 581 (1) at pp. 661-662. In view of the decisions referred to there, it must be taken that the view generally accepted by the Courts is that simultaneous execution is permitted by the Court.

1. J. C. Galstaun v. F. E. Dinshaw, 1927 Cal. 581=102 I C 513.

but that in making an order for such execution, care should be taken so that there may not be any hardship to the judgment-debtor. But at the same time we must say that the order which was made by the Murshidabad Court in the present case on 24th September 1932, directing the copy of the decree to be transferred to the Birbhum Court together with a certificate of non-satisfaction is an order which ought not to be supported for one reason, at least if for no other reason, that it was made without giving any opportunity to the judgment-debtors to state what they had to state in opposition to such an order.

Our attention has been drawn by Mr. Bhattacharjee appearing on behalf of the respondents to the provisions of Cl. (b), S. 39 of the Code and it has been argued by him that in the present case there is nothing to show that in point of fact the properties which are within the jurisdiction of the Murshidabad Court will not be sufficient to satisfy the decree. And he has also argued that Cl. (b), R. 6, O. 21 suggests that it is only where either there has been no execution of a decree or where there has been execution but the decree has not been satisfied in full that an order may be made sending a decree for execution to another Court. We are of opinion that these contentions are not well founded. It is not necessary, in our opinion, for the Court to go through the process of a sale in order to find out whether in point of fact the proceeds of the sale would be sufficient to cover the decree. It would be enough if there are allegations made, supported by an affidavit or some other evidence on which the Court can reasonably rely, which tends to show that there are circumstances present from which it can be safely inferred that the properties within the jurisdiction of the Court would not satisfy the decree. If such circumstances are proved to the satisfaction of the Court, it would be quite open to the Court having regard to the provisions of Cl. (b), S. 39 to make an order transferring the decree for execution to another Court. And we are further of opinion that Cl. (b), R. 6, O. 21 only lays down what the Court will have to do at the time when the decree is sent for execution; it only says that a certificate will have to be issued setting out that satisfaction of the decree has not been obtained by execution, or where the decree has been executed in part, the extent to which satisfaction has been obtained. In our opinion nothing that has been said in Cl. (b), R. 6, O. 21 should be considered as indicating that in a case where execution is pending in a Court, the Court is deprived of the power of issuing a certificate of non-satisfaction. We therefore think that it must be held that the view which the learned Judge has taken as regards the competency of the Murshidabad Court to transfer the decree to Birbhum Court to execute is not correct. In our opinion therefore, the learned Subordinate Judge was not right in dismissing the execution case on the ground on which he has proceeded.

As we have already stated, the original order which was made by the Court at Murshidabad was not an order properly made. We therefore do not interfere with the order from which the appeal was preferred. We think it only right to point out to the learned Subordinate Judge who made the order for transfer of the decree that he should now go on with the proceedings from the point at which the application was made by the decree-holder on which he made the order of 24th September 1932. He should now order notices to issue on the judgment-debtors so that they may have an opportunity of showing cause as to why an order should not be made under O. 21, R. 6 of the Code. After hearing the judgment-debtor's objection, if any, as regards the order to be made, the learned Judge will proceed to consider whether sufficient cause has been made out justifying the issue of simultaneous execution under the provisions of S. 39 of the Code. If he decides to make such an order he will consider, having regard to the provisions of O. 21, R. 26 of the Code as to whether any, and if so what, further order should be made as regards the limitation to be put upon the execution that will take place in the Court in which the decree would be sought to be executed.

The result therefore is that the appeal is dismissed, but the attention of the Subordinate Judge of Murshidabad, in whose Court the execution in respect of the aforesaid decree is pending should be drawn to the observations made

above so that he may proceed with the case in accordance therewith. There will be no order for costs in this appeal.

K.S. *Appeal dismissed.*

A. I. R. 1935 Calcutta 271 (1)

MUKERJI, AG. C. J. AND S. K. GHOSE, J.

Atul Chandra Sen—Appellant.

v.

Kaunammal and *others*—Respondents.

Appeal No. 272 of 1932, Decided on 9th August 1934, from original order of Dist. Judge, Chittagong, D/- 31st March 1932.

Provident Funds Act (1925), Ss. 4, 5 (2)—Nominee holding certificate is entitled to money in preference to another having obtained prior certificate.

In a competition between two persons, it is the nominee who holds a certificate who is entitled to the money. Hence where a widow holds a succession certificate in respect of assets of her deceased husband but subsequently a nominee of her husband obtains a succession certificate for the provident fund amount, the latter is entitled to the money and the former's certificare is no bar. [P 271 C 2]

Jitendra Kumar Sen Gupta and *Paresh Chandra Sen*—for Appellant.

Judgment.—The question in this case is what is the true meaning of S. 5 sub-S. (2), Provident Funds Act (19 of 1925). The appellant applied in the Court of the District Judge of Chittagong for a Succession Certificate in respect of a debt in favour of a deceased person recoverable from the A. B. Railway Co. Ltd. The debt was an amount of Provident Fund money due to the deceased, in respect of which the appellant was the nominee. The respondent as widow of the deceased had, prior to the said application, obtained a Succession Certificate in respect of the assets of the deceased from the Court of the District Judge of Trichinopoly. The appellant's application has been refused by the learned Judge on the ground that the certificate previously obtained by the respondent affords a bar. The question turns on the meaning of sub-S. (2) of S. 5, Provident Funds Act (19 of 1925). The relevant words of the sub-section are :

" Notwithstanding anything contained in the Succession Certificate Act, 1889 . . . . . any such person (i. e. a nominee) shall, on the death of the subscriber or depositor, be entitled to the grant of a certificate under that Act . . . . entitling him to receive payment etc."

Does it mean only this that the nomination will entitle the nominee to a certificate without any proof of his right thereto such as an applicant for a certificate has otherwise to establish (vide S. 373, Succession Act 39 of 1925) ? Or, does it go further and mean that other provisions of the Act which may afford as a bar will also be operative. The matter is one of first impression and it is not easy to see what exactly was the intention of the Legislature. But it appears that there is no provision in the Act laying down that no certificate shall be granted in respect of assets for which a previous certificate has been obtained. S. 385, Succession Act, merely says that a certificate subsequently granted would be invalid under certain circumstances. Moreover, the effect of S. 4, Provident Funds Act, is that in a competition between two persons it is the nominee who holds a certificate who is entitled to the money. We therefore think it would be reasonable to hold that the former meaning should be attributed to the sub-section in question. The result is that, in our judgment, the appeal should be allowed and the order complained of being set aside, the case will go back to the Court below, and that the application for certificate, if it is otherwise in order, should be granted. No order as to costs.

K.S. *Appeal allowed.*

A. I. R. 1935 Calcutta 271 (2)

MITTER, J.

Mannilal Anandji — Plaintiff—Petitioner.

v.

B. N. Ry., Ltd.—Defendants—Opposite Parties.

Civil Rule No. 493 of 1934, Decided on 20th August 1934, from judgment of Small Cause Court Judge, Sealdah, D/- 22nd December 1933.

(a) Railways Act (1890), S. 72 (1) (2)—Liability of Railway administration is that of bailee and not that of common carrier or insurer — Misconduct implies something more than negligence—Rain water entering wagon by great force of winds—Held it was no misconduct.

In India the liability of a Railway Administration is not that of a common carrier. It is not an insurer. Its liability is that of a bailee as defined in the Contract Act. If there is no negligence, there is no liability. Whatever the term misconduct may imply, the word implies something more than negligence. If rain water enters a wagon by the great force of winds, the omission of the railway company to provide

absolutely water-tight doors such as would not permit even a drop of water to enter would not amount to misconduct To insist on such a high standard would be to make an Indian Railway administration virtually an insurer and not a bailee: 1933 *Pat* 630, *Expl.*

[P 273 C 1]

(b) Railways Act (1890), S. 72—Railway company does not insure against negligence of consignor.

A railway company does not insure against the negligence of the consignor. It is the duty of the consignor to have his goods properly packed, such as would be damaged unless properly packed. [P 273 C 2]

J. D. Lewis and *Mahendra Kumar Ghose*—for Petitioner.

S. C. Brahmachari and *Sudhir Kumar Khastgir*—for Opposite Parties.

Order.—This Rule is on behalf of the plaintiff whose claim for damages against the B. N. Ry. Co. has been dismissed by the learned Small Cause Court Judge of Sealdah. The plaintiff is a dealer in biri. His agent booked consignments of Biri leaves from Amgaon to Shalimar under invoice No. 16 dated 17th September 1930 and from Gondia to the same station under invoice No. 47 dated 28th October 1930. On arrival of the goods at Shalimar it was found that 8 bags of the first and 6 bags of the second consignment had been damaged by wettage. The railway officers estimated without prejudice the damage at 20 per cent and the plaintiff took delivery. The plaintiff has now claimed damages. For both the consignments the plaintiff's agent executed risk notes in Form B approved by the Governor-General in Council which would make the Railway Administration liable for "loss, destruction, deterioration or damage" only if the plaintiff proved misconduct on the part of the Railway Administration's servants. For the consignment booked from Amgaon the plaintiff's agent also executed a risk note in Form A, the goods being not packed according to the requirements of the defendant, namely they were not packed in double gunny bags of the required quality.

In the plaint the plaintiff made specific allegations that the goods had been damaged by the undue delay in transit and by the carriage in non-waterproof wagons with wooden roofs. In one paragraph of the plaint however there is a general statement that the Railway Company's servants had been guilty of negligence and misconduct, no particulars being given. The defendant Company ought to have asked for particulars about the misconduct pleaded which they neglected to do. The learned Small Cause Court Judge has recorded findings to the effect that there was no undue delay in transit and that it was not proved that the wagons which according to the admission of the defendant company had corrugated iron roofs, were defective. He also held that the plaintiff had failed to prove wilful neglect on the part of the Railway company's servants. How the last finding is material I fail to see. The form of risk note B was amended in 1924, when the word misconduct was substituted for the words wilful neglect. He did not record an express finding on the question as to whether there was any misconduct on the part of the Railway company's servants. He however found that the Railway company had proved satisfactorily that its servants had taken due care and precaution in respect of the consignments and that damages that occurred cannot be attributed to any neglect on their part.

One would have thought that after the said findings it was a bold step for the plaintiff to move further in the matter. Realising that he could not further hope to succeed on the specific allegations made in the plaint, the plaintiff turns round and presents his case on a new line altogether, which has only been rendered possible by the Railway company neglecting to ask for particulars about the misconduct pleaded. He says now that the servants of the Railway Administration had been guilty of breach of standing orders and points out two of them to be found in Ex. 4. The first is that during the monsoon (which according to the instructions of the Railway company is to be taken to last from June to December) goods liable to damage are not to be loaded against the sides of flap doors of wagons but well away and the second is that wagons with corrugated iron roof should not be loaded with damageable commodities and urges that breach of standing orders by itself is misconduct. As I have stated that on the plaint this case the defendant opposite party was not called upon to meet, but I would not rest my judgment on the said ground.

Assuming that mere breach of standing orders would amount to misconduct for which there is some authority, see 1931 Cal. 734 (1) and 1932 Cal. 70 (2), the findings of the learned Small Cause Court Judge exclude the case of misconduct. It is not necessary for me in this case to define the word misconduct or to decide if there is a distinction between "misconduct" as used in Risk note B in currency in India and the word "wilful misconduct" used in England in such cases. On this point there is a divergence of opinion: see 1930 Cal. 815 (3) and 1933 Cal. 742 (4).

In India the liability of a Railway Administration is not that of a common carrier. It is not an insurer. Its liability is that of a bailee as defined in the Contract Act. If there is no negligence there is no liability. Whatever the term misconduct may imply, it is quite apparent from a comparison of Cl. (1) with Cl. (2) of S. 72, Railways Act, that the word implies something more than negligence. The risk notes approved by the Governor-General in Council as their terms show are intended to reduce and limit the responsibility which railway administrations would otherwise have under sub-S. (1) of S. 72. The finding that there was no negligence on the part of the opposite party necessarily excludes the case of misconduct. There is documentary evidence that in respect of at least the consignment booked at Gondia the agent of the plaintiff admitted that the wagon was in good condition (Ex. G). There is no evidence that the goods had been loaded against the sides or flap doors as all the evidence that has been placed before me is inconclusive. That evidence is that when the wagons were opened at Shalimar some bags fell out. The bags of biri leaves are huge and comparatively light; It may as well be that some of them had slided to the sides by reason of the jerks and other causes due to motion. Exs. Q and Q-2, the only documents on which the learned Advocate of the petitioners could lay his hands on, show that the opinion of some of the railway servants was that rain had "beaten in." If rain water enters a wagon by the great force of winds I do not see how the omission of the railway company to provide absolutely water-tight doors, such as would not permit even a drop of water to enter would amount to misconduct. If that is the proposition intended to be laid down in 1933 Pat. 630 (5) I must respectfully dissent from it. To insist on such a high standard would be to make an Indian Railway administration virtually an insurer and not a bailee, whose responsibility is defined in Ss. 151 and 152, Contract Act.

With regard to the consignment booked at Amgaon there is a further difficulty that bars the success of the plaintiff. His agent admitted that the consignment had not proper and adequate covering and on that footing executed a risk note in Form A. A Railway company does not insure against the negligence of the consignor. It is the duty of the consignor to have his goods properly packed, such as would be damaged unless properly packed. This is even so where the responsibility of a carrier is much more than that of an Railway Administration: see Lord Dunedin in 1920 A. C. 324 (6) at 335 Disney's Carriage by Railway, Edn. 7, p. 64. For these reasons I would discharge the Rule with costs one gold mohur.

K S. *Rule discharged.*

1. Secy of State v. Dhokahual, 1931 Cal 734=134 I C 940.
2. B. N. Ry. v. Moolji Sicca, 1932 Cal 70=134 I C 1268.
3. B. N. Ry. Co. v. Moolji Sicca, 1930 Cal 815=129 I C 769.
4. M. S. M. Ry. Co. v. Sunderjee, 1933 Cal 742=147 I C 752=60 Cal 993.
5. Jamnadas v. E. I. Ry. Co., 1933 Pat 630=148 I C 396.
6. L. & N. W. Ry. Co. v. Richard Hudson, 1920 A C 324=89 L J K B 323=122 L T 530.

A. I. R. 1935 Calcutta 273

MITTER AND EDGLEY, JJ.

Tulsi Bibi—Plaintiff—Appellant.

v.

Farrak Bibi and *others*—Respondents.

Appeal No. 53 of 1930, Decided on 22nd August 1934, against decree of Sub-Judge, First Addl. Court, 24 Parganas, D/- 27th November 1929.

(a) Court-fees—Question of—Proper Court-fee depends on allegations in plaint.

The question as to what the proper Court-fee ought to be on the plaint depends on the allegations which are contained in plaint. [P 275 C 1]

(b) Partition — Several persons entitled to succeed to property — Property belongs to

them jointly—Possession of one is constructive possession on behalf of all—Co-sharer.

Where several persons become entitled on the death of the last owner to succeed to the estate of the owner, the properties belong jointly to all of them and possession of one co-sharer is really a constructive possession on behalf of all: 6 *C L J* 651, *Rel on.* [P 275 C 1]

(c) Court-fee — Suit by one of co-sharers for partition of his share—Allegation that he is in joint possession with defendants—Ad-valorem fee need not be paid—Partition.

Where plaintiff files a suit for partition of his share and alleges that he is in joint possession with the defendant co-sharer, ad valorem court-fee need not be paid, but if the Court finds that he is altogether out of possession, it can ask for ad valorem Court-fees. [P 275 C 2]

Shyamadas Bhattacharji—for Appellant.

Nagendra Nath Dutt, Satyendra Chandra Sen, Subodh Chandra Dutt and *Surjya Kumar Aich*—for Respondents.

D. N. Mitter, J.—This is an appeal from the decree of the Subordinate Judge of 24 Parganas, dated 27th Nov. 1929 by which he dismissed the plaintiff's suit on her failing to put in ad volorem Court-fees for her share within a fortnight of the date of the judgment. The suit was one for partition and was instituted by Tulsi Bibi who is the appellant before us. It is stated in the plaint that one Golam Jalani Khan, a Peshwari Mohamedan, who was a wealthy land-holder and a brick manufacturer of Topsia in the District of 24 Parganas and was governed by the Kakezai custom of inheritance prevailing in his clan died on or about 23rd day of March 1927 leaving considerable moveable and immovable properties, that upon the death of the said Golam Jalani Khan the plaintiff, now appellant, and the defendants Furokh Bibi and Najibunnessa Bibi jointly and absolutely inherited the estate left by the said Gulam Jelani Khan by virtue of such special custom of inheritance prevailing in the Kakezari clan by which he was governed. She further states that the plaintiff and the said defendants obtained joint possession of the said estate and the management thereof was entrusted in the hands of Furrokh Bibi she being the senior member of the family who from time to time paid various sums of moneys to the plaintiff and the other defendant Najibunnessa Bibi. In paragraph No. 7 she recites that the defendant Najibunnessa Bibi, in collusion with the defendant Furokh Bibi, secretly and without the knowledge of the plaintiff instituted a suit for partition being title Suit No. 107 of 1927, against the said Furokh Bibi ignoring her rights altogether. It is stated in paragraph No. 13 that Furokh Bibi is all along and still is in management of the said estate and has failed and neglected to render to the plaintiffs a true and faithful account in respect of the income thereof though repeatedly called upon by the plaintiff to do so. On these allegation she prayed for partition by metes and bounds of the estate of Gulam Jelani Khan and allotment of plaintiff's one third share to her to be enjoyed by her in severalty and absolutely. There were other reliefs which were asked for including relief for an injunction restraining the defendant from dealing with the income of the joint estate or any part thereof and from proceeding with the partition by virtue of the fraudulent compromise in title suit No. 107 of 1927. The two preliminary issues that were tried by the Subordinate Judge were to this effect, namely (1)

"Has the necessary Court-fee been paid ?"

and (2)

"Is the plaintiff entitled to get any relief without a prayer for recovery of possession and without setting aside the document dated 25th April 1927 alleged to have been executed between the plaintiff and defendant 1 as mentioned in the plaint ?"

The Subordinate Judge also stated in his judgment the respective contentions of the plaintiff and defendants. The plaintiff contended that the Court-fee payable was the one payable in a suit for partition, namely a sum of Rs. 15, whereas the defendants contend that as it appears that she was out of possession the suit cannot proceed unless ad-valorem Court-fees are paid. After recording the objections of the parties the learned Subordinate Judge said this:

In my opinion the arguments advanced on the defendant's side are quite cogent and reasonable and I am of opinion that the plaintiff must pay advalorem Court-fees for her alleged share and that there ought to be a prayer that the alleged instrument is void in law."

Against this decision the present appeal has been brought by the plaintiff and it is contended on her behalf that the Subordinate Judge has gone wrong on the question of Court-fees. The question as to what the proper Court

fees ought to be on the plaint depends on the allegations which are contained in the plaint, and the plaintiff states clearly in paragraph No. 3 that immediately after the death of Gulam Jelani Khan when succession opened out she being the wife of Golam Jelani Khan became entitled to 1/3rd of the properties and she was in joint possession of the said estate. Reliance was placed on behalf of defendants in the Court below on an affidavit which was filed by the plaintiff's Karpardaz, when the karpardaz is alleged to have stated that the plaintiff was out of possession of the properties which form the subject matter of partition. The affidavit is printed at page 15 of the paper book and the relevant para. is para.No. 16. That paragraph runs as fololws:

"That inspite of repeated requests the said Furrokh Bibi is preventing your petitioner from entering into possession of the said brick field and of other properties and from sharing the management of same."

There is no allegation here that she was not in possession of any portion of the joint property including the dwelling house. We do not think that on the materials before the Court the Subordinate Judge was right in treating the suit as one when the plaintiff has admitted that she was out of possession of the joint property. In a case where several persons become entitled on the death of the last owner to succeed to the estate of the last owner the properties belong jointly to all of them and possession of one co-sharer is really a constructive possession on behalf of all. This is a principle which has been accepted and firmly established. Reference may be made in this connection to the decision in 6 C. L. J. 651 (1) where Mookerjee, J., pointed out that the plaintiff is entitled to maintain a suit for partition, if his possession to some part of the joint property is admitted or established, but if it is established that he is not in possession at all of any portion of the joint property, or that there has been a complete ouster he must sue for recovery of possession and partition and pay ad-valorem Court-fees upon a plaint appropriately framed for the purpose. It is pointed in that case that in order to maintain a suit for partition the plaintiff must be in actual or constructive possession of the properties, and whether he has such possession or not, is to be determined in view of the principle that the possession of one of the co-owners, is prima facie the possession of all the co-owners, and his possession must be presumed to be in conformity with right and title as co-owner. Having regard to this accepted and well known principle we are of opinion that this suit is really a suit for partition on the materials as were before the Court. Consequently on the Court-fee of Rs. 15 which were paid on the plaint the plaintiff is entitled to maintain the suit.

The result is that the decree of the Subordinate Judge dismissing the suit is set aside and the case is sent back to him for the determination of the other issues. It will be open to the Subordinate Judge, after the evidence has been gone into, if he finds that evidence establishes that she is altogether out of possession, to ask for advalorem Court-fees. The plaintiff appellant is entitled to get her costs in this appeal. These costs are to be realised from defendants 1 and 2. The hearing-fee is assessed at five gold mohurs.

Edgley, J.—I agree.

K.S. *Order accordingly.*

1. Bidhata Rai v. Ram Charitar Rai, (1907) 6 C L J 651=12 C W N 37.

A. I. R. 1935 Calcutta 275

MITTER AND EDGLEY, JJ.

Rati Lal Nanji and *others*—Plaintiffs—Appellants.

v.

Uttam Lal Sarcar and *another*—Defendant 1—Respondents.

Appeal No. 212 of 1930, Decided on 16th August 1934, against decree of Sub-Judge, Asansol, D/- 23rd July 1930.

(a) Partnership — Representation by one will not bind others.

Any representation by one of the partners will not bind the other partner. [P 277 C 2]

(b) Civil P C. (1908), O. 21, R. 49—Provision is imperative and sale of partnership property in execution of money decree against one of partners is inoperative and invalid,

Order 21, R. 49 is an imperative provision of the statute and renders the sale of partnership property in execution of the money decree against one of the partners invalid and inoperative as against the other partners. [P 278 C 1]

A. K. Roy, Sushil Chandra Sen and *Amarendra Nath Bose*—for Appellants.

Sarat Chandra Bose and *Gopendra Nath Das*—for Respondents.

Mitter, J.—This is an appeal by the plaintiffs from a decree of the Subordinate Judge of Asansol dated 23rd July 1930, by which their suit claiming several reliefs was dismissed. The reliefs claimed in the plaint are: (1) that certain coal lands mentioned in Sch. (1) to the plaint be declared to be the joint and partnership properties of plaintiff 1 and defendant 2 constituting the firm of Khengarji Amritlal & Co., (plaintiff 2): (2) that a decree in money Suit No 207 and the subsequent proceedings thereof are not binding on the plaintiffs or either of them; (3) that the sale in execution of the said decree is void; or even if it be held to be valid is not binding on plaintiff 1 and his share has not been affected thereby, and (4) that it be declared that plaintiff 1 has a right to redeem the schedule properties and the decree for redemption may be passed after taking an account of what would be due to the principal defendant.

The case stated in the plaint is that the principal defendant Uttamlal Sarkar and his cosharers are the joint owners of mauza Jote Dhamo and that the one-half share of the said undivided mauza belongs to the said defendant and the remaining half share to his cosharers; that in the said mauza there is a plot of land measuring 527 bighas the underground coal mining rights thereof was demised to one Mr. James Kirkwood by two leases one of which was executed by the principal defendants on 28th January 1920, in respect of his undivided half share and the other by his cosharers Hem Chandra Sarkar and others on the same date and at the same time in respect of the remaining eight annas; that on 17th April 1920, Mr. Kirkwood demised on certain terms his rights in the said plot of 527 bighas acquired under the two leases to the proforma defendant for the firm of Khengarji Amritlal & Co., the partners whereof were the proforma defendants Amritlal Ojha and the late Nanji Khengarji, the father of plaintiff 1; that on 20th June 1921, Mr. Kirkwood conveyed to the firm of Khengarji Amritlal & Co., the right which he had under the two leases, viz., his right to receive royalty from the said firm under the sub-lease of 17th April 1920; that the said firm became the tenant under the principal defendant and his cosharers in respect of the premises demised by the leases of 28th January 1920; that plaintiff's father had 7-annas share in the colliery; that plaintiff 1's father died on 3rd March 1928; that on the death of his father the plaintiff became entitled to his entire share in the partnership business regarding the jote Dhamo Colliery; that some time in August 1928, plaintiff 1 came to know that the colliery has been sold in execution of a decree obtained by defendant 1 for the royalty of the said colliery; that as a result of his inquiries it transpired that defendant 1 had instituted a suit (Misc. No. 207 of 1924) against defendant 2 for certain amount due to him in respect of royalty of the colliery and had obtained a charge decree on 21st April 1926, which was eventually confirmed by the High Court on 18th January 1928; that defendant 1 proceeded to sell some of the properties covered by the said charge decree and that he himself had purchased the same at a grossly inadequate price of Rs. 700, the real price being Rs. 1,25,000; that in the said suit neither plaintiff's father nor the plaintiff was made a party; that the plaintiff believes that defendant 1 followed an illegal and irregular procedure in bringing about the sale; that the properties being partnership properties could not be sold by defendant 1 in execution of a decree against defendant 2 alone and the partnership properties have not in fact been sold. On this state of pleadings the plaintiffs asked for the reliefs which have already been stated. There were several defences to the suit but it is only necessary to mention those defences which bear on the points raised by the present appeal. They are: (1) that defendant 2 was the sole owner and proprietor of the firm of Khengarji Amritalal & Co.; (2) that the defendant 1 executed the decree in Suit No. 207 of 1924 quite legally and purchased the properties at a fair price; (3) that the plaintiff allowed himself to be represented by defendant 2 in all transactions regarding the disputed colliery with the lessors and is bound by the decree in money Suit No. 207 of 1924, on the principal of estoppel, acquiescence and waiver. On these pleadings several issues were framed.

Issue 2 is to the following effect: Is plaintiff 1, a partner in the firm of

Khengarji Amritalal & Co. (plaintiff 2)? The finding of the Subordinate Judge on this issue is in favour of the plaintiff-appellant. He has held that Nanji Khengarji who was a partner in the firm of Nanji is the father of plaintiff 1. The finding of the Subordinate Judge on this part of the case has been challenged by the respondent by way of cross-objection and we have heard the respondent on this point but nothing that we have heard from the respondent induces us to take a view different from that of the Subordinate Judge on this point. It is true that no deed of partnership was produced in this case; besides it appears that the conveyance (Ex. 4) executed by Amritalal Ojha in favour of the firm shows that Amritalal Ojha was not the sole partner, for in that document Amritalal describes himself as a member of the firm of Khengarji Amritalal Co. This document is dated 22nd January 1921 (see p. 17, part 2). The subsequent conveyance by Mr. Kirkwood dated 20th June 1921, is in favour of the firm Khengarji Amritalal & Co.: see Ex. 5, p. 20, part 2. It also appears that in Ex. 9 series a published report of the Government of the list of coal mines worked under the Indian Mines Act, Nanji father of plaintiff 1, is also shown as the partner of the firm and these reports extend from 1920 to 1927: see pp. 9, 10 and 25, part 2. We have no doubt on this documentary evidence that the plaintiff's father was the partner of the firm. The respondent in support of his cross-objection has seriously commented on the fact that Amritalal Ojha has not gone into the witness-box and that his agent Maniklal who was present in Court has not also been examined and that when material evidence is withheld an inference unfavourable to the party withholding the evidence should be drawn. Chunilal however has been examined on behalf of the plaintiff and he proves that Nanji was the proprietor of the colliery and that he was appointed by Nanji some ten years before he was deposing to look after the work of the colliery. We are therefore of opinion that the Subordinate Judge has rightly decided the issue in favour of the plaintiff. This disposes of the cross-objection.

Issues 3 and 4 raise the question as to whether Amritalal represented the firm in Money Suit No. 207 of 1924, and whether the decree obtained by defendant 1 for royalty of the colliery in Money Suit No. 207 and the sale in execution thereof are binding on the plaintiffs. It is to be noticed in this connexion that plaintiff 1 is the son of one of the partners and plaintiff 2 is the firm of Khengarji Amritalal & Co. The Subordinate Judge has held on the evidence of Uttam Lal Sarkar, defendant 1 alone, that Amritalal represented the plaintiffs' firm and the plaintiffs are bound by the decree against defendant 1 and the sale thereunder. This finding of the Subordinate Judge has been challenged by the learned Advocate-General who appears for the plaintiffs-appellants. After reading the evidence of Uttamlal we do not think that any case of presentation has been made out.

On the other hand the receipts which Uttamlal gave to Khengarji Amritalal & Co.. would go to show that Uttamlal was treating the company as the tenant. These receipts extend over the period of four years commencing from 29th July 1924, and ending with 28th November 1927: (see Ex. 7 series) pp. 38 to 41, part 2. Some of the receipts cover a period subsequent to the institution of the suit of 1924, and they make it clear that the tenant was the firm. After issuing the receipts defendant 1 who was plaintiff in Suit No. 207 might have added the firm as a party to the suit if he wanted to make the decree in the suit binding on the firm, The evidence of defendant 1 is that Amritlal told him that he had acquired Kirkwood's interest in the firm but any representation by one of the partners will not bind the other partner. Nanji. If defendant 1 had only cared to look into the conveyance by Kirkwood he would have at once discovered that the transferee was the firm one member of which was Amritalal. This conveyance at p. 21, part 2 refers to the pottah of 17th April 1920 granted by Kirkwood in favour of Amritalal where Amritalal is described as a member of the firm. The receipts and these documents show conclusively that the doctrine of representation cannot be availed of by defendant 1. For the above reasons the conclusion of the Subordinate Judge that Amritalal represented the firm cannot be supported. It follows from this that the sale is not

binding either on plaintiff 1 and cannot affect his interest nor is the sale binding on the firm, i. e., plaintiff 2. The share of plaintiff 1 in the partnership seems to be five and half annas and the sale so far as he is concerned does not bind him.

The next question for consideration is what is the effect of the sale so far as the firm plaintiff 2 is concerned. O. 21, R. 49, Civil P. C., provides that save as otherwise provided by that rule property belonging to a partnership shall not be attached or sold in execution of a decree other than a decree passed against the firm or against the partners of the firm as such. This is an imperative provision of the statute and renders the sale in execution of the decree in Money Suit No. 207 of 1924, invalid and inoperative as against the plaintiffs or either of them. It appears from the application for execution dated 16th March 1928, pp. 47 to 50, part 2, that the decree-holder prayed for realization of the decretal amount including costs and interest by auction sale of the colliery in question, that in the said execution case the property was sold and was purchased by the decree-holder for Rs. 700 only: see Ex. 2, p. 63, part 2. The sale as we have held is inoperative but there is an alternative prayer in the plaint that it be declared that the first plaintiff has the right to redeem the schedule properties and a decree for redemption be passed after taking an account of what will be due to defendant 1. Having regard to the fact that Amritalal Ojha represented to defendant 1 that he was the sole partner of the firm it will be just to grant the plaintiff the alternative relief claimed by him and we accordingly set aside the decree of the Subordinate Judge dismissing the plaintiff's suit and direct that plaintiff 1 be allowed to redeem the properties which have been sold and that a decree for redemption be passed after taking an account of what will be due to defendant 1 in accordance with the provisions of O. 34, R. 7, Civil P. C,, read with R. 15, Considering all the circumstances of the case we are of opinion that each party should bear its own costs throughout.

Edgley, J.—I agree.

K.S. *Decree set aside.*

A. I. R. 1935 Calcutta 278

NASIM ALI, J.

Srish Chandra Pal Choudhury—Defendant—Appellant.

v.

Rajani Kanta Biswas and *others*—Respondents.

Appeals Nos. 283 to 285 of 1932, Decided on 27th August 1934, from appellate decree of Special Judge, Nadia, D/- 7th July 1931.

(a) Bengal Tenancy Act (1885), Ss. 180-A, Cl. (15) & 115(c)—No dispute about status of tenants or about enhancibility of rent or about area—Held dispute was only about amount of rent settled and no second appeal lay.

Where there was no dispute about the status of the tenants or about the enhancibility or otherwise of the rent and there was no dispute also as regards the area for which the rent was to be assessed.

Held: that the decision was only about the amount of rent settled and that no second appeal lay 1935 *Cal.* 97 *Rel. on.* [P 279 C 2]

(b) Bengal Tenancy Act (1885), S. 180-A—Fair rent — Court can consider rate which will be payable if portion of holding is kept fallow under panchan system.

In settling the amount of fair rent, the Court is entitled to take into consideration the rate which is payable by tenants, if a portion of their holding is kept fallow under the panchan system. [P 279 C 1,2]

A. N. Bose and *Hemanta Kumar Bose*—for Appellants.

Ramendra Mohan Majumdar—for Respondents.

Judgment.—These three appeals arise out of three applications under S. 180-A, Ben. Ten. Act, by the tenants for determination of uniform annual money rent in respect of lands held by them under the utbandi system. The defence of the defendant landlord was that the applications were not maintainable in their present form and that the prayers of the tenants were not sustainable under the law. The landlord also alleged that the lands were very much improved by the excavation of a khal for flow of excess water at his cost. The learned Assistant Settlement Officer, after consideration of all the materials which were placed before him by the parties, held that the rate of Re. 1-2-0 per bigha would be the fair rent for the lands in respect of which no kabuliyats were executed by the tenants and Rs. 2 would be the fair rent per bigha for the lands in respect of which kabuliyats were executed by

the tenants. Appeals were then taken by the tenants to the Special Judge. The learned Special Judge came to the conclusion that the nature and extent of improvements alleged to have been effected by the landlord by the opening of the khal could not be determined with any degree of precision. He was also of opinion that the fair and equitable rent should be determined irrespective of the question of any contract between the parties. He also held that the average of the amount that was actually paid as rent for the lands for the previous six years could not be determined as the papers filed by the landlord were not reliable.

The learned Judge then considered whether he could take into consideration any of the elements which are mentioned in the proviso to Cl. 9 of S. 180-A, Ben. Ten. Act. The learned Judge, after examining the materials on the record was of opinion that Cls. (a), (b) and (c) were not sufficiently attracted in these cases. He was however of opinion that in fairness to the landlord the question of improvement should be taken into consideration and in fairness to the tenant the element of pachan should be considered in determining the fair rent, After taking these two factors mainly into consideration the learned Judge varied the rate fixed by the Assistant Settlement Officer by fixing Rupee 1-6-6 per bigha for kabuliyat lands and Re. 1/- for the non-kabuliyat lands. Hence the present appeal by the landlord. A preliminary objection was taken to the competency of these appeals by the learned advocate for the respondents on the ground that in view of the provisions of S. 180-A, Cl. 15, Second Appeals to this Court are not maintainable, inasmuch as the Special Judge has only settled fair rent in these cases. In other words the contention is that the dispute in these cases being only about the amount of rent second appeal was barred under S. 180-A, Cl. 15 read with S. 115 (c), Ben. Ten. Act. From what has been stated above it is clear that in these cases there was no dispute about the status of the tenants or about the enhancibility or otherwise of the rent. There was no dispute also as regards the area for which the rent was to be assessed. Consequently I am of opinion that the decision of these cases is only a decision about the amount of rent settled. See the unreported case in 1935 Cal. 97 (1) decided by this Court on 12th March 1934. The preliminary objection must therefore prevail. The appeals are accordingly dismissed.

Mr. Bose appearing on behalf of the landlord however prayed that these appeals might be treated as applications for revision in these cases. It was contended by Mr. Bose that the learned Judge has no jurisdiction under the law to take into consideration the pachan system in settling the amount of rent in view of the provisiens of S. 180-A, Ben. Ten. Act. I am unable to accept this view of the matter. In settling the amount of fair rent, the Court is entitled to take into consideration the rate which is payable by these tenants, if a portion of their holding is kept fallow under the panchan system. It is argued by Mr. Bose that unless the area of the panchan land in each particular year be known, it would be inequitable to take panchan rate into consideration in settling the fair rent, inasmuch as the quantity of panchan land in the holding of each tenant might very from year to year. I am unable to accept this contention and to hold that without a correct determination of the area of panchan land in each particular year, it would not be fair to the landlord to take the general rate for panchan land into consideration in fixing the annual rate of rent. I am therefore not inclined in view of the facts of these cases to interfere as I am not satisfied that there has been a failure of justice in these cases. The prayer for taking these appeals as applications for revision cannot therefore be entertained.

K.S. *Order accordingly.*

1. Badri Narayan v. Abdul Madal & Ors., 1935 Cal 97=154 I C 466.

A. I. R. 1935 Calcutta 279

GUHA AND BARTLEY, JJ.

Sailendra Nath Kundu—Petitioner.

v.

Surendra Nath Sarkar and *others*—Respondents.

Civil Rule No. 1118 of 1934, Decided on 28th November 1934, from order of Second Addl. Sub-Judge, 24-Parganas, D/- 28th May 1934.

Court-fees Act (1870), S. 7 (4) (c)—Declaration that certain leases in respect of debuttar property are illegal and invalid and for possession of property — Value of subject-matter is value of leasehold interests created by leases and not value of properties irrespective of leases.

Where plaintiff sues for a declaration that certain leases created in respect of debutter property are illegal and invalid and for possession of the property, the value of the subject-matter of the suit is value of the leasehold interest created by the leases and not the value of the properties irrespective of the leases. The plaintiff is under the law entitled in a case of the present description, to put his own valuation on the lessee s interest, the subject-matter of the suit, as it cannot be said that the leasehold is capable of strictly accurate valuation.

[P 280 C 2]

Gunada Charan Sen and *Rakhal Chandra Bose*—for Petitioner.

Jogesh Chandra Ray and *Satindra Roy Choudhury*—for Opposite Party.

Order.—This Rule is directed against an order passed by the Second Additional Subordinate Judge, 24-Parganas, in title suit No. 12 of 1933 directing the plaintiff in the suit, a shebait, to pay court fees on the plaint on the value of the subject-matter of the suit. The plaintiff in the suit prayed for a declaration that certain leases executed in respect of debuttar properties were illegal, invalid, and inoperative; there was also prayer for khas possession of the properties covered by the leases. The leasehold properties which were the subject-matter of the suit were valued by the plaintiff at Rs. 2,000 and ad valorem court-fees were paid on that amount. It appears that a commission was appointed for the purpose of ascertaining the value of the properties in suit irrespective of the leases; and the valuation made by the Commissioner was Rs. 69,921-5-0. The plaintiff was then directed by the learned Judge to pay court-fees on the aforesaid sum of of Rs. 69,921-5-0, the value of the subject matter of the suit before the Court.

A question was raised on the side of the opposite party in the Rule that the case was not one in which the revisional jurisdiction of the Court could be allowed to be invoked in favour of the plaintiff petitioner in this Court. We were not at all impressed with the view presented before us on behalf of the opposite party, that because there was the right of appeal by the plaintiff in the suit after his plaint has been rejected on the plaintiffs not complying with the Court's order in the matter of payment of deficit court-fees, this Court should not interfere in revision, if we were convinced that the order directing the payment of additional court-fees was not supportable under the law, and was passed in the illegal exercise of jurisdiction by the Court below. In our judgment the order complained of is illegal. On a perusal of the plaint filed in Court, there can be no doubt that court-fees in the case were leviable under S. 7, sub-S. (4) and Cl. (c), Court-fees Act, as the suit instituted by the plaintiff was one to obtain a declaratory decree where consequential relief was prayed. Four leases specified in the plaint were sought to be avoided, by the plaintiff as shebait; and it was necessary to pray for possession of the properties covered by these leases as a prayer for a declaration could not be considered to be sufficient under the law, in cases of the present description.

The question then was, what was the value of the subject-matter of the suit as mentioned in S. 7, sub-S. (5), Court-fees Act? The primary relief claimed in the suit was the cancellation of the leases in respect of the debuttar properties, and possession was sought to be obtained by the plaintiff of the leaseholds created by the documents alleged by the plaintiff to be illegal, invalid and inoperative. In our opinion there can be no question that the valuation required to be put on the properties cove ed by the plaint before the Court was the valuation of the leasehold interests created by the different leases, and not the valuation of the properties irrespective of the leases. In the above view of the case we are unable to agree with the Court below in holding that the plaintiff in the suit, the petitioner in this Court, was required to pay ad valorem court-fees on the plaint filed by him, on the value of the properties in suit, which has been ascertained to be Rs. 69,921-5-0 irrespective of the leases in question. The subject-matter of the suit were the the leasehol ls created by documents alleged by the plaintiff to be invalid under the law, and the valuation put by the plaintiff on the subject-matter appears to be adequate, regard being had to the fact that the annual rent payable for debsheba by the lessees

in possession was only Rs. 75. The plaintiff was under the law entitled in a case of the present description to put his own valuation on the lessees' interest, the subject-matter of the suit, as it cannot be said that the leasehold was capable of strictly accurate valuation.

In the result the Rule is made absolute. The orders of the Court below passed on 28th May 1934 are set aside. The suit before the Court will now be proceeded with on the plaint as filed in Court. There is no order as to costs in the rule.

K.S. *Rule made absolute.*

A. I. R. 1935 Calcutta 281

S. K. GHOSE AND HENDERSON, JJ.

Mohammad Saleuddin and *another* — Appellants.

v.

Emperor—Opposite Party.

Appeal No. 495 of 1934, Decided on 29th January 1935.

(a) Interpretation of Statutes — General Act inconsistent with special Act—Latter is applicable—Criminal P. C.

The provisions of the Criminal Procedure Code, in so far as they are inconsistent with the Bengal Act 12 of 1932, are not applicable to trials by Special Magistrates. [P 282 C 1]

(b) Criminal P. C. (1898), S. 337— Special Magistrate has power to tender pardon to accused person — Bengal Act (12 of 1932), S. 25.

A Special Magistrate has power to tender a pardon to an accusod person. [P 282 C 1]

Manowar—for Appellant.

Khundkar and *Nirmal Chandra Chakravarty*—for the Crown.

Henderson, J.—The appellants have been found guilty of conspiracy with each other; the accused Romesh Das who has not appealed, P. W. 2, Peara Hossain and others to commit offences punishabie under Ss. 387 and 506, I. P. C. In brief the prosecution case is that they are members of a gang of revolutionaries, who extort money from persons by terrorising them. The modus operandi is said to be as follows: A letter is sent demanding the payment of money, which is said to be required for the purchase of firearms and for other revolutionary purposes. The letter contains a threat to the effect that, if the money is not forthcoming, the recipient and the members of his family will be murdered. There is a further direction to hand over the money to a messenger, who will come with another letter on some subsequent date. This letter is then followed by another one containing a direction in these terms. The prosecution case is that in pursuance of this conspiracy specific offences were committed against P. W. 3, Radhika Prosad Mukherjee, P. W. 10, Satish Chandra Roy Choudhury and P. W. 13, Manmatha Nath De.

A pardon was tendered to the accused Piara Hossein and he was examine l as a prosecution witness. It has been contended by Mr. Manowar on behalf of the appellants that this procedure has resulted in an illegality. This argument has two branches: in the first place it was contended that the Magistrate, having once taken action under this section, was bound to commit the accused for trial to the Court of Session: in the second place it was contended that if the Magistrate did not commit, S. 337, Criminal P. C., has no application and the evidence so taken was inadmissible. On behalf of the Crown Mr. Khundkar argued that a special Magistrate has no jurisdiction to commit and that he has power to tender a pardon under the provisions of this section. It may be noted here that the appellants were tried by a Special Magistrate under the provisions of S. 25, Bengal Act 12 of 1932. It was not disputed that under the Criminal Procedure Code a Magistrate, who takes action under S. 337, must commit the accused for trial to the Court of Session. It is also clear that a Special Magistrate has no jurisdiction to commit; this is apparent from the terms of S. 25 to the following effect, viz. . . .

"The Local Government . . . may, by order in writing, direct that such person shall be tried by a Special Magistrate."

The direction to the Magistrate is that he is to try the accused, not to send him elsewhere to be tried by some other tribunal. Indeed it is difficult to see what useful purpose would be served by appointing a Special Magistrate to do what could be done by an ordinary Magistrate of the first class. We could only give effect to this argument made on behalf of the appellants by holding that when the Code is inconsistent with the special Act, the former is to prevail. This contingency is provided for in S. 34, Bengal Act, which is in these terms:

"the provision of the Code . . . . . in so far as they may be applicable and in so far as they are not inconsistent with the provisions of this

Chapter, shall apply to all matters committed with . . . . . a trial by Special Magistrate."

A similar question came up for decision before this Court in 1933 Cal 537 (1). In that case the trial was held under the provisions of Ordinance 2 of 1932. Some of the provisions of that Ordinance had been incorporated in the Bengal Act and the Ordinance contained a provision identical with that in S. 34, Bengal Act. The appeal was heard by Rankin, C. J. and Costello, J. In dealing with this point the learned Chief Justice observed as follows:

"When we look at the Ordinance, we find that there is an express provision that the provisions of the Code are to apply in the case of Special Magistrates so far as they are not inconsistent with the Ordinance . . . . It is quite clear that, in so far as the Ordinance is inconsistent with subsection 2-A (of the Code), the Ordinance prevails."

The identical point, with which we are concerned, also came up for decision in two unreported cases, i. e. Criminal Appeals 844 and 845 of 1933. The accused persons in those appeals were tried by a Special Magistrate appointed under the provision of S. 25 of the Bengal Act. The appeals were heard by Guha and Nasim Ali, JJ., who had to determine the point which has been raised before us. The learned Judges hold that the provision of the Code, in so far as they are inconsistent with the Act, are inapplicable to trials by Special Magistrates; in reaching this decision they relied on the judgment of Rankin, C. J., in the case to which I have already referred. It is thus plain that the point is amply covered by authority and it is really unnecessary for us to say more than that we respectfully agree with those decisions. There remains the second branch of the defence argument. There can be no question that, if S. 337 applies, the provisions of the Bengal Act are inconsistent with it. But the point is not whether the Bengal Act is inconsistent with the Code but whether the Code is inconsistent with the Act; if it is, the Act is to prevail. It is therefore only necessary to see whether the provisions of S. 337 of the Code are within the terms of S. 34 of the Act. It could hardly be said that the provisions for tendering a pardon to an accused person in order to secure his evidence are not applicable to a trial before a Special Magistrate.

Although the point does not appear to have been argued, it was actually decided in both the cases to which I have referred. In both these cases a pardon was tendered to one of the accused and his evidence was taken into consideration. Thus there can be no question that, if the contention advanced before us is sound, both those cases were wrongly decided. We must accordingly hold that a Special Magistrate has power to tender a pardon to an accused person and the evidence of P. W. 2 was rightly admitted. It is therefore necessary to consider what weight should be attached to it. When his evidence is read, it at once becomes apparent that, if he has told the whole truth, he has done nothing which requires a pardon; indeed his position is in no way different from that of the two coolies P. Ws. 9 and 14. (After examining the evidence His Lordship concluded). After giving the case our best consideration we can only come to the conclusion that the appellants have been properly convicted and the appeal is dismissed.

S. K. Ghose, J.—I agree.

K. S. *Appeal dismissed.*

1. Abdul Majid v. Emperor, 1933 Cal 537=1933 Cr C 898=145 I C 656=34 Cr L J 1023=60 Cal 652.

A. I. R. 1935 Calcutta 282

MITTER, J.

Jogesh Chandra Roy—Defendant—Appellant.

v.

Sm. Sachchhanda and *others*—Respts.

Appeal No. 3167 of 1931, Decided on 23rd August 1934, from appellate decree of Sub-Judge, 2nd Addl. Court, Chittagong, D/- 15th August 1931.

Easement—Prescription—Right of way—Open and peaceable enjoyment for over 20 years is necessary—Mere discontinnance of user is not interruption or abeyance of enjoyment of right, even though such cessation occurs while right is being acquired.

In order that a prescriptive right may be successfully claimed the pathway must be enjoyed peaceably and openly as an easement without interruption for more than twenty years. The term interruption refers to an adverse obstruction, not a mere discontinuance of user. A person may be said to be in enjoyment of a right of way during a period of time, though he does not use the way every moment. Cessation of user is not an invariable indication of the abeyance of enjoyment of a right, that is it is not inconsistent with the continuance of the enjoyment of the right : 1919 *Cal* 357 and *Eng. Cases Ref.* [P 283 C 2]

Cessation of user for a time while the right is being acquired does not stand on a different basis than when the right had already been acquired by twenty years enjoyment ; *Sturges v. Bridgman*, 11 *Ch D* 852, *Expl.* [P 283 C 2]

S. C. Basak and *Nripendra Chandra Das*—for Appellant.

Narendra Kumar Das and *Rohini-binod Rakshit*—for Respondents.

Judgment.—This appeal is on behalf of the defendant. It arises out of a suit instituted by the plaintiffs for declaration of their right of way from their homestead over the bank of the defendant's tank to a public highway farther south and for a permanent injunction restraining the defendant from putting obstructions. The plaintiffs alleged that they had acquired the right of way by prescription and alternatively they say that the way is a way of necessity. Although the lower appellate Court has given a decree to the plaintiffs also on the footing that the way is a way of necessity, that part of the judgment is not sought to be supported before me. The plaintiffs and defendant hold under different landlords and the plaintiffs' homestead and the bank of the defendant's tank had never been held under a common title. The only question therefore in this appeal is whether the findings arrived at support the claim based on prescription.

The defendant took the defence that the plaintiffs homestead had been abandoned for about 24 years, and that there had not been any user for a long period. They accordingly contended that the plaintiffs' claim based on prescription cannot be supported. The 1st Court found that the plaintiffs did not occupy their homestead for six or seven years holding that there could not be any possible claim based on prescription. The lower appellate Court did not agree with this finding. The material findings arrived at by the lower appellate Court are the following : (i) the pathway had been used for more than 50 years; (ii) that the homestead of of plaintiffs had never been abandoned; (iii) that it was not not a fact that the plaintiffs ceased to live in their homestead for six or siven years; (iv) that since the death of plaintiff 1's son (which occurred in 1900) the plaintiff had been living sometimes in her daughter's house and sometimes in her own homestead.

The appellant relies on the last finding and says that the continuity in the enjoyment has been broken and the plaintiff's claim based on prescription must be negatived. The findings of the Subordinate Judge make it clear that 20 years' enjoyment had been completed before the plaintiff's son died when the plaintiff began sometimes to live with her daughter and sometimes in her own hut. In order that a prescriptive right may be successfully claimed the pathway must be enjoyed peaceably and openly as an easement without interruption for more than 20 years. The term interruption refers to an adverse obstruction, not a mere discontinuance of user: 3 Q B 581 (1), 13 Q B D 304 (2), (1900) 2 Ch. 138 (3). A person may be said to be in enjoyment of a right of way during a period of time, though he does not use the way every moment. Cessation of user is not an invariable indication of the abeyance of enjoyment of a right, that is, it is not inconsistent with the continuance of the enjoyment of the right (see 1919 Cal. 357 (4). I would accordingly hold that the learned Subordinate Judge is right in holding that the plaintiffs have a right of way over the bank of the defendant's tank which right has been acquired by prescription.

The appellant has argued before me that cessation of user for a time while the right is being acquired stands on a different basis than when the right had already been acquired by 20 years enjoyment and in support of this proposition the case of 11 Ch D 852 (5) has been cited before me. That case is no authority for the proposition contended for. It only reaffirms the principle laid down in the well-known case of (1881) 6 A C 740 (6), that an enjoyment physically incapable of interruption would not confer any right of easement by prescription. Besides, as I have

1. Carr v. Foster, (1868) 3 Q B 581=2 G & D 753 =11 L J Q B 284=6 Jur 837.
2. Hollins v. Verney, (1885) 13 Q B D 304=53 L J Q B 430=48 J P 580= 33 W R 5.
3. Smith v. Baxter, (1900) 2 Ch 138=69 L J Ch 437=48 W R 458=82 L T 650.
4. Gopal Chandra v. Bankim Behary. 1919 Cal 357=51 I C 372.
5. Sturges v. Bridgman, (1880) 11 Ch D 852=48 L J Ch 785=28 W R 200=41 L T 219.
6. Charles Dalton v. Henry Angus & Co., (1881) 6 A C 740=50 L J Q B 689=30 W R 191=44 J P 132=44 L T 844.

pointed out, plaintiff 1 began to live in her daughter's house off and on only after the enjoyment had been completed for more than 20 years.

Another point has been raised that the learned Subordinate Judge has proceeded upon a misconstruction of Ex. B. That is a deposition of plaintiff 3 in a criminal case. I am not satisfied that the said document has been misconstrued, but assuming it has been that does not raise any question of law for it is only a piece of documentary evidence. For these reasons I dismiss the appeal with costs.

K.S. *Appeal dismissed.*

A. I. R. 1935 Calcutta 284

COSTELLO AND LORT-WILLIAMS, JJ.

Lal Behary Dhur and *another*—Appellants.

v.

Administrator-General, Bengal, and *others*—Respondents.

Appeal No. 18 of 1934, Decided on 20th July 1934.

(a) Hindu Law — Religious endowment—Succession to Office of Shebait – Laying down rule differing from line of Hindu inheritance is invalid.

Rules laid down by the founder of a Hindu debutter for succession to the Office of Shebait are invalid, if they provide for the office to be held by some one among the heirs of the founder to the exclusion of others, in a succession differing from the line of Hindu inheritance. [P 285 C 1]

A will provided as follows : "I appoint my sons *K* and *R* to be Shebaits of the said Thacoors and I direct that upon the death, retirement or refusal to act of any of them or any of the future Shebaits, the then next eldest male lineal descendant of *K* or *R* shall act as a Shebait in place of the deceased or retiring Shebait or Shebait refusing to act as such—it being my intention that the eldest for the time being in the male line of my said sons *K* and *R* shall always remain as joint Shebaits and in the event of the death or refusal to act of any Shebait the then next male member of the branch to which the Shebait dying or refusing belonged shall act as a Shebait in his place and stead" :

Held, that the intentions of the testators were that he wished to provide that *K* and *R* should be the first Shebaits and that upon the death, retirement or refusal to act of either of them, or of any of the future Shebaits, the then next eldest lineal descendants of *K* and of *R* should be the joint Shebaits representing *K's* and *R's* branches of the family respectively—and that there should be only two Shebaits at any time :

Held further : that the provisions in this will for the succession of the eldest in the male line was invalid, because it excludes some of the founder's heirs according to Hindu law and that the testator did not intend to give to either *K* or *R* an estate of inheritance or an absolute estate but at most only life interest because he provided for the succession on their death, retirement or refusal, of persons who were not their heirs according to Hindu law. [P 285 C 1]

(b) Will – Benign construction should be used — Intention of testator should be given effect to.

A benign construction is to be used, and if the real meaning of the document can be reasonably ascertained from the language used, though that language be ungrammatical or untechnical, or mistaken as to name or description or in any other manner incorrect, provided it sufficiently indicates what was meant, that meaning shall be enforced to the extent and in the form which the law allows but effect should be given to the intention of the testator. [P 280 C 1]

W. W. K. Page and *S. N. Banerjee (Jr.)* for Appellants.

A. K. Roy and *S. B. Shinha*—for Administrator-General.

N. C. Chatterjee—for Respondents.

Lort-Williams, J.—This is an appeal from a decision of Panckridge, J., upon an originating summons concerning the validity of certain dispositions in the will of Luckey Narain Dhur dated 18th November 1923. The testator died on 26th March 1927, leaving three sons, Ram Chunder, Kartick and Ganesh. Ram died on 17th October 1928, and Kartick on 2nd May 1927.

Ram left four sons, Lal Behary, Bon Behary, Rash Behary and Banku Behary, and Kartick left one son Netyo. All these are alive, and Ganesh has one son, Madan. On 25th April 1929 letters of administration de bonis non were granted to the Administrator-General, Bengal, who wishes to know who are the persons now entitled to act as Shebaits of a religious endowment created by Cls. 9 and 10 of the will. Cl. 11 provides as follows :

"I appoint my sons Kartick Chunder Dhur and Ram Chunder Dhur to be the Shebaits of the Thacoors and I direct that upon the death, retirement or refusal to act of any of them or any of the future Shebaits the then next eldest male lineal descendant of Kartick Chunder Dhur or Ram Chunder Dhur shall act as a Shebait in place of the deceased or retiring Shebait or Shebait refusing to act as such—it being my intention that the eldest for the time being in the male line of my said sons Kartick Chunder Dhur and Ram Chunder Dhur shall always remain as joint Shebaits, and in the event of the death or refusal to act of any Shebait, the then next male member of the branch to which the Shebait dying or refusing belonged shall act as a Shebait in his place and stead."

The intentions of the testator are reasonably clear. He wished to provide

that Kartick and Ram should be the first Shebaits, and that upon the death, retirement or refusal to act of either of them, or of any of the future Shebaits, the then next eldest male lineal descendants of Kartick and of Ram should be the joint Shebaits representing Kartick's and Ram's branches of the family respectively—and that there should be only two Shebaits at any time.

But it has been decided by a Full Bench of this Court in 1932 Cal 791 (1) that Shebaitship is a kind of property in the eye of Hindu law and not merely a right to an office. That a person succeeding to the Shebaitship is a grantee or donee of property, and his right to succeed to the office is subject to the rule of law laid down by the Privy Council in I A Sup Vol 47 (2) that all estates of inheritance created by gift or will, so far as they are inconsistent with the general Hindu law of inheritance are void as such.

According to Hindu law no person can succeed under a gift or will as heir to estates described in the terms which in English law would designate estates tail, and it follows that rules laid down by the founder of a Hindu debutter for succession to the office of shebait are invalid, if they provide for the office to be held by some one among the heirs of the founder to the exclusion of others, in a succession differing from the line of Hindu inheritance. The result is that the provision in this will for the succession of the eldest in the male line is invalid, because it excludes some of the founder's heirs according to Hindu law. Further it is clear that the testator did not intend to give to either Kartick or Ram an estate of inheritance or an absolute state, but at most only a life interest, because he provided for the succession on their death, retirement or refusal, of persons who were not their heirs according to Hindu law : I A Sup Vol 47 (2) at pp. 66 and 76-78 : see also 16 Cal 383 (3).

This disposes of the contention raised on behalf of Bonbehary, Rashbehary and Bankubehary, that they ought to succeed along with Lalbehary and Netye, as the immediate heirs of Ram and Kartick. The old rule of Hindu law that a bequest cannot be made to an unborn person is not relevant to the present case, firstly because all persons claiming under the will were born during the life of the testator, and secondly because, in any case, the Hindu Disposition of Property Act, 1916 would have applied. There remains to be decided the questions whether the whole of the provisions of the clause fail, after the life interests given to Ram and Kartick, in which case Ganesh would succeed along with the heirs of Ram and Kartick, as joint heirs of the testator; or whether the clause can be construed as providing for independent gifts of life interests to Lalbehary and Netye, who happen to be the eldest male lineal descendants of Ram and Kartick. That is to say, whether the words 'eldest male lineal descendant' can be construed so far as they affect Lalbehary and Netye, as words of description only, and not of inheritance. This question was discussed but not decided in 2 I A Sup Vol 47 (2), where their Lordships said :

"It remains however to be considered whether the persons described as heirs in tail or heirs of inheritance not recognised by law are sufficiently designed to take successively by way of gift that which the will incorrectly assumes to give them as heirs, so that they may be regarded as a succession of donees for life, having the power and subject to the restrictions sought to be imposed by the will upon the successive heirs in tail."

In that case the bequests were (1) to Juttendro Mohun Tagore for life, then (2) to his eldest son born in the testator's lifetime for life, then (3) in strict settlement on his heirs in tail male, then (4) similar limitations for life and in tail male on the other sons of Juttendro Mohun Tagore, born in the testator's lifetime, then (5) limitation in tail male on the sons of Juttendro Mohun Tagore born after the testator's death, then (6) "after the failure or determination of the uses and estates hereinbefore limited" to Shooshendro Mohun Tagore for life, (7) like limitations for his sons and their sons, and (8) like limitations for the sons of Lullit Mohun Tagore, who was deceased at the date of the will, and their sons in tail male. Juttendro Mohun Tagore had no son born in the testator's

1. Monohar Mukherjee v. Bhupendra Nath Mukerjee, 1932 Cal 791=141 I C 544 (FB).
2. Jatindra Mohan Tagore v. Ganendra Mohan Tagore, (1872) I A Sup Vol 47=9 Beng L R 377=18 W R 359=2 Suther 692=3 Sar 82 (PC).
3. Sreemutty Kristoromoney Dossee v. Maharajah Norendro Krishna Bahadoor, (1889) 16 Cal 383=16 I A 29 (PC).

lifetime, and in any case the subsequent limitations of inheritance were invalid because they offended against the rule of the Hindu law of succession. to which I have already referred. The gift to Sourendro Mohun Tagore for life was invalid because the testator only intended it to be operative after the failure or determination of the prior estate created, and this must be construed as failure in fact, and not by reason of invalidity in law, On p. 78 their Lordships observed that:

"There is however another point of view in which the estates in tail male may be regarded namely, as intended, at all events, to confer an estate for "life upon the first taker in existence when the will took effect. The intention of the testator to give at least a life estate to the first taker is clear, and if an estate in tail male stood first in the will, effect might perhaps be given to that intention. There was however no person in existence to take an estate in tail male at the "testator s death except Suttendro Mohum Tagore. (who was the grandson of Lullit Mohun Tagore) and the validity of his claim to a life "interest in succession stands upon the same ground as that of Sourendra Mohun Tagore".

Their Lordships decided that a life interest was created in Juttendro Mohun Tagore, and that the estates of inheritance and subsequent estates or interest attempted to be created by the will failed. It will be observed that the facts in 2 I. A. Sup. Vol. 47 (2) which made it unnecessary for their Lordships to decide the question now in issue, are not to be found in the present case, which must therefore be distinguished. It becomes necessary therefore to attempt to apply to the facts of this case the observations of their Lordships to which I have referred, and to construe this will in such a way as to give effect, so far as is legally possible, to the wishes and intention of the testator. The attitude to be adopted in construing a Hindu will is set out at pp. 64-70 of 2 I. A. Sup. Vol. 47 (2) and one general principle is

"that a benignant construction is to be used, and that if the real meaning of the document can be reasonably ascertained from the language used, though that language be ungrammatical or untechnical, or mistaken as to name or description or in any other manner incorrect, provided it sufficiently indicate what was meant, that meaning shall be enforced to the extent and in the form which the law allows".

Moreover S. 87, Succession Act, provides that

"the intention of the testator shall not be set aside because it cannot take effect to the full extent, but effect is to be given to it as far as possible".

The decided cases are not of much assistance, In 1928 P. C. 33 (4), the bequest was of the income of certain property to K,

"and after her death in trust for the male heirs of the said K, share and share alike."

It was decided that this was an absolute gift of the property to K's sons which took effect after the determination of her life interest. The words "male heirs" did not connote a descendible quality of estate. In an Indian settlement they are not to be construed primarily as words of inheritance, denoting the character of an estate. K's sons took not by way of inheritance from her, but by virtue of a wholly independent gift to such persons as answered the description of male heirs at the date of her death. They took an absolute estate because there was nothing to suggest that such estate was limited to their life, and no descent was marked out after their death. In the present case, on the one hand the words

"it being my intention that the eldest for the time being in the male line of my said sons Kartick Chunder Dhur and Ram Chander Dhur shall always remain as joint shebaits"

seem to indicate that the testator intended to create an estate of inheritance in tail male, but on the other hand the words

"I appoint my sons Kartick Chander Dhur and Ram Chunder Dhur to be the Shebaits of the said Thacoors and I direct that upon the death, retirement or refusal to act of any of them or any of the future Shebaits the then eldest male lineal descendant of Kartick Chunder Dhur or Ram Chunder Dhur shall act as a shebait in place of the deceased or retiring shebait or shebait refusing to act as such"

are not altogether appropriate to the creation of such an estate, and are capable of being construed as an intention to make an independent gift of the office for life to such person as happened to answer the description of "eldest male lineal descendant" at the date of the death retirement, or refusal to act of Kartick or Ram. In 1934 Cal 379 (5), the words of bequest were:

"In default of such appointment by the said Sm. Surabala Dassi her spiritual guide Mahendra Nath Chatterji or in case of his death his eldest male heir, and in like default by the said Saraju-

4. Madhavrao Gaupatrao v. Balabhai Raghunath, 1928 P C 33=107 I C 119=55 I A 74=52 Bom 176 (P.C.).
5. Kandarpa Mohan Gossain v. Akhoy Chandra Bose, 1934 Cal 379=150 I C 179=61 Cal 106.

bala, her spiritual guide Hari Mohan Gossain, or in case of his death his eldest male heir, jointly with the survivor of the said settlors, and after the death of both of the said settlors and in default of such appointment as aforesaid the said two spiritual guides or their or his eldest male heir shall act as joint shebaits of the said deities, and thenceforth the future shebaits shall consist of the eldest male descendant of the said Mahendra Nath Chatterji and the said Hari Mohan Gossain, provided always that every shebait of the said deity shall have like power to nominate and appoint by deed or will his successor in office."

This was construed as providing for gifts to Mahendra Nath Chatterjee and Hari Mohan Gossain or alternatively, should they happen to be dead at the time when the gifts took effect, then to such persons as happened to be their eldest male heirs, by way of gift, and not by way of inheritance, and that if either Mahendra Nath Chatterji or Hari Mohan Gossain or their eldest male heirs has taken thus by way of gift, then subsequently the eldest male descendant of any of them could take only by way of inheritance.

This decision turned upon the particular words of the settlement in question, and is distinguishable from the present case. The gift to the eldest male heir was made dependent upon the question whether his predecessor happened to be dead at the time when the gift took effect. It was a gift to the predecessor and his eldest male heir in the alternative only, and not gifts to each of them in succession. In 16 Cal 383 (3) the words of bequest ran as follows:

"I give, devise and bequest the residue of my real and personal estate both joint and self-acquired unto my executors, in trust to pay the rents, issues, profits and income thereof unto my said daughter during her lifetime, and after her death in trust to pay, assign and convey the residue of my estate real and personal to my half-brothers Rajas Nreependro Khrishna Bahadur and Norendro Krishna Bahadur in equal moieties and to the heir or heirs male of their or either of their body, in failure of which in trust to give the same to the son or sons of my said daughter."

Their Lordships decided that these words could not mean that an absolute gift was intended to be made to the half-brothers, because "heirs male" obviously negatived an intention to give an estate descendible to heirs generally:

"The words must mean either that the estate of inheritance given to the brothers is a qualified one, or that the heirs male are to take somehow by way of direct gift from the testator."

Their Lordships further decided that the first of these two alternative constructions was the only possible one, because the plain and obvious sense of the words used indicated an intention to confer on them an estate of inheritance resembling an English estate in tail male. They rejected the first alternative because the words were "and" and not "or" heirs male. But they observed at p. 41 that if words of limitation had been attached to the words "heirs male", they would have tended to show that the "heirs" were objects of direct gift, because it would have been inappropriate to attach such words of limitation to the words "heirs male", if these were to be regarded themselves as words of limitation. On the whole I have come to the conclusion that Cl. 11 can be construed as providing inter alia for independent gifts for life to Lalbehary and Netye as the persons who happened to answer the description of eldest male lineal descendants of Ram and Kartick at the times of their respective deaths, and they are the persons at present entitled to act as shebaits. Therefore the appeal is allowed and the cross-objections are dismissed. Costs of all parties will come out of the estate. The costs of the Administrator-General will be as between attorney and client.

Costello, J.—I agree.

K.S. *Appeal allowed.*

A. I. R. 1935 Calcutta 287

LORT-WILLIAMS AND KHUNDKAR, JJ.

Abdul Hakim— Complainant — Petitioner.

v.

Fozu Mia and *another*—Opposite Parties.

Criminal Revn. No. 474 of 1934, Decided on 7th August 1934. from order of Honorary Magistrate, Alipore.

(a) Criminal P. C. (1898), S. 350 (1), Proviso (a) Trial by two Magistrates and one recording depositions — Bench dissolved and case heard again by Magistrate who recorded confession— No new trial can be claimed —S. 350 only refers to case where Magistrate sitting singly is succeeded by another Magistrate sitting singly.

Section 350 refers to cases heard by a Magistrate sitting singly, who is succeeded by another Magistrate sitting singly. Obviously, it contemplates cases in which the second Magistrate is a person other than the first Magistrate, and in which the second Magistrate has not had any previous opportunity of hearing the witnesses.

[P 288 C 1]

Where two Magistrates have heard a case and one of them has recorded the depositions, and on the dissolution of the Bench, the Magistrate who has recorded the deposition proceeds with the case, S. 350 does not apply and no retrial can be claimed in such a case: 22 *Mad* 47, *Ref.*

[P 288 C 2]

(b) Interpretation of Statutes — Marginal notes when inserted by or under authority of legislature can be referred to.

A marginal note can be referred to for an exposition of the meaning of a section, where the note has been inserted by or under the authority of the legislature : *Case law referred.*

[P 289 C 1]

Binayak Nath Banerjee — for Petitioner.

Joy Gopal Ghose and *Anil Kumar Das Gupta*—for Opposite Parties.

Lort-Williams, J.—In this case, a rule was issued to show cause why an order made by B. C. Ghosh, Honorary Magistrate of Alipore in the District of 24 Parganas, under S. 350, Criminal P. C., granting a new trial, should not be set aside. The order was upheld on revision by Mr. S. N. Ray, Additional District Magistrate of Alipore. The petitioner filed a complaint under S. 406, I. P. C., before Mr. L. K. Sen, the Police Magistrate of Alipore, who transferred the case for disposal to the file of Messrs. B. Rahman and B. C. Ghose, two Honorary Magistrates constituting a Bench. Witnesses were examined and cross-examined on both sides, and charges framed and the trial had reached the stage when a date had been fixed for arguments when the bench was dissolved and the Magistrates were ordered to sit singly. Mr. Sen withdrew this case to his own file, and transferred it to the file of Mr. B. C. Ghose who had recorded the depositions.

Thereupon at the re-opening of the proceedings before Mr. B. C. Ghose, the accused demanded a new trial, under the provisions of S. 350 (1), proviso (a). The Magistrate held that he was bound to accede to the demand, and had no discretion to refuse to re-summon and rehear all the witnesses. At the previous trial, the pleader for the accused had stated verbally that he would not demand a new trial, otherwise it is possible that the case would have been disposed of by the bench before it was dissolved. Some of the witnesses for the complainant have left Calcutta, and are not now available. The Magistrate observed that, as a result of his order, the complainant would undoubtedly suffer inconvenience, harassment and unnecessary expense, and would probably be prejudiced owing to his inability to produce some of his witnesses for re-examination. On the other hand, it seems reasonably clear that the accused could not have been prejudiced if their demand for a new trial had been refused. Mr. B. C. Ghose had been present throughout the whole trial, and as already stated, had actually recorded all the depositions.

Section 350, Criminal P. C., does not in terms apply to a case like the present. It refers to cases heard by a Magistrate sitting singly, who is succeeded by another Magistate sitting singly. Obviously, it contemplates cases in which the second Magistrate is a person other than the first Magistrate, and in which the second Magistrate has not had any previous opportunity of hearing the witnesses. The reasons for the provisions contained in the section are not present in a case like the present, especially in view of the fact that Mr. B. C, Ghose recorded all the evidence given at the hearing before the Bench which consisted of himself and Mr. Rahaman. The section refers only to cases in which the whole or any part of the evidence has been recorded by the first Magistrate and he is succeeded by another Magistrate. Mr. Rahaman did not record any part of the evidence, the whole of it was recorded by Mr. Ghosh, and so far as he is concerned, he has not been succeeded by another Magistrate but by himself. If it were permitted to refer to the marginal note to assit one to interpret the section, it is clear that such reference would confirm the interpretation which I have put upon it, because the marginal note refers only to cases in which the evidence has been recorded partly by one Magistrate and partly by another. In 26 All 393 (1) at p. 436 Lords Macnaghten said that:

"It is well settled that marginal notes to the sections of an Act of Parliament cannot be referred to for the purpose of construing the act. The contrary opinion originated in a mistake, and it has been exploded long ago. There seems to be no reason for giving the marginal notes in an Indian Statute any greater authority than the marginal notes in an English act of Parliament."

The English rule as stated by Lord Macnaghten seems to be founded upon the assumption that the eye of Parlia-

1. Balraj Kunwar v. Jagatpal Singh, (1904) 26 All 393=31 I A 132=8 Sar 639 (P C).

ment has never rested on the marginal notes which are not always to be found on the parliament roll. 11 Ch D 449 (2) per Baggallay, L. J., at p. 461, 22 Ch D 511 (3), per Jessell, M. R., at p 513. But marginal notes have been referred to as part of a statue in the English Courts, when they have been found on the Parliament roll. 5 Ad & El 841 (4) and 2 Ch D 522 (5). Now-a-days, they are printed on the draft bill, so it cannot be said that the eye of Parliament has never rested on them. But the disposition of the English Courts is to disregard them. It appears however that in certain local and personal acts marginal notes may perhaps form part of the Act (1914) 1 Ch 300 (6), per Phillimore, L. J, at p. 322. In India it has been held that marginal notes do not restrict the application of section, because they are not part of the enactment, 23 Cal 55 (7). But the Judges in that case simply followed without discussion 3 C P 511 (8) and the other English cases to which I have referred. In 25 Cal 858 (9); 28 Bom 143 (10); 1919 Mad 514 (11) and 1927 Mad 156 (12) the Judges again followed these case without further discussion. In 1926 Mad 749 (13) it was decided that though the marginal notes ought not to be held to govern the clear text of a section, yet they can be taken as an indication of what the legislature meant.

The question was very fully discussed in 1929 All 53 (14) and a Full Bench of the Allahabad High Court following and adapting the ratio nes decidendi in the case of 3 C P 511 (8) held that the question whether a marginal note can be referred to for an exposition of the meaning of a section depends upon whether the note has been inserted by or under the authority of the legislature. And King, J., while discussing the practice in the U. P. Legislative Council, asserted that in that Legislative Council at any rate, the marginal notes are treated as being part of the enactment, and are inserted with the assent and authority of the legislature. With this judgment of King, J. I respectfully agree and in my opinion, Lord Macnaghten's statement was not intended to be an authoritative and final pronouncement upon this question, so far as all Indian statutes are concerned. Someday, the matter will have to be more fully considered, unless Government think fit to settle the point by inserting an appropriate section in the General Clauses Act. This course would remove all uncertainty and would save much time and trouble, and I recommend it for the attention of the Government.

However it is not necessary to have recourse to the marginal note in order to interpret S. 350, Criminal P C., and in my opinion and for the reasons which I have stated, the section has no application to the facts of this case. The somewhat similar facts in 22 Mad 47 (15) and the remarks of Sir Arthur Collins, C. J, though nor precisely in point, are sufficiently pertinent to be cited in support of the view which I have formed. The result is that the order granting a new trial must be set aside, and the Magistrate is directed to proceed with the trial of the case from the point reached at the time when the Bench was dissolved.

Khundkar, J.—I agree.

K S. *Order set aside.*

2. A. G. v Great Eastern Ry. Co,, (1879) 11 Ch D 449.
3. Sutton v Sutton, (1882) 22 Ch D 511.
4. R v. Milverton (Inhabitants), (1836) 5 Ad & El 841.
5. Re Venour's Settled Estates, Venour v. Sellon (1876) 2 Ch D 522 = 45 L J Ch 409 = 24 W R 752
6. Re Woking M.C. (Basingstoke Canal) Act 1911, (1914) 1 Ch 300 = 83 L J Ch 201 = 78 J P 81 = 110 L T 49.
7. Dukhi Mullah v. Halway, (1896) 23 Cal 55.
8. Claydon v. Green, (1863) 3 C P 511 = 37 L J C P 226 = 16 W R 1126 = 18 L T 607.
9. Punardeo Narain Singh v. Ram Sarup Roy, (1898) 25 Cal 858 = 2 C W N 577.
10. Emperor v. Alloomiya Husan, (1904) 28 Bom 129 = 5 Bom L R 805
11. Kesava Chetty v. Secy. of State, 1919 Mad 514 = 51 I C 46 = 42 Mad 451.
12. *In re*, Natesa Mudaliar, 1927 Mad 156 = 99 I C 324 = 28 Cr L J 116 = 50 Mad 733.
13. Narayanasami v. Rangasami, 1926 Mad 749 = 95 I C 731 = 49 Mad 716.
14. Ramsaran Das v. Bhagwat Prasad, 1929 All 53 = 113 I C 442 = 51 All 411 (F B).
15. Queen-Empress v. Sri Ahobalamatam Jeer, (1899) 22 Mad 47.

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Full Bench

COSTELLO, LORT-WILLIAMS, JACK, M. C. GHOSE AND NASIM ALI, JJ.

Biswambar Biswas—Petitioner.

v.

Aparna Charan Mohary and *others*—Opposite Parties.

Full Bench Reference No. 1 of 1934 and Civil Rule No. 1606 of 1933, Decided on 23rd January 1935, from decision of Munsif, North Raozan, in Misc. J. Case No. 85 of 1933.

****(a) Civil P. C. (1908), S. 73—Application for rateable distribution—Court has no power to inquire as to whether decree is proper or bona fide one—Remedy of aggrieved judgment-creditor is under S. 73 (2)—In distributing assets, Court acts in administrative and not judicial capacity—Execution, Decree binding:** 16 *I C* 795; 22 *I C* 407 and 11 *Cal* 42, **Overruled.**

The execution Court is only concerned with those matters which are set out as being the conditions of participation, and so long as a decree is put forward by the holder of that decree, and the holder of the decree satisfies the Court that the money under that decree has not been paid, then that decree-holder is entitled to come in and claim a proportionate share in the assets of the judgment-debtor. If any part of those assets is paid out to a decree-holder who has obtained a decree by fraud or collusion or by any other improper means, then a remedy is open to the judgment-creditor who has suffered from those circumstances, as provided for in sub-S. (2), S. 73 of the Act, 1908. The dominating factor with regard to this point is this: that the Court concerned with the distribution of the assets is doing something in connexion with execution proceedings. The distribution of assets is only one of the acts in the execution proceedings, and the Court is functioning in an administrative and not in a judicial capacity, and no procedure is provided under the provisions of S. 73 of the Act, 1908, and no machinery exists for the holding of an inquiry of the kind involved in the ascertainment as to whether or not the decree is not a bona fide or proper decree: 16 *I C* 795; 22 *I C* 407 and 11 *Cal* 42, **Overruled**; *Case law discussed.* [P 294 C 1, 2]

(b) Evidence Act (1872), S. 44—S. 44 has no application to proceedings under Civil P. C., S. 73.

Per *Jack, J.*—S. 44, Evidence Act, has no application to proceedings under S. 73, Civil P. C. It is only decrees under Ss. 40, 41 and 42, Evidence Act, which are referred to in S. 44, Evidence Act, and such decrees have no application in execution proceedings. [P 295 C 2]

Narendra Kumar Das and *Durgesh Prosad Das*—for Petitioner.

Chandra Sekhar Sen—for Opposite Parties.

Costello, J.—This matter has been referred to a Full Bench by Jack and Khundkar, JJ. on the short point whether a Court acting under the provisions of S. 73, Civil P. C., 1908, is entitled to inquire as to the validity of a decree put forward as the basis for claiming a share in the distribution of the assets of the judgment-debtor. The question we have to answer is whether that Court can go behind the decree and investigate the question whether that decree has been obtained by fraud or collusion. There are conflicting decisions upon this point. There are decisions of this Court which have laid it down that it is competent for a Court acting under the provisions of S. 73, Civil P. C., to go behind the decree. There is a number of decisions of other High Courts in the contrary sense. In order satisfactorily to determine the question it is necessary in the first place to examine the actual provisions of S. 73, Civil P. C., 1908. That section in sub-S. (1) provides that

"where assets are held by a Court, and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decree for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deductiug the costs of realization, shall be rateably distributed among all such persons."

Then follow certain provisions as to the method by which distribution is to be effected. It appears therefore that the conditions for rateable distribution are these: (1) the decree-holder claiming to share in the rateable distribution should have applied for execution of his decree to the Court by which the assets are held; (2) such application should be made prior to the receipt of the assets by the Court; (3) the assets of which a rateable distribution is claimed must be assets held by the Court; (4) the attaching creditor as well as the decree-holder claiming to participate in the assets should be holders of decrees for the payment of money; and (5) such decrees should have been obtained against the same judgment-debtor.

The primary condition to be fulfilled, by a person claiming to participate in the assets of the judgment-debtor, is that he must have a decree for the payment of money, which has been obtained by him against the same judgment-debtor. There are no words of qualification in sub-S. (1) as to the nature or validity in law of the decree which is being put forward. It appears therefore that all that is required, in order that a decree-

holder shall establish his right to participate, is that he should bring forward a decree which he has obtained against the same judgment-debtor. Thereupon it becomes the duty of the Court by which the assets are held, to allow that decree-holder to participate in the distribution equally with the decree-holder who obtained the decree against the judgment-debtor upon which the execution proceedings were instituted. It has been argued by Mr. Das that if that is the position, a door is opened to a vast amount of fraudulent claims being put forward based on decrees obtained against the judgment-debtor by his benamidars, or friends, or other persons who have been found willing to lend themselves to a device for defrauding the bona fide judgment-creditor. It was upon the footing of some such argument or rather some such consideration, that the decision in the case in 11 Cal 42 (1), was given by Sir Richard Garth who was then the Chief Justice of this Court. That decision was given in 1884, at a time when the Code of Civil Procedure, 1882 was in force, and the matter fell to be decided under S. 295 of that Code. We find in the judgment of Sir Richard Garth this passage :

" We think that the words 'decree-holders' or 'persons holding decrees for money against the same judgment-debtor' in S. 295 must mean bona fide decree-holders against the judgment-debtor; and if in point of fact the decree which the present applicant holds is a sham decree, we think that the Court has a right to inquire into the question, and to exclude him from the distribution of assets. If this were not so, it is obvious that the section would give rise to a great deal of fraud, because any man, who is in difficulties, and likely to have executions issued against him by bona fide creditors, might always have a number of sham decrees in readiness against himself, to defeat the claim of any bona-fide creditor who might put in an execution."

In my opinion with all possible respect to the learned Chief Justice, there was no justification at all for inserting the qualification "bona fide" in front of the word 'decree' or 'decree-holder.' It is to be observed, as Sir Richard Garth himself mentioned, that the Court had not the advantage of hearing both sides in that case; in other words the matter was not fully argued before Sir Richard Garth and Beverly J. It would therefore perhaps not be wrong to come to the conclusion that the judgment was given without due consideration of the precise nature of the then existing section. Unfortunately the judgment of Sir Richard Garth in 11 Cal 42 (1) has been taken as the foundation for a number of subsequent decisions in this Court all of them adopting, as far as one can see, the same point of view as that which influenced Sir Richard Garth. The next case in chronological order is one of Bombay, 13 Bom 154 (2). That was a decision of Sir Charles Sargent, the Chief Justice and Nanabhai Haridas, J. The head note of the case runs thus:

" In distributing the proceeds of execution under S. 295, Civil P. C. (Act 14 of 1882), the Court has power to inquire into the bonafides of the several decree-holders that apply for rateable distribution, if the same has been called in question, and to decide it in the same manner as all other questions that arise in execution. The party aggrieved by such a decision is entitled, under the last clause of the section, to bring a regular suit to compel the successful judgment creditor in execution to refund."

Sir Charles Sargent in delivering judgment said :

" The question referred to us is not without difficulty, but we are disposed to adopt the ruling of the Calcutta High Court in In re Sunder Das."

So even at that early stage doubt was cast upon the correctness of the decision of Sir Richard Garth, and in the year 1897 doubt was again expressed by Sir Francis Maclean when, sitting with Banerjee, J., he delivered judgment in 1 C W N 633 (3). Referring to the case 11 Cal 42 (1) and to that of 13 Bom 154 (2) Sir Francis said :

" We are invited to say that these cases are not law. If they be law, there is an end of the present situation. I must say for myself, that I entertain some doubt as to the soundness of these decisions."

In the year 1901 the matter was raised at any rate indirectly in a case before the Judicial Committee of the Privy Council 23 All 313 (4) and the importance of that case is this: that the judgment of their Lordships of the Judicial Committee which was given by Lord Robertson makes it clear that when a Court concerns itself with the distribution of assets under the provisions of S. 295 (as the relevant section then was), the Judge is acting in an administrative rather than in a judicial capacity. Lord

1. In re Sunder Das, (1885) 11 Cal 42.
2. Chhogan Lal v. Fazar Ali, (1889) 13 Bom 154.
3. Raghu Nath v. Chatraput Singh, (1897) 1 C W N 633.
4. Shankar Sarup v. Mejo Mal, (1901) 23 All 313 =28 I A 203=8 Sar 72 (P C).

Robertson made it clear as appears from the observations at p. 323 of the report that an order for distribution was a step in an execution proceeding. On the previous page His Lordship is reputed in saying :

"The scheme of S. 295 is rather to enable the Judge as a matter of administration to distribute the price according to what seems at the time to be the rights of parties without this distribution importing a conclusive adjudication on those rights, which may be subsequently readjusted by a suit such as the present."

If one takes the view that in distributing the assets under the provisions of S. 295 of the previous Code or rather S. 73 of the present Code, the Court is acting in an administrative capacity, it is very difficult to understand how it can be contended that there can be any proper machinery for holding any kind of inquiry into the bona fides of a decree which is put forward as the basis of claim.

Some 11 years after the decision of the Judicial Committee of the Privy Council to which I have just referred there came a case which is the first of the two cases which are responsible for the present proceedings before us. In the year 1912 the point which we are now considering, came before a Bench consisting of Mookerjee, J., (that is to say, Sir Asutosh Mookerjee) and Beachcroft J., in 16 I C 795 (5). By that time of course the present Code of Civil Procedure had been in operation for some years, and therefore the matter fell within the provisions of S. 73. The head note of the case says :

"under S. 73, Civil P. C. (1908), it is competent to the Court to investigate whether any of the decree-holders who claim rateable distribution is a benamidar for the judgment-debtor or not."

Mookerjee, J., in course of his judgment considered the matter and effect of sub-S. (1), S. 73. He said :

"On behalf of the opposite party, it has been argued that it is incumbent on the Court to ensure that the process of the Court is not abused, and that the Court must for that purpose, ascertain whether the decree on the basis whereof rateable distribution is claimed is a real decree."

It appears therefore that the same kind of argument was put forward before Mookerjee, J., and Beachcroft, J., as had been effective before Sir Richard Garth many years before, and we have had the same kind of argument put before us to-day. It is remarkable circumstance that Mookerjee, J., himself said :

"The question of the true construction of this section, that is S. 73, is not free from difficulty: but in view of the decision of this Court in 11 Cal 42 (1) which was followed in 13 Bom 154 (2), we must overrule the contention of the petitioner."

The petitioner had contended that the executing Court had no right to inquire into the validity of a decree. Mookerjee, J., really added little or nothing to the decision or to the reasons for the decision given by Sir Richard Garth, except in so far as appears from the concluding passage of his judgment where he said :

"We must bear in mind however that since the date of the decision in 11 Cal 42 (1) and 13 Bom 154 (2) the Code of Civil Procedure has been revised and re-enacted ; if the legislature had been of the opinion that the view taken by this Court and by the Bombay High Court was erroneous and did not represent the true intention of the framers of the Code, the language of the section might have been suitably altered ; but although we find that the provisions of S 295 have been reproduced with variations in S. 73, the phraseology has not been so modified as to justify an inference that the decision in 11 Cal 42 (1) is no longer good law. We therefore accept the view adopted by Sir Richard Garth and Sir Charles Sargent."

With all possible respect to Mookerjee, J., that seems to me an entirely fallacious argument, because the provisions of S 295 of the Act of 1882 and those of S. 73 of the present Code are entirely different, from the provisions of S. 272 of the Code of 1859. Under the latter section some sort of machinery was provided for the kind of inquiry which is now sought in the present proceedings. What is still more important is that under the provisions of S. 295 of the Code of 1859 there was no provision for the institution of the suit such as is now contained in sub-S (2), S. 73. That sub-section provides that :

"Where all or any of the assets liable to be rateably distributed under this section are paid to a person not entitled to receive the same, any person so entitled may sue such person to compel him to refund the assets."

That provision would seem to indicate that the intention of the legislature both under the Code of 1882 and under the present Code was to provide that when essential conditions for rateable distribution were fulfilled there should be rateable distribution, without any inquiry at that stage into the validity of any decree, and a right was given to any party aggrieved subsequently to

5. Puran Chand Baid v. Surendra Narain Singh, (1912) 16 I C 795.

bring a regular suit in order to secure his full share of the assets. If any part of the assets was distributed to a person who was not lawfully entitled to participate then it was, under the previous Code and is under the present Code, open to the judgment-creditor who is aggrieved by that distribution to bring a suit claiming a refund. It seems to me that Mookerjee, J., in 16 I C 795 (5) did not give sufficient weight to the fact that there was the distribution to which I have just referred between the provisions of the Code in 1859 and those of the two subsequent Codes. 16 IC 795 (5) was decided in the year 1912, and in the following year the matter again came before the same Bench in 22 I C 407 (6) and it is not surprising that Mookerjee and Beachcroft, JJ., then adhered to the opinion which they had expressed in the case which had been before them in the previous year, and so once more they said that an execution Court has jurisdiction under S. 73 of the Code, to hold a summary inquiry as to the fraudulent character of a decree obtained by one of the decree-holders claiming rateable distribution.

Now it is those two judgments of Mookerjee, J., which have given rise to all the difficulties in the present proceedings, because when the matter was before the execution Court the learned Munsif seems to have thought that those two decisions of this High Court were not correct, and he took the view that an execution Court ought not to go into the question of the validity of a decree put before it for the purpose of claiming a share in the distribution of assets. The learned Munsif who had to deal with the matter apparently took that view, because he was aware of the fact that other High Courts have consistently adopted a view directly contrary to the view expressed by this Court.

We find that only three or four years after the decision given by Mookerjee and Beachroft, JJ., the Madras High Court came to the conclusion that an inquiry under S. 73, Civil P. C., is of a non-judicial character and a Court charged with the distribution of assets under that section has no power to inquire into the validity or the bona fides of a decree on the strength of which rateable distribution is claimed, and that the only conditions to be satisfied under S. 73 are that there must have been an application before the assets are realized, and that the decree should not have been satisfied. That was a decision of Ayling and Seshagiri Ayyar, JJ., in 1918 Mad. 825 (7). In the judgment delivered by Seshagiri Ayyar, J., we find a very illuminating passage at p. 843 (of 40 Mad.) The learned Judge referring to the case of 23 All. 313 (4), that is to say, the case decided by the Judicial Committee of the Privy Council says :

"The question before their Lordships related to limitation. It was argued that a suit brought to contest the validity of payments made to one of the decree-holders should have been instituted within a year of the decision under Art. 13, Limitation Act. Their Lordships pointed out that in making a rateable distribution under S. 295, Civil P. C 1882, the officer was acting departmentally and not as a Court, and that consequently the decision of such an officer was not one which should have been set aside within a year. A comparison of the provisions of the Code of Civil Procedure relating to rateable distribution and to claim proceedings, fully bears out this view. O. 21, which relates to execution, makes provisions in Rr. 58 to 63 for investigating the claims of third parties. There are similar provisions beginning with R. 97 where there is resistance to delivery of possession to the decree-holder. An inquiry is provided for in these rules, and the unsuccessful party is directed to establish his right in a Court of law, failing which it is declared that the orders passed under the rules shall be final."

Then in the final part of the judgment their Lordships said :

"No such provision is to be found with reference to S 73. Cl. (2) of that section says that a wrongful distribution may be questioned in a regular suit. No procedure is prescribed for ascertaining the legality or otherwise of the decree under which rateable distribution is sought. The absence of such a provision indicates that the inquiry under S. 73 is non-judicial. It follows from this that an officer distributing the assets can have no power to inquire into the bona fides or otherwise of a decree brought to his notice. S. 73 (c), Cl. (4), does not contemplate any such inquiry."

Then the learned Judge emphasized again what are the fundamental conditions for obtaining a share in the distribution. He said :

"The only conditions to be satisfied are : there must have been an application before the assets are realized and the decree should not have been satisfied. Both these are matters of record which do not necessitate any lengthy

6. Peary Lal Das v. Peary Lal Dawn, (1913) 22 I C 407.

7. Saravana Pillai v. Arunchalam Chettiar, 1918 Mad 825=38 I C 117=40 Mad 341.

investigation. We are therefore, on the construction of the provisions relating to the rateable distribution, of opinion that it is not competent to the District Munsif to inquire into the validity of a decree on the strength of which rateable distribution is claimed."

Then he proceeds to examine the earlier decisions which I have mentioned, and to show why he differs from them. That was a decision of the Madras High Court. There is also a very important and significant decision given by a Full Bench of the Bombay High Court in 1922 Bom, 31 (8). The decision of the Court was given by Sir Norman Macleod, the then Chief Justice, and at p. 639 we find a passage where the learned Chief Justice after saying that the attention of the Court was drawn to S. 272 in the Code of 1859, proceeded thus :

"Therefore under that Code the Court which was distributing the assets amongst the decree-holders had the power to deal with the question whetner any of the decrees passed by itself had been obtained by fraud or other improper means. But this power was not given by S. 295, Act 14 of 1882, nor by S. 73 of the present Code. S. 73 directs that the assets, after deducting the costs of realization, shall be rateably distributed among all such persons as shall have made applications to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor. On general principles, the Court, which would be merely a distributing agency would not have any power to deal with the question whether any of the decrees had been obtained by fraud or other improper means just as in an ordinary case of execution the Court which executes the decree cannot go behind the decree."

With great respect I adopt and entirely agree with what is said in that passage of the judgment of Sir Norman Macleod. In my opinion it concisely and correctly gives the proper view of the point which is now under consideration. The passage indicates that the true view of the law is that the execution Court is only concerned with those matters which I have set out as being the conditions for participation, and, so long as a decree is put forward by the holder of that decree, and the holder of the decree satisfies the Court that the money due under that decree has not been paid, then that decree-holder is entitled to come in and claim a proportionate share in the assets of the judgment-debtor. If any part of those assets is paid out to a decree-holder who has obtained a decree by fraud or collusion or by any other improper means then a remedy is open to the judgment-creditor who has suffered from those circumstances, as provided for in sub-S. (2), S. 73 of the Act of 1908. To my mind the dominating factor with regard to this point is this: that the Court concerned with the distribution of the assets is doing something in connexion with execution proceedings. The distribution of assets is only one of the acts in the execution proceedings, and the Court is functioning in an administrative and not in a judicial capacity, and no procedure is provided under the provisions of S. 73 of the Act of 1908, and no machinery exists for the holding of an enquiry of the kind involved in the ascertainment as to whether or not the decree is not a bonafide or proper decree.

It would not only be inconvenient but indeed impossible for a Court concerning itself with execution matters to decide in a summary procedure, whether or not a decree is a "bona fide," to use the expression of Mookerjee, J., or a "real" decree as said by the other learned Judge in the same case. The last case to which I would refer in order to complete the chronological survey of the authorities is 1926 Pat. 497 (9), in which Das and Foster, JJ., relying on 23 All. 313 (4), decided in definite terms that:

"an executing Court making a rateable distribution under S. 73, Civil P. C., 1908, has no power to make enquiries into the bona fides of the decrees of the rival claimants."

In my judgment the decisions in the Madras, Bombay and Patna High Courts represent the correct view of the law. It follows therefore that we must say that the cases of 16 I. C. 795 (5) and 22 I. C. 407 (6) were not correctly decided. We are unanimously of opinion that the Rule No. 1606 of 1933 which was issued on 15th December 1933 must be discharged. Each party will bear its own costs in the Rule as well as in this reference.

Lort-Williams, J. — S. 272, Act 8 of 1859 provided that:

"If it shall appear to the Court, upon the application of a decree-holder, that any other decree under which property has been attached was obtained by fraud or other improper means, the Court may order that the applicant shall be satisfied out of the proceeds of the property

8. Dattatraya Govindseth v. Purshottam Narayanseth, 1922 Bom 31=65 I C 600 = 46 Bom 635.

9. Uma Habiba v. Mt. Rasoolan, 1926 Pat 497=98 I C 759=5 Pat 445.

attached so far as the same may suffice for the purpose if such other decree be a decree of that Court, or, if it be a decree of another Court, may stay the proceedings to enable the applicant to obtain a similar order from the Court by which the decree was made."

There was no such provision in S. 295, Act 14 of 1882, nor is there any in S..73 of the present Code of Civil Procedure. But S. 295 provided that

"If all or any of such essets be paid to a person not entitled to receive the same, any person so entitled may sue such person, to compel him to refund the assets,"

and similar provision is made in S. 73 (2). Nevertheless, in 11 Cal. 42 (1), Sir Richard Garth, C. J., decided that

"a Court is bound, in cases falling within this section, to satisfy itself whether the claimants are bona fide decree-holders within the meaning of the section, and where it is unable to satisfy itself as to the bona fides of the claim, the Court should exclude such claimant from the distribution of assets."

This is the source and foundation of other decisions in the Calcutta High Court, especially in 16 I C 795 (5) and 22 I C 407 (6) and has given rise to the conflict between this and other High Courts on this point. Sir Richard Garth, at p. 44 of the report in the case of In re. Sunder Das said as follows:

"He contends that, so long as his client holds a decree against the judgment-debtor which is unsatisfied (let that decree be ever so fraudulent) still the Court is bound to give effect to it, and to allow the decree-holder to share in the assets. We cannot adopt that view. We think that the words "decree-holders' or persons holding decrees for money against the same judgment-debtor in S. 295 must mean bona fide decree-holders against the judgment-debtor; and if in point of fact the decree which the present applicant holds is a sham decree, we think that the Court has a right to enquire into the question, and to exclude him from the distribution of assets."

I do not understand the expression a "sham decree." Clearly, the learned Chief Justice did not mean a decree made by a sham Judge or the decree of a sham Court. What he meant was a decree made in respect of a false or fraudulent claim. But that would not make the decree a sham decree. Such a decree would be a good decree and valid, unless and until it was set aside by some competent Court, and as a result of a proper trial. A decree of a competent Court ought not to be set aside as a result merely of some kind of enquiry especially when charges of fraud are involved. S. 73 (2) provides the appropriate remedy in such circumstances. Sir Richard Garth, and other Judges, and Mr. Narendra Kumar Dass, who has ably argued this case, have shown that the remedy given may often turn out to be of little or no value. But that is a result, and probably an inevitable result, of any attempt to make provision for rateable distribution in execution proceedings. Under Ss. 270 and 271 of the Code of 1859, the creditor who first attached the property had statutory priority, and, in my opinion, that provision was preferable to the provision for rateable distribution made for the first time in the Code of 1877 and included in the present Code. The function of the Judge under S. 73 is administrative and not judicial. This was decided, with respect to the corresponding S. 295, by their Lordships of the Judicial Committee of the Privy Council in 23 All. 313 (4), in which Lord Robertson said at p. 322 of the report.

"The scheme of S. 295 is rather to enable the Judge as matter of administration to distribute the price according to what seem at the time to be the rights of parties without this distribution importing a conclusive adjudication on those rights, which may be subsequently readjusted by a suit such as the present."

Therefore, in my opinion, the decisions in 1918 Mad. 825 (7) and 1922 Bom. 31 (8), are correct, and a Court charged with distribution of assets under S. 73, Civil P. C. has no power to enquire into the validity or the bona fides of a decree on the strength of which rateable distribution is claimed. It follows that in my opinion, the cases of 16 I C 795 (5) and 22 I C 407 (6), on this point, were wrongly decided, as also was the case of 11 Cal. 42 (1).

Jack, J.—I would only add that S. 44 Evidence Act, to which a reference has been made in supporting the rule obviously no application to proceedings under S. 73, Civil P. C. These proceedings are, as held by their Lordships of the Privy Council in 23 All. 313 (4), a step in aid of execution. It is only decrees under Ss. 40, 41 and 42, Evidence Act which are referred to in S. 44, Evidence Act and such decrees have no application in execution proceedings. It is well recognised that the executing Court is not entitled to question the validity of the decree.

The strongest argument which has been advanced in support of the Rule is that it is the duty of the Court to go

into the question of fraud or collusion in order to prevent abuse of the process of the Court, but, if that were the case, it must be held that in all execution proceedings the Court would be equally entitled to inquire into such questions. That is obviously not so. The remedy which is open to the parties is laid down by the section itself, and the fact that no procedure is provided in the section for such an inquiry shows that it was never intended that such questions should be inquired into. So long as there is an unsatisfied decree capable of execution and application for rateable distribution has duly been made, the applicant is entitled to a share under S. 73, Civil P. C.

M. C. Ghose, J.—Upon a full consideration of the matter, I am of opinion that the Court making a rateable distribution under S. 73, Civil P. C., is not competent to decide whether a decree is bona fide. To hold otherwise would be to introduce complications in the administration of law. A decree may be challenged by an appeal and a second appeal. To allow an executing Court to set aside a decree on the ground of fraud or collusion would be to establish that Court as a revising Court of decrees and to delay the finality of litigation. The Court making a rateable distribution is not acting in its judicial capacity. The executing Court cannot go behind the decree. It is complained that the petitioner may be defrauded by false decrees obtained by dishonest people. The answer is that S. 73 (2) provides the remedy. Whenever the petitioner finds that a fraudulent decree is put forward for the purpose of rateable distribution, it is open to him to challenge the decree by instituting a suit in the proper Court for a declaration and he may obtain an injunction from the Court, staying the distribution until the matter is decided.

Nasim Ali, J. – I agree. I would like to add a few words with reference to the two cases on which the learned Advocate for the petitioners placed much reliance. In 11 Cal 42 (1) the main reason given by the learned Chief Justice is that if before the distribution of assets no inquiry in the bonafide of the decree be held, the money may be paid to a creditor who may be a pauper from whom it would be very difficult to realize the money afterwards. But if a certain creditor finds that a person is about to participate in the sale proceeds on the basis of a fraudulent decree, his proper remedy is to institute at once a suit and to get an injunction from the Court restraining him from taking any money from the Court till the disposal of the suit. In 16 I C 795 (5), Mookerjee, J., followed the decision in 11 Cal 42 (1). But it appears from the judgment that the learned Judge also gave an additional reason in support of the view which was taken by the Chief Justice in the case reported in 11 Cal 42 (1) viz. :

"Since the date of the decisions in 11 Cal 42 (1) and 13 Bom 154 (2) the Code of Civil Procedure has been revised and re-enacted; if the Legislature had been of the opinion that the view taken by this Court and by the Bombay High Court was erroneous and did not represent the true intention of the framers of the Code, the language of the section might have been suitably altered; but although we find that the provisions of S. 295 have been reproduced with variations in S. 73, the phraseology has not been so modified as to justify an inference that the decision in 11 Cal 42 (1) is no longer good law."

But it would appear that in the year 1901 the Judicial Committee in 23 All 313 (4) definitely pointed out that the act of the Court under S. 295 of the Code of 1882 was a ministerial Act. Therefore when the Legislature amended the section in the Code in 1908, no change was considered to be necessary. The Legislature in 1908 accepted the view that the distribution of assets by the Court under S. 73 is a ministerial Act, and in case of dispute the rights of the parties can be subsequently adjudicated by a regular suit.

K.S. *Reference answered.*

A. I. R. 1935 Calcutta 296

MUKERJI, AG. C. J. AND S. K. GHOSE, J.

Hem Chandra Das Chaudhury and *others*—Appellants.

v.

Secy. of State and *others*—Defendants—Respondents.

Appeal No. 1707 of 1932, Decided on 24th August 1934, from appellate decree of Addl. Dist. Judge, Noakhali, D/- 1st April 1932.

Bengal Cess Act (9 of 1880), S. 4—Kabuliyat—Ijardar entitled to exclude anybody else from dealing with land in manner in which he himself is entitled to do—Held he

was in use and occupation and what he pays under kabuliyat is rent

Where under the terms of the kabuliyats the ijardars are entitled to exclude anybody else from dealing with the lands in the particular manner in which he himself is entitled to do under his kabuliyat, in that sense, a limited sense though it be, the ijardar is in use and occupation, being allowed by his kabuliyat to let in or exclude anybody he liked for sale of the particular commodities to which his kabuliyat referred, collecting such tolls as his kabulivat permitted and using perhaps such portion of the land covered by the boundaries on which those particular commodities used to be sold. What the ijardar has to pay under his kabuliyat is rent within the meaning of S. 4 of the Act; 1929 *Cal* 197, *Applied*. [P 298 C 1, 2]

Atul Chandra Gupta and *Nagendra Nath Bose*—for Appellants.

Sarat Chandra Basak, *Rupendra Kumar Mitter* and *Bijan Kumar Mukherji*—for Respondents.

Judgment.—This appeal asises out of a suit which was instituted by the plaintiffs for a declaration that the assessment of cess by the Cess Revaluation Officer on the income from the stalls of a certain market or hat of which the plaintiffs are tenure-holders was illegal and ultra vires, and also for refund of the amount of cess which they had paid under protest. The Courts below have dismissed the suit.

The plaintiffs are tenure-holders in respect of the lands on which the market or hat holds its sittings. The exact particulars are not available, but, as far as may be gathered, there are some stalls and also some open space on which the dealers come and sit and do their work. The hat meets two days in the week, The plaintiffs have taken kabuliyats from several ijardars who under the terms thereof collect tolls from the stall keepers and dealers of various descriptions and out of the sums so collected pay certain sums as jamas per year to the plaintiffs. The jamas just mentioned have have been treated as "rent" and the annual value being found on the basis thereof the reassessment has been made, We are told that prior to the reassessment cesses had to be paid on the annual value calculated on the basis of the rents of such tenants as were actually on the land and also on the average of such raiyati rents as might be held to be realisable from the portion of the land which was untenanted. The market or hat was also in existence at the time.

Reading S. 4, Cess Act (Beng. Act 9 of 1880) it is found that the annual value means the total rent which is payable, or if no rent is actually payable, would on a reasonable assessment be payable during the year by cultivating raiyats or by other persons in actual use and occupation, There are several difficulties in interpreting this definition, but they need not concern us here because the point in controversy is a limited one. It has been formulated by the Subordinate Judge in these words:

"Whether the ijardars in the present case are in use and occupation of the lands and whether the amounts paid by them can be treated as rent within the meaning of S. 4, Cess Act."

It is not urged on either side that this enunciation of the proposition, which is for our consideration, is not correct In para. 4 of the plaint the plaintiffs have averred that the lands are non-agricultural and non-leasable and are in the khas possession of the plaintiffs, that in the hat which is held every thursday and Sunday various commodities are sold, that there is no permanently allotted space for the sale of the same, that temperary stalls are made and dealers do their business, that tolls are collected by the ijardars who in accordance with their agreements pay some moneys to the plaintiffs, and that under the agreements the profits and losses belong to the ijardars. Under each of the kabuliyats which are all for a period of a year, the right to collect tolls for some particular commodities only is granted, and it is stipulated that besides those commodities, tolls on no others would be realisable by the grantee, and a lump sum being fixed, it is made payable in five kists. The kabuliyat is described as of a temporary ijardari settlement. The lands concerned in all the kabuliyats are the same, the boundaries in each kabuliyat covering the entire land on which the market or hat stands.

To the above should be added certain facts which have been found by the Court of appeal below. In the settlement the lands are recorded as being in the khas possession of the plaintiffs and no interest as of the ijardars has been recorded; there are no fixed plots or places for the several commodities which form the subject-matter of any particular kabuliyat. though certain lands are set apart for the sale of each kind of

article; there are different mahals in the hat corresponding to the different commodities, specified commodities being sold in defined places set apart for the purpose and any particular commodity being sold in a particular place .for a long period irrespective of the persons who might be ijardars or stall-keepers. On the pleadings and facts found as above, the question that has to be determined is whether the ijardars can be said to be in use and occupation of the lands and whether the amounts payable by them under the kabuliyats can be treated as rents within the meaning of S. 4 of the Act. The question will have to be decided not merely by reference to the words and expressions used in the kabuliyats but on an appreciation of a right, if any, created thereby.

The authority strongly relied on behalf of the plaintiffs, as appellants, is the Full Bench decision of this Court in 35 Cal. 82 (1). On a careful perusal of the decisions in that case it seems to us that there are certain points of difference between that case and the present one. These points are notably two: First that in that case the assessment was made on the basis of the profits which the ijardar, in whom the right to hold a mela was vested, made from the stall-keepers, whereas in the present case the assessment has been made on the basis of the amount which the ijardars pay to the plaintiffs; and second that in that case the lands were already in the occupation of occupancy-raiyats and so the ijardars, who under a kabuliyat obtained the right to hold the mela for a certain time were not, in fact in use and occupation of the lands and could not in fact be put in use and occupation thereof by the landlords, whereas in the present case that element is entirely absent. It was held in that case what the profits which the ijardars realized from the stall-keepers were not profits paid by the tenant to the landlord, nor profits paid for use and occupation. In the present case under the terms of the kabuliats the ijardars are entitled to exclude anybody else from dealing with the lands in the particular manner in which he himself is entitled to do under his kabuliyat. In that sense a limited sense though it be, the ijardar was in use and occupation being allowed by his kabuliyat to let in or exclude anybody he liked for sale of the particular commodities to which his kabuliyat referred collecting such tolls as his kabuliyat permitted and using perhaps such portion of the land covered by the boundaries on which those particular commodities used to be sold. In our judgment therefore what the ijardar has to pay under his krbuliyat is "rent" within the meaning of S. 4 of the Act.

We think the Courts below were right in applying to this case the view taken in 1929 Cal. 197 (2), the effect of the kabuliyat in that case being what we consider to be the effect of the kabuliyats in the present case. The appeal is accordingly dismissed with costs.

K.S. *Appeal dismissed.*

1. Secy. of State v. Karuna Kanta Chowdhury, (1908) 35 Cal 82=6 Cr L J 342.

2. Secy. of State v. Sati Prosad Garga, 1929 Cal 197=115 I C 185=55 Cal 1328.

A. I. R. 1935 Calcutta 298

NASIM ALI, J.

John Earnest Edward and *another*—Defendants—Petitioner.

v.

Rai Jogendra Chandra Ghose Bahadur—Plaintiff—Opposite Party.

Civil Rules Nos. 1125 and 1126 of 1934, Decided on 5th February 1935, from decree of Small Cause Court Judge, Sealdah, D/- 1st May 1934.

(a) Corporation—It should not exceed or abuse its powers—It must act in good faith and reasonably.

A public body invested with statutory powers such as conferred upon the corporation must take care not to exceed or abuse its powers. It must keep within the limits of the authority committed to it. It must act in good faith. And it must act reasonably : *Westminister Corporation* v. *L. & N. Ry.* (1905), *A C* 426, *Foll.* [P 300 C 1]

(b) Electricity Act (1910), S. 24—Licensee cannot discontinue supply to premises whose charge has been paid—Clause in agreement that he can do so if default is committed by consumer for any other premises is inconsistent with Act.

Section 24 of the Act authorises the licensee to cut off supply only of that premises, the charge of which is in arrear and it does not authorize the licensee to discontinue supply to premises the charge of which has been paid off, even though both premises are owned by the same person. And a clause in an agreement by which the licensee is allowed to do so on default of consumer to pay for any of his premises is inconsistent with the Act. [P 302 C 1]

(c) Interpretation of Statutes—Fiscal enactment—Benefit of doubt should be given

to those who might be prejudiced by exercise of powers—Electricity Act.

The benefit of doubt is to be given to those who might be prejudiced by the exercise of powers which the enactment grants and against those who claim to exercise them. [P 301 C 1]

(d) Electricity Act (1910), S. 24—Power to discontinue is power given in addition to right to realize arrears—Opportunity to pay off arrears should be given before cutting off connexion.

The power to discontinue supply to a premises is evidently a power given in addition to the rights to realize the arrears by suit. Under the circumstances the consumer should be given an opportunity by licensee to pay off the arrears immediately before the connexion is cut off. [P 302 C 2]

(e) Electrictity Act (1910), S. 24—Supply should be discontinued only as last resort after all formalities have been complied with.

The supply should be discontinued as a last resort after all the formalities laid down in the Act have been complied with. [P 304 C 1]

S. M. Bose, N. Barwell, Satindra Nath Mukherjee and *Siddeswar Chakraburtty* —for Petitioners.

S. C. Basak, S. C. Talukdar, Anilendra Nath Ray Chaudhury and *Rajendra Chandra Guha*—for Opposite Party.

Order.—These two rules were issued at the instance of the defendants upon the plaintiff opposite party in a suit instituted in the Court of the Small Causes, Sealdah for recovery of damages. The case of the plaintiff opposite party briefly stated is as follows : Plaintiff is the owner of Premises 25 and 25 A Harish Mukerji Road Bhowanipur P. S. on 7th June 1933 and 8th June 1933 defendant 2 i. e., Calcutta Electric Supply Corporation Ltd. served notices upon him demanding payment of the charge for supplying electric current and intimating that on failure thereof the supply would be cut off. The amounts covered by the said notices were paid in time by the plaintiff. No notice of discontinuing the current of the aforeraid premises on account of their arrears was ever served on him. He was never informed by defendant 2 that the electric connexion of the said premises would be cut off, for non-payment of the charges for supplying energy to his other premises. Though nothing was due to defendant 2 on account of the said premises, defendant 1, an Inspector of defendant 2, entered the said premises on 23rd June 1933 on the false pretext of examining the meters of the said premises for changing it without disclosing his real purpose and cut off the supply without knowledge of the plaintiff. There are 10 shops in the one storied out-house appertaining to the said premises, the shop keeper of which pay for the current to the plaintiff. On account of this wrongful cutting off of the supply the tenants of the shops lost their customers and plaintiff also sustained loss and damage. On these allegations plaintiff claimed Rs. 400 as damages.

The defences of the defendants in substance are; (1) that the plaintiff did not pay certain bills for supplying energy to premises 27-A, 27-B, 27-C, 27-D, Harish Mukherji Road; (2) that on 1st June 1933 plaintiff was given express notice that unless all the sums due from him were paid defendant 2 would disconnect the meters at Nos. 25 and 25-A Harish Mukerji Road; (3) that statutory notices were given to the plaintiff; (4) that on 23rd June 1933 Rs. 380-5-6 was due from the plaintiff to defendant 2; (5) that by virtue of the provision of Cls. 6 and 10 of the agreement executed by the plaintiff on 17th June 1922, 29th December 1924, 14th January 1925, 28th January 1925, 6th February 1925, and 12th January 1932 and in pursuance of the power conferred by S. 20, sub-S. 1 and S. 24, Electricity Act, 1910, defendant 2 by its servant, defendant, entered upon the plaintiff's premises Nos. 25, 25-A and by its said servant removed and took away some fuses connecting defendant's meters in the said premises installed with the service and supply lines, (6) that on the said occasion and prior to the removal of the said fuses defendant 1 verbally intimated to the plaintiff his intention and purpose to disconnect the said meters and that he had authority and order of defendant 2 to cut off the supply of electrical energy from the said premises unless the plaintiff then and there paid to him as representing defendant 2 the whole of the money then due and owing in respect of energy supplied to the premises 27-A, 27-B, 27-C and 27-D, (7) that the written notices served upon the plaintiff prior to the cutting off the supply constitute "information" required by S. 20, sub-S. 1, Electricity Act, 1910.

The opposite party gave evidence in support of his allegation in the plaint. Defendant 1 however did not come to the witness box. The learned Small

Cause Court Judge held: (a) that the charges for premises 25 and 25-A were paid after service of notice; (b) that the charges for 27-A, B, C and D remained due; (c) that under Cl. (6) of the agreement between parties defendant 2 had right to cut off the supply from premises Nos. 25 and 25-A; (d) that defendant 1 who cut off the supply did not disclose his purpose to the plaintiff that he wanted to enter the premises for cutting off the supply; (e) that defendant 1 cut off supply stealthily without the knowledge of the plaintiff and bolted away; (f) that if the plaintiff had known that defendant 1 had come to cut off the supply he would have paid off the dues then and there, although there was controversy how far the bills for the premises No. 27 which was sold away by the plaintiff are recoverable from him; (g) that the plaintiff was entitled to get damages at the rate of Rs. 20 per day. The suit has accordingly been decreed in part.

The present rules were thereupon obtained by defendants 1 and 2 under S. 25 Provincial Small Causes Court Act. The only point urged in support of the rule is that on the facts found by the learned Small Cause Judge plaintiff's suit should be dismissed. Now:

"It is well settled that a public body invested with statutory powers such as are conferred upon the corporation must take care not to exceed or abuse its powers. It must keep within the limits of the authority committed to it. It must act in good faith. And it must act reasonably, per Lord Macnaghten in (1905) A C 426 (1)."

Under S. 24, Electricity Act 1910, the licensee after giving seven days' notice in writing to a person who neglects to pay any charge in respect of the supply of energy to him, without any prejudice to his right to recover such charge by suit can cut off that supply and for that purpose can cut or disconnect any electric supply line and other works being the property of the licensee through which energy may be supplied and may discontinue the supply until such charge is paid. It is therefore clear that in addition to the right to realize the charge by suit the legislature has given power to the licensee to discontinue the supply of energy to a consumer who neglects to pay the charge. The section does not clearly lay down that the licensee can cut off the supply of the premises for which the charge has been paid for the consumer's neglect to pay the charges supplied to his other premises. The corresponding provision in the English Act which is to be found in S. 18, Electric Lighting Act 1909, (Edn. 9. 7 C. 34) is however clear on the point. It is in these terms:

"The undertakers may refuse to supply electrical energy to any person whose payments for the supply of electrical energy are for the time being in arrear (not being the subject of a bona fide dispute) whether any such payments be due to the undertakers in respect of a supply to the premises in respect of which such supply is demanded or in respect of other premises."

Dr Basak appearing on behalf of the plaintiff-opposite party contends that S. 24, Electricity Act, authorizes the licensee to cut off supply only of that premises the charge of which is in arrear and that it does not authorize the licensee to discontinue supply to premises the charge of which has been paid off. Mr. Bose appearing on behalf of the petitioners on the other hand contends that words 'any person' 'any charge for energy' 'in respect of the supply of energy to him' are very wide and authorize the licensee to cut off the supply where the default occurs as well as in other premises owned by the same person within the area of supply. In order to accept Mr. Bose's contention one will have to read into the section some words which are not there. One will have to import into the section words to the effect "the premises in respect of which the charge is due or in respect of other premises" after the words 'cut off the supply. Mr. Bose however contends that the words 'any person' 'to him' rather indicate that the legislature had in mind the same owner and not the same premises. But S. 18 of the English Act also contains the words 'any person' whose payments for the supply of the electrical energy for the time being in arrear.' The English Act definitely allows the licensee to refuse supply to other premises of the consumer whose payments are in arrears. But the Indian Act does not say so. Again if such powers were given by S. 24 it is difficult to understand why a clause embodying this right of the licensee to cut off the supply from premises where there was no default was not mentioned in the agreement executed before 1923: see Ex-

1. Westminister Corporation v. L & N Ry., (1905) A C 426=74 L J Ch 629=3 L G R 1120=54 W R 129=93 L T 143.

A-5 taken from the plaintiff in respect of premises No. 25 on 17th June 1922. Such a clause was introduced for the first time in the agreements the forms of which were sanctioned by the Local Government in 1923 under proviso (a) sub-S. (1), Cl. 4 of the Schedule. Up to the year 1922 the licensee evidently thought that the Indian Act was different from the English Act in this concern. At any rate

"the benefit of doubt is to be given to those who might be prejudiced by the exercise of powers which the enactment grants and against those who claim to exercise them: see Maxwell on Interpretation of Statntes, 7th Edn., p. 258."

It is therefore difficult to say that the right to discontinue supply to premises for which the charge has been paid off is given to the licensee by S. 24. The next point for determination is whether the agreements executed by the plaintiff authorize the defendant 2 to discontinue supply to premises No. 25, 25 A though the charges of those premises were paid off. It may be mentioned at the outset that the notices which were served upon the plaintiff did not mention that the supply would be discontinued on the basis of the agreements. Apparently they purported to be notices under S. 24 of the Act

Under S. 3 (2) (d) (i) the license granted under the Act may prescribe such terms as to the limits within which and the conditions under which the supply of energy is to be compulsory and permissive and generally as to such matter as the Local Government may think fit. The exercise of the power under S. 3 of the Act however is subject to the control of the Governor-General in Council. The Schedule in the Act contains provisions which are to be deemed to be incorporated with and to form part of every license granted under Part II of the Act, save in so far as they are expressly added to or varied or excepted by the license. The license granted to defendant 2 is not before the Court. The provisions of the Schedule are to be taken therefore to be incorporated in the license of defendant 2. By proviso (a), Cl. 6 (i) of the Schedule the licensee is not bound to supply energy to a consumer unless the latter executes a written contract in a form approved by the Local Government. In this case the plaintiff did execute the agreement Ex. A-5 for premises No. 25 on 17th June 1922 in the form which was sanctioned by the Local Government. I have already pointed out that this agreement does not empower defendant 2 to discontinue supply to premises No. 25 for non-payment of the charges of other premises of the plaintiff. Cl. 6 of the subsequent agreements executed by the plaintiff in respect of his other premises however contain a clause enforcing the licensee to discontinue the supply to the plaintiff's premises where there is no default.

Dr. Basak however contends that Cl. 10 of these agreements definitely states that the other clauses in the agreements are subject in all respects to the provisions of the Calcutta Electric License and to the provisions of the Indian Electricity Act of 1910, and that the condition contained in Cl. 6 of these agreements, on which the petitioners rely, being inconsistent with the terms of the license and S. 24 of the Act is not enforceable. Under Proviso (a), Cl. 6 the written contract which is to be executed by the consumer binds him to take a supply of energy for not less than two years to such amount as will produce at current rates charged by the licensee a reasonable return to the licensee. The license therefore authorises the licensee to take such an undertaking from the consumber. Mr. Meares in his "Law Relating to Electrical Energy in India" 4th Edn. p 75 has observed:

"As to the agreement it will generally contain many other matters some of which may not be enforceable in law."

Again at 78 the following passage occurs:

"It has always been customary for electric supply authorities, both in Great Britain and India, to issue so-called 'rules' purporting to bind the consumer, giving in considerable detail the way in which the consumer is to wire his premises and so on. A licensee may demand that the prospective consumer shall enter into an agreement, in a form to be approved by the Local Government, to take a supply for two years and to give security to that effect; but he may mot prescribe any special form of appliance nor may he control or interfere with the use of energy. No doubt as a guide of the non technical consumer these so-called rules had a value. In Great Britain such licensee's rules have never received legal sanction, but the custom has now been legalized in India by the Indian Electricity (Amendment) Act. in S. 21 of the Act, in which the second and third sub-sections were inserted in 1922. The conditions of supply as authorized must not be inconsistent with the Act, the rules or the license; they require the previous sanction of the Local Government

both for their introduction and as to their contents, so that in practice the onus of ensuring that they are unobjectionable will lie on the Electric Inspector."

If any other conditions are to be imposed on the consumer the licensee is bound to take the previous sanction of the Local Government under S. 21 (2). In this case it does not appear that previous sanction of the Local Government for inserting the condition under discussion in Cl. (6) of the agreements was obtained under S. 21 (2) of the Act. Again the conditions must be intra vires. If I am right in my view that S. 24 does not authorize the licensee to discontinue supply to the premises where there is no default, Cl. (6) so far as it gives power to the licensee to discontinue supply to any other premises owned or occupies by the consumer would be inconsistent with the Act. The Regulations of the licensee which received the approval of the Local Government and which were placed before me do not appear to contain the "condition" on which the petitioner rely. I am therefore of opinion that defendant 2 had no right to cut off supply from premises No. 25 and 25-A in respect of which all charges were paid.

Again assuming that defendant 2 had authority to cut off the supply under S. 24 this statutory power should be exercised in good faith and reasonably. In the written statement of the defendants it was definitely stated that defendant 1 when he went to the plaintiffs residential house at Premises No. 25 informed the plaintiff that unless the arrears were paid off to him then and there he would cut off the supply. Plaintiff in his evidence denied this. The defendant 1 did not come to the witness box to support this allegation in the written statement. In the notices Ex. D and E series it was not stated that unless the arrears of 27 A, B, C and D were paid of the supply to his residential house at premises No. 25 would be cut off. Plaintiff in his letter dated 26th May 1933 intimated to defendant 2 that he had sold off his mansion in 27 A, B, C and D to Raha Court of Wards Estate and they were liable for all current bills from that date. Assuming that the purchaser refused to pay, one would expect that defendant 2 would inform the plaintiff that unless the arrears for other premises were paid off immediately the supply to his residential house would be discontinued. The power to discontinue supply to a premises is evidently a power given in addition to the rights to realize the arrears by suit. Under the circumstances defendant 1 should have been given a opportunity to the plaintiff to pay off the arrears immediately before the connexion was cut off. The learned Judge has found that if defendant 1 had asked the plaintiff to pay off these arrears, the plaintiff would have at once paid them off. Defendant 1 instead of taking that course obtained access to the house on a representation which he knew to be not true and did not inform the plaintiff even after entering the house, that he was there to cut off the supply for non-payment of arrears of the other premises. The facts of this case show that the power of cutting off the supply was not exercised reasonably.

Further the plaintiffs case is that the connexion was not cut off in accordance with the provisions of S. 20 of the Act. The contention of Dr. Basak is that before cutting off the supply defendant 1 was bound to inform the plaintiff of his intention to enter the house for the purpose of cutting off the supply, and that if defendant 1 had given him that informatian he would have either paid off the arrear or refused to allow defendant 1 to enter his house. It is argued that if arrears were paid off the connexion could not have been cut off. If however plaintiff refused to allow defendant 1 to enter the house plaintiff would have been entitled to a further notice under S. 20, Cl. (3). The contentions of Mr. Bose on behalf of the petitioners with regard to this matter are however two-fold : (i) That S. 20 (1) applies only when the licensee or his agent wants to enter for removing something cut, whereas in this case, as defendant 1 wanted only to cut off the supply and not to remove anything he was not bound to follow the formalities prescribed by S. 20 (1). (ii) That even if defendant 1 was bound to follow those formalities he was bound simply to inform the plaintiff of his intention to enter and that he was not bound to disclose the purpose of his entry.

I am unable to agree with Mr. Bose in this view of the matter. As regards the first contention it may be pointed out that this is not the defendants case in

the written statement, in which it was definitely stated that some fuses were removed and taken away by defendant 1. As regards the second contention it should be remembered that in the written statement it was definitely stated that defendant 1 informed the plaintiff that he wanted to enter the premises for the purpose of cutting off the supply and that unless the arrears were paid then and there the supply would be immediately cut off. Again under S. 20 (1) the information is to be given to the occupier. The occupier may not be in a particular case the consumer. He may not even know whether the arrears have been paid off. Notice under S. 24 is served on the consumer. If the occupier is not the consumer he may refuse entry and the licensee would then have to give a further notice under Cl. (3) and in the meantime the occupier may make arrangements for paying off the arrears. Again if the licensee or his agent does not disclose the purpose how is the occupier to know whether he has the right to enter because the right of entry into the house is only for the purposes specified in S. 20 (1). Unless the purpose is disclosed it is also very difficult for him to decide whether the time when the licensee or his agent wants to enter the house is reasonable or not. R. 108 of the Statutory rules lays down that all persons entering in pursuance of the Act any building which is used as a human dwelling shall in making such entry have due regard so far as may be compatible with the exigencies of the purpose for which entry is made to the social usages of the occupant of the building entered. Mr. Bose also contended that it was not necessary that the real purpose should be disclosed. It is argued by him that it would be sufficient compliance with the requirements of law if one of the purposes mentioned in the section be disclosed. In other words one purpose for entering the house may be disclosed though a different purpose is really included. This interpretation would however frustrate the object of the legislature. It is true that the properties mentioned in Cls. (a), (b) and (c), S. 20 (1) are the properties belonging to the licensee. But they are in a house in the possession of another man which is his castle. That the licensee or his agent cannot enter the house against the wishes of the occupier is clear from the provisions contained in Cl. (3), S. 20. Under the said clause if the licensee or his agent is not allowed to enter the premises, the licensee is to serve a notice and then he can cut off the supply.

In fact Cl. (3) was introduced into S. 20 by the amending Act of 1922 to meet difficulties of the licensees in obtaining access to houses on their lawful business. The object of the amendment was to enable them to cut off the supply in the last resort. It is true that if a dishonest consumer persists in refusing to allow the licensee or his agent to enter the premises to cut off the supply even after the notice under S. 20 (3) the section does not say how the supply is to be cut off. If possible, the licensee may cut off the supply from outside without entering the house. Perhaps, the object may also be achieved by starting prosecution under S. 47 of the Act. But the provisions contained in the Act certainly contemplate that the supply should be discontinued as a last resort after all the formalities laid down in the Act had been complied with. Regard being have to the formalities laid down I am not in a position to hold that the legislature contemplated that entry into private property could be secured by misrepresentation.

It was also contended by Mr. Bose that notices Ex. E series are notices under S. 20 (3) of the Act. These notices were given on 19th June 1933. But in these notices even the plaintiff was not informed that the connection of premises No. 25 and 25-A would be cut off. Further there was no attempt before the date on which the said notices were given to enter the premises in question as required by S. 20 (1) and consequently there had been no refusal within the meaning of S. 20 (3). Mr. Bose also contended that the written notices given on 19th June 1933 contained the information as required by S. 20 (1). I have already pointed out that those notices do not mention even that the licensee wanted to cut off the supply from premises No. 25. It is also argued by Mr. Bose that if a person has got a right to do something and if he succeeds in doing that thing by employing fraudulent

means he is not liable in tort. It is however not necessary for the purposes of the present case to express my opinion on this point. The legislature has given certain powers to a Corporation to be exercised in a particular manner. Suffice it to say that

"It is not within the province of any tribunal to relax conditions which the legislature thought fit to impose: see (1892) A. C. 498 (2), at pp. 523-524."

The provision about cutting off the supply is in the nature of a penal provision. The object of the legislature is that the supply is to be cut off as a last resort, i. e., after all the steps indicated in the Act for realization of the arrears have failed. This view of the matter was also presented in the written statement of the defendants. When defendant 1 went to cut off the supply, if he had simply informed the plaintiff that he would discontinue the supply unless the arrears were paid, the plaintiff, as the Small Cause Court Judge has observed, would have paid off the arrears; and there would have been no necessity for cutting off the supply. The learned Judge in one part of his judgment has observed:

"the drastic measure adopted, the stealthy severance of electric connexion and bolting away from the consumer's premises was not dignified proper and valid."

The last point urged by Mr. Bose is that plaintiff's suit being a suit for damages for breach of contract and the plaintiff having by his own act brought about the injury to himself, he is not entitled to claim any damages. In view of what I have said before I am unable to accept this contention. The suit is really a suit for damages for breach of an obligation imposed by statute. Though there was an agreement between the parties the right to enforce the terms thereof was also made subject to the provisions of law. In view of the facts and circumstances disclosed in this case I am not inclined to interfere in the matter. The rules are accordingly discharged with costs. There will be only one hearing fee in the two rules which is assessed at three gold mohurs.

K.S. *Rules discharged.*

2. Herron v. Rathmines and Rathgar Improvement Commissioners, (1892) A C 498=67 L T 658.

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LORT-WILLIAMS AND JACK, JJ.

Superintendent and Remembrancer of Legal Affairs Bengal—Appellant.

v.

Tarak Nath Chatterjee — Accused — Respondent.

Government Appeal No. 5 of 1934, Decided on 11th January 1935.

(a) Interpretation of Statutes—Introductory note can be referred only where section is ambiguous.

No reference may be made to the introductory note to a Code or to any statement of reasons for legislation, unless it be where a section is ambiguous, and cannot be construed without some such reference to outside sources.

[P 305 C 1]

(b) Criminal Trial — Great suspicion against accused—Nothing inconsistent with possibility of accused's story being true—Accused should not be convicted.

Where it is case of very great suspicion against the accused and there are a number of facts which lead one to suspect that the real truth has not been placed before the Court either by the accused or by some of the witnesses for the prosecution, but there is nothing in the evidence which is inconsistent with the possibility of the story of the accused being either wholly or to a large extent true, in such a position it would not be right or just to convict him of the offence. [P 305 C 2]

(c) Penal Code (1860), S. 193—Accused must have intention of fabricating evidence in order that it should appear in evidence in judicial proceeding — Fabricating evidence merely to screen himself is not sufficient.

Per *Jack, J.*—An accused could only be guilty under S. 193, if he had the intention of fabricating evidence in order that it should appear in evidence in a judicial proceeding or in a proceeding taken by law before a public servant, as such, or an arbitrator as laid down in S. 192. The prosecution must therefore show that there was such an intention and that the accused did not fabricate evidence merely to screen himself in the belief that his conduct would result in no proceedings whatever being taken.

[P 305 C 2; P 306 C 1]

Probodh Chandra Chatterjee and *Bireswar Chatterjee*—for Appellant.

Anil Chandra Rai Choudhury—for the Crown

Lort-Williams, J.—This is an appeal against a decision of the learned Sessions Judge at Burdwan, setting aside a conviction and sentence passed by a Magistrate, 1st Class, Burdwan, under S. 193, I. P. C. The learned Judge acquitted the accused on a point of law, and did not deal with the merits of the case against the accused. The story, shortly stated, is that on the evening of 16th March 1933, the attention of the villagers was attracted by sounds coming from the village Post Office. On

going there, they found that the Post Master was lying gagged and bound and apparently in a semi-conscious state. A sum of approximately Rs. 1060 was found missing, and, the Post Master complained of having been seized and bound by robbers. The Police came to the conclusion that the story was false, and that the Post Master had set up a bogus story to cover his own defalcations. He was sent up for trial under S. 193, I. P. C. for fabricating false evidence in order to create an impression of robbery. The learned Judge held that S. 193 is not intended to be applicable to an act done by an offender to screen himself from punishment, and is only applicable to an act done by the offender for the purpose of getting another person into trouble. In my opinion, this view of the section is incorrect. The learned Judge seems to have been misled by Note G made by the framers of the Code in their introductory note, which is quoted at p. 457 of Ratanlal's 'Law of Crimes,' Edn. 12, wherein they say:

"We do not propose to punish him for fabricating evidence with the view of escaping punishment, unless he also contemplated some injury to others as likely to be produced by the evidence so fabricated . . . . ."

And then an example is given. It appears, however that this intention of the framers of the Code was not carried out, because in the Draft Penal Code, Ch. 9 which deals with 'False Evidence,' there is a S. 182 which would have carried out this expressed intention. Neither this section nor any section like it finds any place in the present Code. The learned Judge, therefore cannot be right, unless it can be shown that in other ways the framers of the Code have carried out that intention, and that such an intention can be discovered from the actual words of S. 193. The decision in 28 All. 705 (1) supports the view which the learned Judge has taken. In my opinion, that decision is not correct. It cannot be denied that no reference may be made to the introductory note to a Code or to any statement of reasons for legislation, unless it be where a section is ambiguous, and cannot be construed without some such reference to outside sources. There is no ambiguity however, in S. 193, which clearly covers a case such as this. The result is that the point upon which the learned Judge acquitted the accused, was wrongly decided by him. But the learned Advocate for the accused has asked us not to send the case back to be reheard by the Sessions Judge on appeal, but to examine the evidence ourselves and dispose of the case one way or the other, and this we decided to do. Undoubtedly, it is a case of very great suspicion against the accused. There are a number of facts which lead one to suspect that the real truth has not been placed before us either by the accused or by some of the witnesses for the prosecution. But I can find nothing in the evidence which is inconsistent with the possibility of the story of the accused being either wholly or to a large extent true. In such a position, in my opinion, it would not be right or just to convict him of this offence.

The only way in which the learned Advocate for the Crown has endeavoured to show that the evidence is only consistent with guilt, is to ask us to discount the truth of the evidence of a considerable number of his own witnesses. Where they have given evidence which supports the case for the accused, he asks us to come to the conclusion that they have been mistaken or misled by the facts. With regard to other witnesses, he has frankly admitted that in order to arrive at any sort of logical conclusion about the facts, we must disbelieve them. In such circumstances, it seems to me impossible to convict the accused of this offence. (After examining the evidence, his Lordship concluded.) That substantially is the evidence. As I have stated, it is a case of grave suspicion, but one which, in my opinion, has not been satisfactorily proved, and the result is that although the decision of the learned Judge is reversed on the point of law, the appeal itself is dismissed on the merits. The accused who is on bail is discharged from his bail bond and is acquitted.

Jack, J.—I agree that the evidence being entirely circumstantial is not inconsistent with the possible innocence of the accused. On the point of law I should like to add that an accused could only be guilty under S. 193, I. P. C. if he had the intention of fabricating evidence in order that it should appear in evidence in a judicial proceeding or in a

1. Emperor v. Ram Khilawan, (1906) 28 All 705.

proceeding taken by law before a public servant, as such, or an arbitrator as laid down in S. 192. The prosecution must therefore show that there was such an intention and that the accused did not fabricate evidence merely to screen himself in the belief that his conduct would result in no proceedings whatever being taken.

K.S. *Order accordingly.*

A. I. R. 1935 Calcutta 306

COSTELLO AND M. C. GHOSE, JJ.

Boidya Nath Sil and *others* — Appellants.

v.

Bejoy Chandra Kundu and *others* — Respondents.

Appeal No. 265 of 1934, Decided on 30th January 1935, from appellate order of Sub-Judge, Bogra, D/- 22nd January 1934.

Res judicata — Execution — Notice under O. 21, R. 22 to judgment-debtor — He not appearing on such date — Further rule issued for attaching property fixing certain date — Judgment-debtor appearing on such date and taking plea of limitation — Appeal from latter rule not then barred — Held rule of constructive res judicata did not apply by judgment-debtor not appearing on date mentioned in notice — Execution.

The notice under O. 21, R. 22 was issued on 10th April fixing the 13th May; on 13th May the judgment-debtors, not appearing, a further rule was issued for attaching the property fixing 10th June. On 10th June the judgment-debtors appeared and stated that they had not received the notice under R. 22 and they pleaded limitation

Held: that when on 10th June the judgment-debtors appeared and took their plea of limitation they were within time to appeal against the order of 13th May, and the primary Court also had authority to review the order of 13th May on the petition of the judgment-debtors. Both the appeal and the petition for review being within time, the Court was within its jurisdiction on 10th June to entertain the petition of the judgment-debtors, that the case was barred by limitation and that the rule of constructive res judicata did not apply: 1933 *Cal* 855; 8 *Cal* 51 (*P C*), *Dist.* [P 307 C 2]

Bhupendra Kishore Basu and *Joytindra Nath Das*—for Appellants.

Jogesh Chandra Roy and *Narendra Nath Chaudhury*—for Respondents.

M. C. Ghose, J.—This is a second appeal by the judgment-debtors in an execution case. In the primary Court they pleaded that the execution case was barred by limitation. The decree-holders sought to avoid the plea of limitation by pleading that on two separate dates the judgment-debtors had paid sums of Rs. 4 and Rs. 7 and by such payments under S. 20, Lim. Act, limitation was saved. The judgment-debtors asserted that the alleged payments were not true, that no payments had actually been made. The trial Court on hearing the evidence came to the conclusion that the payments alleged by the decree-holders were not true. Thereupon the trial Court held that the case was barred by limitation. It may be stated here that the suit was instituted in 1922, and the final decree was obtained in November 1922. The last execution case was started in February 1924 and was dismissed on 18th March 1924. The second execution case was started in August 1924 and was dismissed in November 1924. The third execution case which is now in question, was started on 10th April 1933. Prima facie this third execution case was barred by limitation as it was started nine years after the second execution case. The decree-holders alleged payments of Rs. 4 in July 1927 and Rs. 7 in April 1930. As stated above both these payments were found by the trial Court to be not true. The learned Subordinate Judge in appeal did not reverse the finding. On a perusal of his judgment it appears that he accepted the finding that the alleged payments were not made by the judgment-debtors. He allowed the appeal on the ground that on 10th April 1933 the Court ordered the issue of notice under O. 21, R. 22 upon the judgment-debtors to show cause why the decree should not be executed against them. 13th May 1933 was fixed as the next date of hearing. On that date it was said that notice had been served but the judgment-debtors did not appear. The Court recorded the order:

"No objection by the judgment-debtors. Issue notices under O. 21, R. 66, fixing 10th June 1933."

On 10th June the judgment-debtors appeared and made an objection that the execution case was barred by limitation. The learned Subordinate Judge held on authority of the case of 1933 Cal. 855 (1) that as the judgment-debtors did not appear on 13th May to make an objection to the execution it was sufficient to act as constructive res judicata and the judgment-debtors

1. Lalit Mohan Roy v. Sarat Chandra Saha, 1933 Cal 855=149 I C 1017.

were not entitled on 10th June subsequent to plead that the case was barred by limitation. In our opinion the view taken by the Subordinate Judge is not warranted by law. The case of 1933 Cal. 855 (1) was based on the decision of their Lordships of the Judicial Committee in 8 Cal. 51 (2). In that case the question for decision in respect of 7th petition of 22nd September 1877, was whether the previous execution case of 1874 had been barred by limitation. It was said that the case ol 1874 was filed more than three years after the previous execution case of 1871. Accepting that view the primary Court, as well as the High Court held that the petition of 1874 was barred by limitation and, as such, the subsequent petition of 1877 was also barred by limitation. Their Lordships of the Judicial Committee observed that in the case of 1874 notice was issued on the judgment-debtor on 10th September 1874. The notice was served on 23rd September 1874; then the decree-holder petitioned to attach the properties on 8th October 1874. The sale proclamation was issued thereafter. Then the judgment-debtor appeared and filed a petition on 21st January 1875 asking to stop the sale for seven days. Further, on 25th January 1875, the judgment-debtors petitioned to stop the sale for three months admitting the debt and admitting that the attachment should remain. It was held, in those circumstances, that it was too late for the judgment-debtor to take the plea of limitation in respect of the case of 1874. Their Lordships stated thus:

"Here an order for attachment was made by the Subordinate Judge on 8th October 1874, after notice served on the judgment-debtor on 23rd September 1874, to show cause why the decree should not be executed against him. The order was made by a Court having competent jurisdiction to try and determine whether the decree was barred by limitation. No appeal was preferred against it; it was acted upon and the property sought to be sold under it was attached, and remained under attachment until the application for the sale now under consideration was made."

It is clear then from the decision of the case of 8 Cal. 51 (2) that their Lordships held the case to be res judicata on the ground that the order was made by a competent Court and the party who had the right to appeal did not appeal against it. In 1933 Cal. 855 (1) the matter was decided on the same principle, namely, that the notice having been served on the judgment-debtor and the properties having been attached, the judgment-debtor had a right to appeal against the same but he did not appeal against the order of attachment nor did he appear in Court within the period which is allowed in law for the purpose of appeal. After the period of the appeal was over the judgment-debtor appeared and took the plea that the execution was barred by limitation. This Court held on the authority of the case of 8 Cal. 51 (2) that the plea of limitation could not be taken by the judgment-debtor at that stage. In the present case the notice under R. 22 was issued on 10th April fixing 13th May. On 13th May the judgment-debtors not appearing a further rule was issued for attaching the property fixing 10th June. On 10th June the judgment-debtors appeared and stated that they had not received the notice under R. 22 and they pleaded limitation. In the first Court the decree-holders did not traverse the plea of the judgment-debtors that they had not received notice under R. 22, nor did they plead in the first Court that the judgment-debtors were bound by the the rule of constructive res judicata, on the ground that they did not make their objection on 13th May. On the contrary they sought to avoid the plea of limitation by allegation of two payments. It was for the fiirst time argued in the Court of appeal below that the judgment-debtors' non-appearance on 13th May concluded the matter by the principle of res judicata.

In our opinion this view is wrong. When on 10th June the judgment-debtors appeared and took their plea of limitation they were within time to appeal against the order of 13th May, and the primary Court also had authority to review the order of 13th May on the petition of the judgment-debtors. Both the appeal and the petition for review being within time, the Court was within its jurisdiction on 10th June to entertain the petition of the judgment-dobtors, that the case was barred by limitation. In our opinion the rule of constructive res judicata does not apply,

2. Mungal Pershad Dikchit v. Girja Kant Lahiri, (1882) 8 Cal 51=8 I A 123=4 Sar 248 (P C).

to the facts of this case. On the facts the first Court found that the payments were not true and the case was barred by limitation. The Court of appeal below did not reverse that finding. The appeal is therefore allowed and the execution petition dismissed on the ground of limitation. In the circumstances the parties will bear their own costs throughout.

Costello, J.—I agree.

K.S. *Appeal allowed.*

A. I. R. 1935 Calcutta 308

LORT-WILLIAMS AND JACK, JJ.

Kishori Kishore Mishra—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 496 of 1934, Decided on 29th January 1935.

(a) Criminal P. C. (1898), S. 297—Judge can decide question of voluntariness of confession in its bearing on admissibility—Jury are also entitled to decide independently of the Judge whether confession was voluntary when considering weight of confession.

Although the Judge has to decide the question of the voluntariness of a confession in its bearing upon admissibility, still, after he has admitted it, the jury are entitled and must be allowed to consider for themselves the question of voluntariness in its bearing upon the truth of the confession. To tell the jury that in admitting the confession the Judge had decided that it was voluntary, and that the jury were to take that question as settled and on that basis decide whether the confession was true, and what value was to be attached to it, is serious misdirection, inasmuch as it withdraws from the jury an issue of fact relating to the question of truth : 1934 *Cal* 853, *Rel on.* [P 309 C 1,2]

(b) Evidence Act (1872), S. 73—Judge presiding cannot delegate to another Magistrate not sitting as Court to take writing from accused—*Obiter.*

Obiter.—S. 73 means that where the accused is in Court, the Judge presiding in that Court may there and then ask him to write something for the purpose of enabling the Court to compare his writing with some other writing, and that the procedure of delegating to another Magistrate, not sitting as a Court, to take such a writing from the accused when the accused is not in Court nor standing his trial in Court does not come within the provisions of the section.

[P 310 C 1,2]

(c) Evidence Act (1872), S. 73—Applicability of S. 73 to accused person doubted (*Lort-Williams, J., Jack, J. holding contra*)—*Obiter.*

Obiter Lort-Williams, J.—There is considerable doubt as to whether S. 73 refers to an accused person at all : 1927 *Cal* 17, *Ref.*

[P 310 C 1]

Per *Jack, J.*—S. 73 does include an accused person : 1924 *Rang* 115 ; 1932 *Bom* 406 *Rel. on.*

[P 311 C 1]

(d) Criminal Trial—Jury should consider and weigh all evidence—Question of reliability of evidence is for jury.

It is the duty of the jury carefully to consider and weigh all the evidence in a case. The question of reliability of the evidence of an expert in handwriting is clearly one for the jury to decide. [P 310 C 2]

Suresh Chandra Taluqdar—for Appellant.

Siddheswar Chakravarty — for the Crown.

Lort-Williams, J.—In this case there were four accused who were tried by the Additional Sessions Judge of Asansol with a jury, who by a unanimous verdict found the accused Ganpat Sonar, Kishori Kishore Mishra and Chhidami Sukul, guilty under S. 395, I. P. C., and Pandit Kishen Prosad Tewari not guilty. They also found Kishori Kishore Misra guilty under S. 465, I. P. C. The learned Judge, agreeing with and accepting the verdict, sentenced Kishore Kishore Misra and Chidami Lal to 10 years' rigorous imprisonment each and Ganpat Sonar to five years rigorous imprisonment. Kishori Kishore Misra is the only appellant. The case was unusual. On 9th January the village Chowkidar came to the house of one Priya Nath Roy and told him that the Sub-Inspector and Inspector of Raneegunge had come to the village to inquire about his gun, as he was suspected of having given it to the dacoits in a case at Raneegunj police station. He was asked to take his license with him as the police officers wanted to see it. Accordingly, he went with the chowkidar and so-called constables to see these "officers." He saw them seated outside the house of one Behari and when he had given his gun license to them, they said that he must go and fetch the gun as well. This he did, and then they sent him to fetch the cartridges. While he was returning, they met him half-way and said that they wanted to search some houses, and took him to the house of his uncle Tarak Nath Roy. When they got there, the so-called "officers" produced revolvers and held up Priya Nath and his companions, entered Tarak's house, and broke open several boxes. One of them gave Priya Nath a receipt (Ex. 11) for his gun and went away with the gun and some property from Tarak's house. When they had gone, Priya Nath, who had realized that they were not police officers but

dacoits went and gave information to the police. The defence was that all the accused except Chhidami were innocent and knew nothing about the incident. Chhidami and Ganpat each made confessions implicating some of the other accused. In charging the jury, the learned Judge dealt with these confessions and told them that the decision whether a confession was voluntary or not and therefore admissible in evidence, whether proper warning was given and a sufficient amount of time for consideration allowed, whether the formalities were properly carried out and other similar matters, were points of law and therefore for him to decide. It was for him to decide whether the police used any violence or inducement in order to make the accused person confess. Then he said that after considering the evidence on these points, he came to the conclusion that there was no reasonable ground for surmising that the confessions were not entirely voluntary. He continued as follows :

" You are bound by my decision on this point. You should consider that the police used no undue influence or violence, that the accused persons were given the proper warning, that their confessions were liable to be used in evidence against them, that they were given enough time to consider, before their confessions were recorded and that the confessions were entirely voluntary. Having taken these things for granted, it is for you to decide whether the accused persons were telling the truth when they confessed, and what weight should be attached to their confessions."

In my opinion this statement amounted to a serious misdirection. In a recent decision on the point in 1934 Cal 853 (1) admissibility is one question and proof another. The first, which is for the Judge, is only a prima facie or preliminary consideration, limited to the letting in of the evidence. The second, which is for the jury and relates to the credibility and the weight of the evidence, arises after the evidence has been let in, and must be decided on a consideration of all the relevant circumstances, including those proved before the Judge. Consequently although the Judge has to decide the question of the voluntariness of a confession in its bearing upon admissibility, still after he has admitted it, the jury are entitled and must be allowed to consider for themselves the question of voluntariness in its bearing upon the truth of the confession. To tell the jury that in admitting the confession the Judge had decided that it was voluntary, and that the jury were to take that question as settled and on that basis decide whether the confession was true, and what value was to be attached to it, is a serious misdirection, inasmuch as it withdraws from the jury an issue of fact relating to the question of truth.

This decision was based upon a careful consideration of the law, and of previous decisions upon this point, and we are in agreement with it. It seems to have been based, to a considerable extent, upon statements alleged to appear in a text book entitled "Wigmore on Evidence," which apparently, is an American Text Book published in Boston, U. S. A. Strictly speaking, statements made in foreign text books ought not to be considered by this Court or any other English Court. But the learned Judges also relied upon Taylor on Evidence, Edn. 2, p. 27. This author is an undoubted authority upon the law of Evidence in England, which law substantially and with very slight alterations is reproduced in the Indian Evidence Act. In addition to this misdirection, the learned Judge made a statement with regard to the appellant about which there seems to be considerable doubt whether it was accurate or not. In dealing with the case of Kishori Kishore Misra he said:

"We now come to this last accused against whom the prosecution has urged that there is more evidence than against any of the other accused persons. He is mentioned in the confession of Ganpat, but Chhidami could not select him out of the suspects in the identification parade."

Now, so far as we can ascertain, this appellant is not mentioned in the confession of Ganpat. The learned Advocate appearing for the Crown has drawn our attention to various statements in the confession which go to show that it is possible that he did mention this appellant, but under another name. The difficulty is that Ganpat referred to Kishori Prosad and not Kishori Kishore Misra. He also referred to Ganti alias Kishori Prosad. Now, Chhidami in his confession referred to himself as Kishori Prosad alias Chhidami and there is no evidence in this case to identify Kishori

1. Kasimuddin v. Emperor, 1934 Cal 853=1934 Cr C 1368=154 I C 273.

Kishore Misra with Ganti. If there had been such evidence, of course it would have been open to the Crown to argue that there was sufficient to show that Kishori, as mentioned in Ganpat's evidence, is the same person as Kishori Kishore Misra. It is true that in the record of proceedings he has been styled Kishori Kishore Misra alias Ganti, but I can find no evidence in the record connecting Kishori Kishore Misra with the name Ganti. That being so, there is considerable force in the argument of the learned Advocate for the appellant that the statement of the learned Judge with regard to Ganpat's confession was not accurate. At any rate, there is very considerable doubt about it. In addition, there is the fact that Chhidami failed to identify Kishori when he was included among a number of suspects in the identification parade. Other points raised by the learned Advocate for the appellant were, that there was no power in a Magistrate making an enquiry prior to commitment to ask some other Magistrate to direct an accused person to make a specimen of his handwriting for comparison with other handwritings in the case. S. 73, Evidence Act, provides that

"the Court may direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person."

It is argued on behalf of the Crown that the Court in this case was the Magistrate holding the enquiry, and he must be taken to have directed the accused to write but to do so before the other Magistrate. It is unnecessary for us to decide this point. But I have no doubt whatever that such a procedure does not come within the terms of S. 73, Evidence Act. I think that where the section says that the Court may direct any person present in Court to write, it must mean that where the accused is in Court, the Judge presiding in that Court may there and then ask him to write something for the purpose of enabling the Court to compare his writing with some other writing, and that the procedure of delegating to another Magistrate, not sitting as a Court, to take such a writing from the accused when the accused is not in Court nor standing his trial in Court does not come within the provisions of the section. Further, I have considerable doubt whether S. 73 refers to an accused person at all. Upon this point the decision in 1927 Cal. 17 (2), shows that the word 'person' when used in a section of an Act dealing with accused persons does not necessarily include the accused.

A further point taken by the learned advocate for the appellant was that the learned Judge ought to have given a more careful warning to jury about the evidence of the handwriting expert, and that he ought to have told the jury that they should very carefully weigh this part of the evidence. There is not much force in this part of the learned advocate's argument, because it is the duty of the jury carefully to consider and weigh all the evidence in this case. The question of reliability of the evidence of an expert in handwriting is clearly one for the jury to decide Some people including Judges have great faith in this kind of evidence, while others take the view that it is seldom reliable. On such a question the jury, after having all the points explained to them by the Judge and by the expert, are in a position to decide whether they think that they ought to rely upon the evidence or not. The misdirection of the learned Judge, especially upon the point of valuntariness, may very well have affected the decision in this case. It is not possible to conjecture what the decision of the jury would have been if they had been told that they were at liberty to consider whether these confessions were voluntary or not when they were considering the question of their truth. If the jury after a proper direction, had rejected the confessions altogether on the ground that they were not true confessions, nothing was left of the evidence against this particular appellant except the receipt. The question whether this receipt had been given by the appellant depended entirely on the evidence of the handwriting expert. In these circumstances, we are of opinion that this conviction cannot be allowed to stand, and the conviction and sentence must be set aside. In view of the fact that there is no evidence against this accused, except the evidence of the handwriting expert, we do not think it worth while to send

2. Azimuddy v. Emperor, 1927 Cal 17=99 I C 227=54 Cal 237.

the case back for retrial. The appellant therefore is acquitted.

Jack, J.—I agree. All that I would like to say with regard to S. 73, Evidence Act, is that had it been necessary to decide this point, I would be inclined to hold that S. 73 does include an accused person. There is authority for this view in the cases of 1924 Rang. 115 (3) and 1932 Bom. 406 (4). However there is no need to decide this point in this particular case. I agree that the conviction and sentence in this case should be set aside and the appellant acquitted.

K.S. *Conviction set aside.*

3. Emperor v. Nga Tun Hlaing, 1924 Rang 115 =83 I C 668=26 Cr L J 108=1 Rang 759 (F B).
4. Emperor v. Ramrao Mangesh, 1932 Bom 406 =1932 Cr C 572=138 I C 703=33 Cr L J 666= 56 Bom 304.

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S. K. GHOSE AND HENDERSON, JJ.

Krishna Chandra Dhenki—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1189 of 1934, Decided on 7th February 1935.

(a) Criminal P. C. (1898), S. 162—Complainant's statement to investigating officer identifying accused is inadmissible.

A statement express or implied by the complainant to the investigating officer to the effect that the accused was the person who attempted to rob her is inadmissible in evidence.[P 311 C 2]

Criminal Trial — Evidence of test identification is admissible under Evidence Act, Ss. 155 and 157 and otherwise also—*Obiter.*

Obiter.—It cannot be said that the evidence of a test identification is admissible only under Ss. 155 and 157, Evidence Act : 1921 *All* 215, *Diss from.* [P 312 C 1]

D. N. Bhattacharjee, Fanindra M. Sanyal and *Prafulla Kr. Banerji*—for Petitioner.

S. K. Ghose, J. — The petitioner in this Rule has been convicted under S. 379/511, I. P. C., and sentenced to undergo rigorous imprisonment for six months. The Rule was issued on the ground that the evidence of the so called test identification held by the police in course of the investigation was inadmissible in law in view of the provisions of S. 162, Criminal P. C. I may say that in this Court there is no appearance for the Crown although an explanation is submitted by the trial Magistrate. The prosecution case is that the petitioner in this case tried to pull out a churi from the hand of a girl of ten as she was returning home. She cried out and the man ran away and the present petitioner was apprehended afterwards. The question is one of identification. The only evidence on the point is that of the girl and she is sought to be corroborated by the fact that at the thana she was shown one Probhat whom she did not identify, but that subsequently she identified the petitioner at a test identification which was also held by the police. The learned Magistrate in his explanation says that hardly any value has been placed on this so called test identification. But it is clear from the judgment of the learned Judge that this test identification has been relied on by the Magistrate as corroborative evidence. Whatever it be, the statement, expressed or implied, which the girl must have made by way of inentifying the petitioner at the thana, is hit by the provisions of S. 162, Criminal P. C. This proposition, as Mr. Bhattacharya for the petitioner has pointed out, is not without authority and he has referred to the cases of 1921 All. 215 (1), 1925 Cal. 161 (2) and 1926 Cal. 320 (3). There is no other evidence against the petitioner. On the contrary, evidence appears to have been given to the effeet that he is well off and the learned Judge rejected it saying that

"the contention leads to the absurd theory that rich men can do no wrong."

We think that this conviction cannot be sustained. The petitioner is acquitted and directed to be set at liberty. He will be discharged from his bail bond.

Henderson, J. — I agree that this Rule must be made absolute. It seems clear that the statement made by the complainant to the investigating officer to the effect that the petitioner was the person who had attempted to rob her was inadmissible in evidence in view of the provisions of S. 162, Criminal P. C. In the course of his argument Mr Bhattacharya referred to the case reported in 1921 All. 215 (1) and I desire to say that, as at present advised and with all respect to the learned

1. Nagina v. Emperor, 1921 All 215=95 I C 477 =27 Cr L J 813.
2. Harendra Nath v. Emperor, 1925 Cal 161=84 I C 452=26 Cr L J 307.
3. Keramat Mondal v. Emperor, 1926 Cal 320= 92 I C 439=27 Cr L J. 263.

Judge who decided that case, I should not be prepared to say that the evidence of a test identification is only admissible under Ss. 155 and 157, Evidence Act. It is not necessary to decide that point in disposing of this Rule and it may therefore be left open.

K.S. *Conviction set aside*

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COSTELLO AND M. C. GHOSE, JJ.

Kashiram Jhunjhunwalla — Accused —Petitioner.

v.

(*Firm*) *Hurdut Rai Gopal Rai*—Complainant—Opposite Party.

Criminal Revn. No. 813 of 1934, Decided on 25th January 1935, from order of Addl. Sess. Judge, Howrah, D/- 31st July 1934.

(a) Criminal P. C. (1898), Ss. 235 (1) and 234—Offence of misappropriation in respect of several items may be joined with charge of falsification which is one of series of acts— Penal Code (1860), Ss. 409 and 477.

A person may lawfully be tried for one offence of misappropriation in respect of several items joined with a charge of falsification which was carried out as one of the series of acts constituting the transaction by which the misappropriation was effected: 1931 *Fat* 349, *Rel on*; *Case law referred.* [P 313 C 2]

(b) Criminal P. C. (1898), S. 222 (2) — 'Transaction' means group of facts so connected together as to involve certain ideas, viz. unity and continuity and connexion — Illicit operations by cashier in one year may be treated as one transaction.

The word transaction means a group of facts so connected together as to involve certain ideas, namely, unity, continuity and connexion. In order to determine whether a group of facts constitutes one transaction it is necessary to ascertain whether they are so connected together as to constitute a whole which can be properly described as a transaction. [P 314 C 2]

Where a clerk or cashier sets out to rob his employer, having regard to the fact that S. 222 (2) provides that he may be charged with having misappropriated the total of whatever sums he may have appropriated in course of any one year, it is not unreasonable to say for the purposes of the section that the year's illicit operations can be regarded as one transaction. [P 314 C 2]

S. K. Basu and *Ram Das Mukherjee* —for Petitioner.

Debendra Narain Bhattacherjee—for the Crown.

Satindra N. Mukherjee — for Complainant.

Costello, J.—This Rule is directed against a judgment of the Additional Sessions Judge of Howrah dated 31st July 1934 affirming the decision of Mr. B. K. Ghose, Magistrate of the first class, Howrah, dated 28th May 1934. The petitioner Kashiram Jhunjhunwalla was convicted by the learned Magistrate on charges laid under S. 408, I. P. C., and under S. 477-A of that Code and was sentenced under the latter section to one year's rigorous imprisonment and to pay a fine of Rs. 1,000. The case for the prosecution was briefly as follows: Kashiram in his capacity as manager and cashier of the complainant firm Hurdut Rai Golap Rai had in his charge certain cheque books which had been signed by the complainant for the purpose of the withdrawal of money from the bank when necessary. Taking advantage of the fact that these cheque-books were in his possession the accused drew from the bank certain sums of money and misappropriated a part of those sums and then sought to cover up the defalcations by making entries on the counterfoils of the cheque books of amounts smaller than the sums for which the cheques were actually drawn and the monies received by him. The main charge against him was that he had misappropriated a total sum of Rs. 2,200 which was made up of seven separate items. He was also charged with falsification in respect of two entries in the counterfoils and in his books of sums smaller that those actually drawn from the bank. He was in fact indicted on a charge of criminal breach of trust under S. 408, I. P. C., and on two separate charges of falsification of accounts under S. 477-A, I. P. C. At the trial the defence taken was a denial of the charges. The learned Sessions Judge says:

"The trial of the case appears to have a chequered career, and at one time certain questions were agitated in High Court."

He then said;

"In this Court of appeal there has been absolutely no argument on the merits of the case."

He gives certain reasons why that was so. The learned Sessions Judge continued:

"The whole argument by the learned advocate appearing for the appellant was restricted to three factors, namely (1) that the accused might now be given an opportunity to cross-examine the prosecution witnesses, (2) that an opportunity might be given to the appellant's lawyer to argue the case before the Magistrate, and (3) that the charges framed by the Court below were vitiated by several factors of illegality."

Having disposed of the first two of those three points he said with regard to the third point :

" The charge under S. 408, I. P. C. relates to a gross sum consisting of seven items of money alleged to have been misappropriated, and it has been argued that this militates against the principle of S. 234, Criminal P. C. In my opinion S. 222 (2), Criminal P. C. furnishes a complete answer to this argument."

The only question which has been argued before us is the question whether it was lawful for the two charges of falsification to be joined with the charge of misappropriation, that is to say, with the charge of breach of trust under S. 408, I. P. C. Mr. S. K. Basu has not sought to argue that the latter charge in itself was illegal, and indeed that part of the matter is completely covered by the provisions of S. 222 (2), Criminal P. C., which provides that

" when the accused is charged with criminal breach of trust or dishonest misappropriation of money, it shall be sufficient to specify the gross sum in respect of which the offence is alleged to have been committed, and the dates between which the offence is alleged to have been committed, without specifying particular items or exact dates, and the charge so framed shall be deemed to be a charge of one offence within the meaning of S. 234 : Provided that the time included between the first and last of such dates shall not exceed one year."

It is clear therefore that it was well within the rights of the prosecution to charge the accused with having misappropriated the total sum of Rupees 2,200. With regard to the charges of falsification however Mr. S. K. Basu has argued that the addition of those charges was not only a misjoinder but a misjoinder of such a character as would vitiate the whole of the proceedings and render them not only irregular but illegal. If that were the effect of what was done, then of course the bounden duty of this Court would be to quash the proceedings and either to acquit the accused here and now, or to order a new trial. It is to be observed that S. 234 (1), Criminal P. C. provides that

" when a person is accused of more offences than one of the same kind committed within the space of 12 months from the first to the last of such offences, whether in respect of the same person or not, he may be charged with, and tried at one trial for, any number of them not exceeding three."

Mr. S. K. Basu has suggested that it was by reason of that provision that the charges in the present case were limited to three, namely, one of misappropriation and two of falsification. Whether that was so or not is however immaterial for our present purposes. What we have to decide is whether in the circumstances of this case the two charges of falsification could properly be joined with the one charge of misappropriation. The answer to that question depends upon the question of whether the provisions of S. 235 (1), Criminal P. C., materially affect this case. That sub-section provides as follows :

" If, in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with, and tried at one trial, for every such offence."

It is clear from the terms of that section that a person may lawfully be tried for one offence of misappropriation joined with a charge of falsification which was carried out as one of the series of acts constituting the transaction by which the misappropriation was effected. Mr. S. K. Basu has referred us to a number of decisions, but it is only necessary, I think, to refer to two of them. In the case of 32 All. 219 (1), the accused had been charged and tried at one and the same trial for three offences under S. 408, I. P. C., committed within a period of one year, and three offences of forgery under S. 467 of the Code, and he was convicted and sentenced in respect of all the six offences. Tudball, J. held that this was an illegality not covered by S. 537, Criminal P. C. It is to be observed however that in that case the facts were that Sheo Saran Lal was a clerk in a certain bank, and the case against him him was that three different persons seeking to deposit money in the Bank, handed over certain sums to him, which he embezzled, and for which he gave receipts in his own handwriting, forging thereon the signature of the Manager of the Bank. The facts of that case were therefore quite different from the facts of the case which is now before us. Tudball, J., said in effect that the accused was tried in respect of six offences at one and the same trial, and although the offences might have been committed within the space of 12 months, the trial contravened the rule laid down in S. 233, even when read with S. 234. Then he says:

1. Emperor v. Sheo Saran Lal, (1910) 32 All 219=5 I C 896=11 Cr L J 285.

"It has been argued however that S. 235, Cl. (1) must be read with S. 234, and that the three offences mentioned in the latter section must be deemed to include all the offences committed in three similar transactions such as are contemplated by S. 235, Cl. (1); in other words, if an accused person goes through three similar transactions within the period of 12 months, committing in each transaction the same series of offences, he can be tried at one and the same trial on account of all offences committed in the course of the three transactions, even if they total more than three. I am of opinion that this would be too great an extension of the exception mentioned in S. 234."

The other case on which Mr. S. K. Basu strongly relied was that of 30 Mad. 328 (2), in which it was held by Benson and Wallis, JJ., that it was illegal to try a person on a charge which alleged three distinct acts of criminal breach of trust and three distinct acts of falsifying accounts. The learned Judges said:

"Section 234, Criminal P. C., will not apply, as the offences of criminal breach of trust and falsification of accounts are not of the same kind, neither will S. 235 cover the case, as the several offences cannot be said to form part of the same transaction."

Then follows a passage in the judgment which seems to be no more than an obiter dictum. In the passage the learned Judges observed:

"It is true that S. 222 provides for a charge being framed in respect of the gross sum misappropriated within 12 months from first to last and enacts that a charge so framed shall be deemed to be a charge of one offence within the meaning of S. 234, but it does not provide that the acts so charged shall be deemed to be one transaction within the meaning of S. 235."

That observation contains a proposition which if correct would operate decisively in favour of Mr. S. K. Basu's contention before us. The real question which we have to decide is whether contrary to the view taken in the Madras case it ought not to be held that if a person is charged within one offence, namely that of misappropriation of a gross sum as provided in S. 222 (2) then that one offence ought to be deemed to have arisen out of one transaction so as to enable the prosecution to join with it in the same charge, a charge of some other offence constituted by the series of acts or some of the series of acts which connected together form that transaction. Mr. Basu has argued that although it is the case that by virtue of the provisions of S. 222 (2) the individual items of defalcation may be lumped together to constitute one offence yet the sum of the items does not constitute one transaction, but remains a series of transactions each one of which is made up of a series of acts. If that were the right view of the matter it would necessarily follow, as Mr. Basu contended, that it would not be possible to combine into one transaction some seven items (as was done here), and then to pick out two of those items and say that for the purposes of S. 235 they were separate transactions, so that the charges of falsification could be made in connexion with each of them.

Mr. Bhattacharjya and Mr. Mukherjee on behalf of the prosecution have invited us to hold that the one offence referred to under S. 222 (2) must be taken to constitute one transaction, and they have argued that the character of the transaction was this: that the accused made up his mind to rob his employer in a series of operations by means of which he secured for himself a total sum of Rs. 2,200 and so each series of operations were merely steps or stages in one comprehensive 'transaction.' It is not easy and indeed possible to give an exact definition to the word transaction, but I think, we may say that it means a group of facts so connected together as to involve certain ideas, namely, unity continuity and connexion. In order to determine whether a group of facts constitutes one transaction it is necessary to ascertain whether they are so connected together as to constitute a whole which can be properly described as a transaction.

In my opinion where a clerk or cashier sets out to rob his employer, having regard to the fact that S. 222 (2) provides that he may be charged with having misappropriated the total of whatever sums he may have appropriated in course of any one year, it is not unreasonable to say that for the purposes of the section that the year's illicit operations can be regarded as one transaction. Mr. Bhattacharjya has contended that none of the authorities cited by Mr. S. K. Basu are directly in point for our present purposes and he has referred us to the decision of the Patna High Court in 1931 Pat. 349 (3), where it was held by

2. Kasi Viswanath v. Emperor, (1907) 30 Mad 328=17 M L J 141=5 Cr L J 341.

3. Michael John v. Emperor, 1931 Pat 349=1931 Cr C 797=133 I C 450=32 Cr L J 1026=10 Pat 463.

Sir Courtney Terrell, C. J. and Adami, J. that:

"It is quite lawful to charge a person under S. 408, I. P. C., 1860, with criminal breach of trust in respect of a lump sum of money made up of three different items and to link with that a series of charges of falsification of accounts under S. 477-A each of which charges under S. 477-A is united with one of the items of embezzlement under the charge under S. 408, provided the charges of embezzlement under S. 403 are linked together into one sum and that linking together also affects the charges of falsification."

Certain decisions of this Court were considered in the Patna case and either distinguished or not followed. The learned Chief Justice and Adami, J. followed the previous decision of the Patna High Court in 1920 Pat. 775 (4), where it was held by Mullick, J. and Bucknill, J. that:

"where a person is charged, under S. 408, I. P. C., with criminal breach of trust committed in one year in respect of a lump sum of money, the Court is competent, by virtue of the provisions of Ss. 234 and 235, Criminal P. C., to try with this charge three charges for an offence under S. 477-A, I. P. C., if committed within the period of one year and forming part of the same transaction as the offence under S. 408."

We are of opinion that the decision of the Patna High Court in 1931 Pat 349 (3) really covers the point with which we are now concerned, and in our opinion that decision gives a reasonable and accurate interpretation of the relevant sections of the Criminal Procedure Code. It follows that this Rule must be discharged.

M. C. Ghose, J.—I agree with my learned brother that this Rule should be discharged. The petitioner was manager and cashier of a certain firm and as such he was entrusted with the cheque books of the firm, and he proceeded to rob his employer by writing cheques for certain sums and writing smaller sums in the counter-foils and in the accounts, and dishonestly misappropriating the balance. It is said that he has altogether robbed his employer by no less than Rs. 24,000. The charge was made with respect to a sum of Rs. 2,200 which he is said to have misappropriated by means of seven cheques in course of one year. The seven cheques and counterfoils were proved in Court. In respect of two of those cheques further charges were made of falsification of accounts under S. 477-A, I. P. C. It is urged by Mr. Basu that the trial of the petitioner as regards the charge of criminal breach of trust and the two charges of falsification of accounts as framed in the case was illegal and without jurisdiction, and as such the conviction and sentence are bad in law. Various reported cases were cited by Mr. Basu. It is worthy of note that in all those cases there were two or more charges of criminal breach of trust against the accused person, and in addition to those charges of criminal breach of trust there were further charges of falsification of accounts, and it was held in those reported cases that the trial of two or more charges of criminal breach of trust with two or more charges of falsification of accounts was illegal.

In the present case there was only one charge of criminal breach of trust in respect of a sum of Rs. 2,200. It is true that the sum of Rs. 2,200 was made up of seven different items, as proved in the case. But S. 222 (2), Criminal P. C. provides:

"when the accused is charged with criminal breach of trust or dishonest misappropriation of money, it shall be sufficient to specify the gross sum in respect of which the offence is alleged to have been committed, and the dates between which the offence is alleged to have been committed, without specifying particular items or exact dates, and the charge so framed shall be deemed to be a charge of one offence within the meaning of S. 234."

The present charge of criminal breach of trust must therefore be held to be a charge of one offence of criminal breach of trust, and the two charges of falsification of accounts were parts of two items of the charge of breach of trust, those falsifications having been made in order to commit the said misappropriation. One charge in respect of Ex. 8 which was a cheque cashed by the accused, was that it was for a sum of Rs. 1,300, but he put in the counterfoil and in the accounts a sum of Rs. 600 thereby misappropriating Rs. 700, and the other charge was in respect of Ex. 9 whereby he withdrew a sum of Rs. 600 and credited to the counterfoil and to the accounts Rs. 200 thereby misappropriating Rs. 400. S. 233, Criminal P. C., lays down that for every distinct offence there shall be a separate charge. The basis of the rule is that an accused person should not be prejudiced by being accused of several offences at once. In this particular case it cannot be said

4. Gajadhar Lal v. Emperor, 1920 Pat 775=60 I C 422=22 Cr L J 230.

that the accused was in any manner prejudiced. He was charged with one charge of criminal breach of trust and in respect of a portion of the money, it was shown that he falsified these accounts in order to commit the said misappropriation. There can be no doubt that an act of criminal breach of trust forms the same transaction together with an act of falsification of accounts which is made in order to facilitate the breach of trust, and the two charges of criminal breach of trust and falsification of accounts may be tried together under S. 235, Criminal P. C. In this case in respect of two sums of money charges of falsification were made. In my opinion there was no illegality in the trial of the two charges in one trial along with the charge of criminal breach of trust.

K.S. *Rule discharged.*

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COSTELLO AND M. C. GHOSE, JJ.

Abdul Rahman and *others* — Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. Cases Nos. 951 to 973, of 1933, Decided on 22nd January 1935, from order of Magistrate First Class Alipore.

(a) Criminal P. C. (1898), S. 196-A — Consent obtained subsequent to initiation of proceedings—Accused not prejudiced—Defect is technical and does not make trial illegal.

The provisions of S. 196-A are designed to provide a safeguard against the initiation of vexatious prosecution for criminal conspiracies of the kind indicated in the section. The section is certainly not intended to provide a means of escape for persons who have been convicted on charges brought against them even though those charges relate to the kind of offences indicated in the section. When the consent is obtained only subsequent to the initiation of proceedings and none of the accused has been prejudiced in his defence, the defect is merely a technical one and does not make the trial illegal [P 319 C 2 ; P 320 C 1]

(b) Criminal P. C. (1898), S. 439 — High Court will not enable, in exercise of revisional power, guilty persons to escape on basis of unsubstantial technicality.

It is not the function of the High Court when exercising its revisional jurisdiction, to allow guilty persons to escape the just regard of their misdoings on the basis of an unsubstantial technicality. [P 320 C 1]

(c) Criminal P. C. (1898), S. 367—If appellate Court can gather from judgment of lower appellate Court what its decision is that is sufficient—S. 367 must be interpreted reasonably.

Section 367 must be interpreted reasonably and so long as the appellate Court below writes a judgment from which the High Court can gather what the decision of the appellate Court really was, that in the majority of instances ought to be sufficient. It would be manifestly most unreasonable to expect an appellate Court to dot every 'i' and cross every 't.' If, therefore, it is possible for the High Court reasonably to arrive at an understanding of what has been found in the Court below, it is not necessary that it should captiously or capriciously set aside the judgment of the Court below or even comment on it with any severe strictures. Still less is it obligatory upon the High Court to hold that the proceedings in appeal ought to be quashed and the matter reheard in appeal from the beginning. [P 321 C 2, P 322 C 1]

(d) Penal Code (1860), S. 120-A—Merely because agreement to do illegal act is of itself criminal conspiracy, it cannot be said that offence begins and ends at same time—It may continue so long as persons constituting conspiracy remain in agreement.

It is true that a mere agreement may bring the conspiracy into existence but nowhere is it said in the Code that after that the offence no longer exists. Criminal conspiracy may come into existence, and may persist and will persist so long as the persons constituting the conspiracy remain in agreement and so long as they are acting in accord, in furtherence of the object for which they entered into the agreement. [P 321 C 2]

(e) Criminal P. C. (1898), S. 439—A finding that conspiracy existed arrived at by lower Courts is binding on High Court—Penal Code (1860), S. 120-A.

A finding by the lower Courts that there did exist a general conspiracy is a finding which cannot be challenged before the High Court. [P 325 C 2]

(f) Dangerous Drugs Act (1930) — Scope—Conspiracy punishable under S. 120-B, I. P. C. and Opium Act formed before 1930 but continuing to exist subsequent to passing of Act—Reference can be made to Act of 1930 in charge and sections in it can be applied.

Where a conspiracy punishable under S. 120-B I. P. C. and Opium Act is formed before Act of 1930 but continues to exist even subsequent to the coming into force of the Act and a prosecution is launched, reference to Act of 1930 can be made in the charge and sections of the Act can be applied. [P 326 C 1]

(g) Interpretation of Statutes — Statutory enactments are less elastic than common Law principles.

The provisions of statutory enactments must always and necessarily be somewhat less elastic than those to be gathered from the Common Law which in effect is enshrined in judgments in decided cases. Courts have to administer and to apply as accurately as lies in their powers the precise words of the relevant statutory enactments. [P 327 C 2]

(h) Criminal P. C. (1898), S. 403—Prosecution for conspiracy and trial — Subsequent prosecution for different conspiracy though

some of members same as before is not barred under S. 403.

Where a prosecution is launched against certain persons for conspiracy for doing some unlawful act and accused are convicted after the trial, a subsequent prosecution and trial of same accused for a different conspiracy is not barred by S. 403. [P 330 C 1]

(i) Criminal P. C. (1898). S. 439 — Evidentiary value of accounts—Question is one of fact—Accounts.

The question of the value as evidence of accounts is one of fact and cannot be interfered with in revision. [P 330 C 2]

N. K. Basu, S. Mitra, Joy Gopal Ghose, S. C. Talukdar, S. K. Sen, Dinesh Chandra Roy, A. K. Fazlul Huq, Probodh Chandra Chatterjee, Bireswar Chatterjee, Camell, Probodh Chandra Chatterjee, Daud, Jogesh Chandra Sinha, Tapan Kumar Mitter, Nurul Huq Chowdhury, A. K. Fazlul Huq—for Petitioners.

A. K. Roy and *Rai Nagendra Nath Banerjee*—for the Crown.

Costello, J.—In these Rules we are concerned with the trial of a number of persons who were tried before Mr. P. C. Ghose, Magistrate of the first class, at Alipore. In all forty six persons were tried before that Magistrate upon a charge under S. 120-B, I. P. C., read with S. 9, Opium Act, (Act 1 of 1878), Ss. 13, 14-A and 19, Dangerous Drugs Act, (Act 2 of 1930), and S. 19 (a) and (c), Arms Act, (Act 2 of 1878.) The charge was that they were parties to a criminal conspiracy to export, import possess and sell opium, (that part had reference to S. 9, Opium Act), import into British India and export from British India and tranship dangerous drugs, i. e. opium and cocaine (S. 13, Dangerous Drugs Act) import and export interprovincially, transfer possess and sell manufactured goods, i. e. cocaine (that part had reference to S. 14 (a), Dangerous Drugs Act), to hold and control a trade in dangerous drugs, i. e. opium and cocaine, obtained outside British India and supplied to persons outside British India (S. 19, Dangerous Drugs Act), and to import and sell firearms. (Ss. 19 (a) and (c) of the Arms Act). We are not concerned with any question relating to the Arms Act as that part of the charge was not proceeded with in course of the trial.

On the main part of the charge thirty seven out of the forty six accused were convicted by the learned Magistrate as appears from the very elaborate and careful judgment which he delivered on 24th April 1933. The thirty seven convicted persons appealed against their conviction and sentences and the appeal was heard by Mr. B. H. Parker, Additional Sessions Judge at Alipore. As a result of the appeal thirty of the appellants had their conviction and sentences affirmed, and seven of the appellants were acquitted. Of the thirty convicted persons two were content apparently with the position which then was. The other twenty eight convicted persons came before this Court and were successful in obtaining Rules directed against their conviction and sentences. The Rules were issued in September, 1933 and between that time and the time the matter came before us a fortnight ago, two of the convicted persons named Joy Bhagwan and Golam Jalani had died. We therefore have to consider the cases of the remaining twenty six convicted persons. All these twenty six persons were represented before us by learned Advocates who put forward a number of points of law, some of which concerned the cases of all the twenty six persons and the others concerned only a certain number of them. The matter was argued before us for a number of days, and undoubtedly all that could possibly have been urged on behalf of these twenty six persons was fully and forcibly put before the Court. We have therefore to consider whether the arguments put before us were sufficient to lead us to the conclusion that any one of these twenty six persons is entitled at the hands of this Court to have his conviction set aside or the sentence imposed upon him reduced or varied or, on the other hand, whether inspite of the forcible and cogent arguments put forward, we ought to come to the conclusion that on the whole the judgment of the learned Additional Sessions Judge should stand.

The points put forward and elaborated before us may be classified under six heads (1) that by reason of non-compliance with the requirements of S. 196-A, Criminal P. C., the whole of the proceedings before the learned Magistrate who tried the case were invalid; in other words, the trial itself was unlawful by reason of the provisions of that section; (2) that the judgment

given by the learned Additional Sessions Judge was not according to law, and that, therefore apart altogether from the illegality of the original trial there ought, at least to be a re-hearing of the case on appeal; (3) that the charge laid against all the accused persons was bad in law and wholly unsustainable by reason of the fact that the allegation made against all the accused was that they were parties to a criminal conspiracy which began in the year 1920 and continued until the month of March 1932, and the charge had included within its scope an allegation of contravention of certain sections of the Dangerous Drugs Act of 1930 which only came into operation on 1st February 1931; (4) that under the provisions of the Opium Act, 1878 even as amended in the year 1914, the maximum sentence provided for is one year's rigorous imprisonment, and that as the Dangerous Drugs Act did not come into operation until the year 1931, it was not competent to the Court to impose the higher sentence of two years' rigorous imprisonment which was the sentence imposed on a large number of convicted persons, nor was it competent to the appellate Court to apply the provisions of S. 18, Dangerous Drugs Act of 1930 and so to require the giving of security as provided for in that section which was in fact done in the case of a considerable number of convicted persons by the learned Additional Sessions Judge of Alipore; (5) that by reason of the fact that a certain number of the accused persons had on previous occasions been convicted of various offences in connection with the illegal trafficking in opium and raw cocaine, those particular convicted persons were entitled to pray in aid the provisions of S. 403, Criminal P. C., as a protection against these subsequent proceedings; seeing that they were basedon a charge of conspiracy contravening the provisions of the Opium Act 1778 and the Dangerous Drugs Act, 1930: and (6) that as regards certain of the accused it was manifest on the face of the judgment of the appellate Court that the evidence adduced against them was not sufficient in law to warrant the conviction, and in connection with this point Mr. N. K. Basu in particular on behalf of Abdul Rahaman, who was a petitioner in Rule 951 of 1933, took the objection that at the trial two sets of accounts had been taken into consideration, namely those of a man named Fazladdin and those of a man named Amiruddin, though these accounts had not been properly proved and were therefore inadmissible in evidence on behalf of the prosecution.

We now proceed to deal with the points which I have just enumerated in more detail. As regards the first point, namely that relating to S. 196-A, although this was originally taken by several of the Advocates who appeared on behalf of the petitioners before us, it was ultimately only relied upon to any extent by Mr. N. K. Basu on behalf of the petitioner Abdul Rahaman, and by Mr. Fazlul Huq on behalf of the petitioners in Rr. 958 and 961 to 972. At the same time, however, it is clear that if it has any substance in it at all, all the petitioners in spite of the attitude adopted by their respective counsel, would be entitled to have the advantage of that point of law if in fact it operates in favour of the defence.

Mr. N. K. Basu and Mr. Fazlul Huq, the latter in particular very strenuously urged that the whole of the proceedings both those before the appellate Court below and those before the Magistrate ought to be quashed by this Court on the ground that S. 196-A, Criminal P. C., provides that no Court shall take cognizance of an offence of Criminal conspiracy punishable under S. 120-B, I. P. C., (1). In a case where the object of the conspiracy is to commit either an illegal act other than an offence, or a legal act by illegal means, or an offence to which the provisions of S. 196 apply, unless upon complaint made by order or under authority from the Governor General in Council, the Local Government or some officer empowered by the Governor General in Council in this behalf, or (2) in a case where the object of the conspiracy is to commit any non-cognizable offence, or a cognizable offence not punishable with death, transportation or rigorous imprisonment for a term of two years or upwards, unless the Local Government or a Chief Presidency Magistrate or District Magistrate empowered in this behalf by the local Government, has, by order in writing, consented to the initiation of the proceedings. The section contains a pro-

viso which is not material for our present purpose.

Much stress was laid upon the word "initiation" as it appears in this section and it was pointed out to us that the trial before the Magistrate at Alipore began on 5th October 1931, and that the charge was formally framed on 14th September 1931, perhaps instead of "framed" I ought to say "submitted," and that at that time no sanction had been given as required by S. 196-A. Admittedly, however, a sanction in due from was given by the Local Government on 30th October 1931. It is to be noted in connection with the discussion on this point, (the point under S. 196-A) that the charge made against all these accused persons did include an allegation that they had committed an offence which was punishable not only under the provisions of the Opium Act of 1878 but also under the provisions of the Dangerous Drugs Act, 1930. Therefore, having regard to the fact that punishment under the relevant section of the Dangerous Drugs Act, 1930 extends to rigorous imprisonment for two years, it may well be the position that in these particular series of cases, I may use the expression "series" with reference to the Rules before us, S. 196-A has no application at all because it is clear from the terms of sub-S. (2) of S. 196-A that if the offence charged is one punishable with rigorous imprisonment for a term of two years or upwards, no consent of the local Government is essential or indeed required at all. But having regard to the arguments which were put forward with regard to the validity of the charge itself it is perhaps better that by reason of the inclusion in it of a reference to the Dangerous Drugs Act 1930, we should dispose of the contention with regard to S. 196-A upon the footing that in this case the consent of the Local Government was necessary as a condition precedent to the initation of the proceedings. Upon that view of the matter there was no doubt a formal defect. The trial was commenced, as I have said, on 5th October 1931, and the consent of the Local Government was not given until some 25 days later, and at a time when the trial had already started on its long course. I use the expression "long course" because actually the proceedings before the learned Magistrate lasted over a period of something like 18 months. Assuming therefore that there was this formal and technical flaw with regard to the initiation of the proceedings, the question then arises whether we should be justified in declaring that the whole of these lengthy and costly proceedings is nugatory and tainted with illegality and whether we should be obliged to order that they be quashed. It seems to me that on the whole anything of the kind would be utterly unreasonable and indeed absurd.

The real position seems to have been this: that on 14th September 1931 the Police put forward a charge upon which the accused were subsequently tried on 5th October 1931. The trial was opened and the Public Prosecutor of Alipore on behalf of the Crown embarked upon his opening speech and in the course of that speech he no doubt with his usual clarity in all proper detail indicated the nature and gravity of the offence with which the accused had been charged. At that stage it apparently became manifest to the advisers of the Crown that it might be desirable, even if it were not absolutely essential, that a formal consent of the Local Government should be obtained and that consent was in fact obtained and given, as already noted, on 30th October 1931. Upon any view of the matter the utmost that can be said is that there was a technical defect as regards the initiation of these proceedings, but it must, at the same time, be transparent and obvious as anything over could be that no one of the accused in any sense at all could have been prejudiced by the belated, even if it was belated, formal consent of the Local Government. The provisions of S. 196A are designed to provide a safeguard against the initiation of vexatious prosecution for criminal conspiracies of the kind indicated in the section. The section is certainly not intended to provide a means of escape for persons who have been convicted on charges brought against them even though those charges relate to the kind of offences indicated in the section. if it could have been shown to us that any one of these accused persons had been prejudiced in his defence by reason of the defect complained of, the matter might have been otherwise, but as it is,

it is clearly impossible, as Mr. S. K. Sen at any rate seems to have realised for this Court to interfere in the way asked for by Mr. N. K. Basu and Mr. Fazlul Huq.

We hold therefore that there is no ground for our interference with any of these convictions by reason of the non-compliance, strictly speaking, with the provisions of S. 196A, Civil P. C. In any view it is not the function of this Court when exercising its revisional jurisdiction to allow guilty persons to escape the just reward of their misdoings on the basis of an unsubstantial technicality. The next point urged on behalf of the 26 persons before us, actually rules 23 were issued, is that the judgment of the learned Additional Sessions Judge is not in accordance with law. That is a very wide and sweeping assertion. It may mean a great deal or it may mean nothing at all. The proposition is wide enough to comprehend arguments on points of law and arguments on questions of fact. It may mean nothing more in essence than that the judgment is wrong because it had the effect of affirming the convictions of 30 persons and setting aside the conviction of seven other persons. But in the course of the argument which was put forward before us mainly by Mr. N. K. Basu on behalf of the petitioner Abdul Rahaman, it emerged that the real contention was that the judgment of the learned Additional Sessions Judge was bad because as Mr. N. K. Basu (and Mr. Fazul Huq) contended the learned Additional Sessions Judge had not properly complied with the provisions of S. 367 and 424, Criminal P. C. Upon numerous occasions in this Court judgments of appellate Courts below have been assailed on the ground of non-compliance with those sections. The contention made on behalf of the petitioners was crystallised by one of the learned Advocates before us in the phrase "the judgment of the appellate Court must be self-contained" and it was suggested that the judgment given in this case was not sufficiently detailed or sufficiently definite. Mr. N. K. Basu urged that nowhere in the judgment of the learned Judge is there any finding that there was any conspiracy as alleged in the charge, and that therefore there is no finding in the judgment of the appellate Court as to what the objects of the conspiracy were. Mr. N. K. Basu supported his argument by emphasising that upon the facts relied upon by the Crown for the purpose of substantiating the charge which was made, it was not possible for any Court rightly to come to a conclusion that there was one general conspiracy between all the accused persons, and that therefore it was all the more necessary for the Judge to come to a definite finding upon the question whether there was a conspiracy or not. Mr. N. K. Basu permitted himself to be somewhat trenchant and indeed sarcastic in his comments upon the judgment of the appellate Courtbelow.

He opened his address to us by saying that what had been written by the learned Additional Sessions Judge was not in the nature of a judgment at all but was in effect "a treatise on logic, paychology and penology." Then Mr. Basu proceeded to say that not only was there no finding as to the existence of a general conspiracy, but there was no satisfactory discussion with regard to the position of each of the individual accused persons. The contentions made on behalf of the petitionerswi th regard to the form and contents of the judgment of the appellate Court below are undoubtedly of some substance, particularly having regard to the fact that it was strenuously argued on behalf of the petitioners that it had never been satisfactorily established that there was one conspiracy, in which they were all involved, of a kind which could be relied upon to found a single charge under S. 120-B, I. P. C. It has been our task to endeavour to ascertain how far the comments and contentions in connexion with the judgment of the learned Judge are justified and to what extent the arguments in this connexion put forward on behalf of the petitioners are at all in their favour.

In dealing with this particular point it may be said at the outset that while not accepting Mr. N. K. Basu's somewhat vitriolic attack on the form and contents of the judgment of the learned Additional Sessions Judge, we think that we are bound to recognise the force of the contention that nowhere in this judgment is there in terms a definite finding as to the existence of the widespread and integral conspiracy as alleged

by the prosecution. My learned brother in course of the argument pointed out that the appropriate place in the judgment where one would expect to find a sentence or two definitely indicating that the Judge was satisfied as to the existence of the conspiracy, was at the end of para. 1, on p. 12 of the printed judgment. In the previous pages the learned Judge had discussed the charge and had discussed certain points of law which had been raised on behalf of the defence at the trial, e. g., the question how far the evidence of accomplices can be relied upon, the nature and extent of corroboration required, the point with regard to the applicability of the Dangerous Drugs Act and the defence raised under S. 403, Criminal P. C. The learned Judge had also discussed in general outline the main evidence which had been given on behalf of the prosecution, and it is not to be overlooked that when considering the contentions put forward by the defence that the charge itself was vague and that there was no proof of any agreement, nor any date when the conspiracy was agreed to or dissolved, the learned Judge at p. 9 had made this observation: "I have now disposed of all the legal points involved." That may perhaps be taken as an indication, at any rate that the learned Judge was not accepting the contention put forward by the defence that there was no conspiracy. But as I have observed the passage in the judgment where one would expect to find a categorical pronouncement on the question of the existence of the conspiracy is at p. 12 of the print. We find there this short paragraph :

"In the light of the foregoing remarks I shall now examine the case against each of the appellants, and I shall continue to use the procession of the judgment though I have examined the evidence independently."

Now if the learned Judge had put in front of that paragraph a line or two stating in clear terms that he was satisfied as to the existence of a general conspiracy, no comment or criticism as regards this point could have been possible. It is therefore to be regretted that the learned Judge, no doubt inadvertently, did not say definitely that he held that the existence of one general conspiracy had been satisfactorily established. We find however on the page following, in course of the discussion as regards the evidence against the two accused Ahmed Shah and Reza Khan, that the learned Judge says this :

"The evidence referred to above proves his complicity (i. e., Ahmed Shah's complicity) in this conspiracy and I hold that he has on all grounds been rightly convicted."

Looking back to the short paragraph which I quoted a moment ago, I think that we must take it that when the learned Judge said: "I shall now examine the case against each of the appellants" what he meant was that he was about to proceed to consider how far each of the appellants severally and individually was implicated in the conspiracy. What the learned Judge had in his mind was that he was at any rate satisfied that the conspiracy had been proved at the trial to exist. The short paragraph on p. 12 of the judgment seems to have been designed to close one part of the judgment, namely, that dealing with the discussion as to whether or not there was a general conspiracy, and to serve as an introduction to the other part of the judgment which is concerned with an inquiry into the question as to whether all or some and which of the accused persons, were members of the general conspiracy. The learned Judge has undoubtedly considered, as far as one can see, fully and adequately the case of each one of the accused and in the end he came to the conclusion that it was his duty to pick out not less than seven of the convicted persons who were convicted at the trial, and to hold that the case against each of those seven persons had not been sufficiently and satisfactorily established. Whenever an appellate Court makes a selection of this character and distinguishes the position of some out of a number of appellants, one is bound to feel that the appellate Court had exercised a judicial discrimination after seriously and carefully considering the evidence as adduced against each one of the appellants before the Court.

It is all very well to say that an appellate Court must comply strictly with the provisions of the sections I have mentioned. But S. 367 must be interpreted reasonably and so long as the appellate Court below writes a judgment from which this Court can gather what the decision of the appellate Court really was, that in the majority of instances

ought to be sufficient. It would be manifestly most unreasonable to expect an appellate Court to dot every 'i' and cross every 't', if I may use the expression. The judgment of the appellate Court is written by some one who is to be presumed to know the value of the words, and it is written with the object amongst other things of its being understood by this Court if it be necessary for this Court to pass it in review. If, therefore, it is possible for this Court reasonably to arrive at an understanding of what has been found in the Court below, it is not necessary that this Court should captiously or capriciously set aside the judgment of the Court below or even comment on it with any severe strictures. Still less is it obligatory upon this Court to hold that the proceedings in appeal ought to be quashed and the matter reheard in appeal from the beginning. Looking at this judgment as a whole we are quite satisfied that the learned Additional Sessions Judge did come to the conclusion that the existence of one general conspiracy had been fully established upon the evidence, and having come to that conclusion it was then his function to ascertain which of the accused, and to what extent each of the accused had been a party to that conspiracy.

I now come to the third of the main points put before this Court, namely, the contention that the charge itself was bad in law and wholly unsustainable by reason of the fact that the general conspiracy alleged was said to have been inaugurated in the year 1921 and to have remained in existence, and indeed in full operation, until the month of March in the year 1932. It was argued by several of the learned advocates appearing on behalf of the petitioners that it was quite wrong and indeed impossible to charge a number of persons with being parties to a conspiracy which originated in the year 1920, a conspiracy having one or part of its objects the contravention of certain provisions of the legislative enactment which only for the first time came into existence in the year 1930 and into force in the month of February in the year 1931. On the face of it that contention appears to be one of considerable weight, and the arguments put forward in support of it were plausible, and well reasoned, and superficially, at any rate, damaging if not wholly destructive of the case made on behalf of the Crown. Bearing that in mind, we have considered this particular point with very great care and have scrutinized it from every possible angle.

In order to arrive at a proper estimation of the value of this contention it is necessary in the first instance that one should examine the precise language used in the charge itself. I have already mentioned the charge as it is summarised at p. 4, of the printed judgment of the Magistrate who conducted the trial. But the actual indictment, if I may so refer to the charge as drawn, puts rather a different complexion upon the matter. The formal charge begins in this way: I, P. C. Ghose, Magistrate, 1st class, hereby by charge you . . . . ; then follows the names of the forty six accused including of course the present petitioners before us; then come these words:

"That you between the year 1920 and the 19th day of March 1932, at Kidderpore, Calcutta, River Hooghly, Delhi, Muttra, Rangoon, Akyab, Chittagong and other places in British India along with . . . . ";

then follows a long string of names of persons who were said to be engaged jointly with the accused as parties to the conspiracy and the document proceeds as follows:

"Were parties, to a criminal conspiracy to unlawfully export, import, possess and sell opium (punishable under S. 9 (a), (b), (c) and (d), Opium Act): import into British India and export from British India and tranship dangerous drugs i. e., opium and cocaine (punishable under S. 13, Dangerous Drugs Act). Import and export interprovincially, tranship, possess and sell manufactured drug i. e. cocaine (punishable under S. 14A, Dangerous Drugs Act), engage in control of trade by which dangerous drugs, e. g. opium and cocaine, were obtained outside British India and supplied to persons outside British India (punishable under S. 19, Dangerous Drugs Act.).

Import and sell firearms and ammunitions (punishable under S. 19 (a) and (c), Arms Act). The modus operandi of the conspiracy being to remove opium from Rampur State, Jaypur State Delhi, Muttra and other places in Upper and Central India including Native States to Calcutta, and then to despatch it to Burma, Chittagong, Straits, China, Japan and other places in the Far East in ships or otherwise from Calcutta and to import cocaine from Japan by reverse process to Calcutta and thence to above-mentioned places in Upper and Central India including Native States and in pursuance of said conspiracy there was a trafficking on a huge scale in opium, cocaine and firearms and thereby committed an offence punishable under S. 120 B, I. P. C., read with S. 9 a, b, c, d, Opium Act (Act 1 of 1878), S. 13, 14A and 19,

Dangerous Drugs Act (Act 2 of 1930) S. 19 (a) and (c) of the Arms Act (Act 2 of 1878) and within the cognizance of this Court, "

and then comes the concluding paragraph :

" And I hereby direct that you be tried by the said Court on the said charge ".

It appears therefore that in the month of October 1931. forty six persons whose names appear at the head of the charge, were being indicted for being parties to one vast conspiracy which had come into existence in the year 1920 and subsisted right down to the 19th March 1932, that is to say, for a period of some twelve years. The objects of this widespread conspiracy, put shortly were these: to acquire and collect opium from Indian States and other places in Upper and Northern India, (and for that purpose there was a group of conspirators in Delhi and and possibly in other places in Upper and Northern India) ; then to cause opium to be conveyed to Calcutta where it was received and possibly accumulated by a group of Peshwaries who were acting not only in concert with each other but in conjunction with the consignors in Northern India. From this group in Calcutta the opium was conveyed to another group in Kidderpore, a group consisting of a number of persons who have been referred to as Karbaris. They were said to have been acting in concert with the first two groups. The Karbaris in their turn transferred the opium to another group of persons who have been referred to as the Manjhis. They were acting in concert with the Karbaris and under their directions the Manjhis conveyed the opium in country boats and surreptitiously handed it over to sailors or other members of the crew of various ships leaving the Port of Calcutta for places in the Far East. The chain thus consisted of five main links. Each link in its turn was compised of smaller links and the whole thing formed an organization for doing what the learned Magistrate in his judgment has desoribed as an organised trafficking on a huge scale and an international trade in opium. The charge also alleged that by this organization cocaine was brought from Japan and other places in the Far East and conveyed through the links of the large claim until it reached the other end of the chain, and was distributed in Northern India and possibly in other places.

The gist of charge therefore against all these forty six persons was that they were units of varying degrees of importance in one large organization. They were all members of one body, some of whom might have been or no doubt were of more importance than the others. But that is the case with regard to any large and complicated piece of a machinery ; some of the cogs are of more importance than the others but each of them has its own part and in the sense that it may be said that the smallest nut may be just as vital as bigger parts of the machinery. For the purpose of resolving this question with regard to the validity of the charge one has to bear in mind what the essence of the allegation against the forty six persons really was. In essence the allegation was nothing more or less than what I have been endeavouring to describe, namely that each one of these forty six persons was an integral part in a vast piece of machinery designed to serve the object of unlawfully exporting opium and unlawfully importing cocaine. To put it even more tersely, the charge against the forty six persons was that of illegal trafficking in opium and cocaine.

That was a violation of the law in this country even before the passing of the Dangerous Drugs Act in the year 1930. It is not necessary, I think that that I should refer in detail to the various sections of the Opium Act of 1878 or to the Bengal Excise Act of 1909 (Bengal Act 5 of 1909) in order to show that long prior to the year 1930 it had been unlawful to deal with opium and cocaine in the way these substances were dealt with by the present accused in this case. In order fully to appreciate how the law stood, it is necessary to examine a number of sections of both the enactments I have mentioned, and to take into consideration the definition appearing in them. We have been referred to all the relevant sections and provisions of those Acts in the course of the argument, and we have very carefully considered how the matter stood prior to the beginning of February 1931, and it is quite clear that long before that date it would have been possible to frame a charge almost precisely in the

same terms as the charge in the present case with only slight alterations as regards the reference to the relevant sections as contained within brackets in the charge.

Looking at the matter therefore from that point of view, I think it may be taken that the material part of the charge is that which sets out the nature of the offence and gives a description of the manner in which it was alleged that the operations of the conspiracy were carried out and in effect and for all practical purposes the enactments were merely referred to in the charge for the purposes of indicating under what provisions of the law as it existed at the time of the trial, the accused persons could be punished if they were found guilty of the allegations made against them. The learned advocates who stressed the point with regard to the validity of the charge, based a great deal of their arguments upon the fact that S. 120-A, I. P. C., states

"When two or more persons agree to do, or cause to be done, (1) an illegal act or, (2) an act which is not illegal by illigal means, such an agreement is designated a criminal conspiracy."

Then follows a proviso which is not relevant for our present purposes, because it only relates to agreements which are not agreements to commit an offence). It is correct to say that the gist of an offence of conspiracy, or more accurately, the gist of an offence under S. 120-A is the conspiracy or agreement between the accused persons. In other words a mere agreement between two or more persons to do an illegal act, or an act which is not illegal by illegal means is of itself a criminal conspiracy.

The learned advocates who relied so much on this contention, that is to say the contention with regard to the form of the charge endeavoured to induce us to adopt the view that because a mere agreement to do an illegal or a legal act by illegal means is itself a conspiracy, therefore the conspiracy is not only complete but is concluded directly the agreement is made in the sense that the agreement having been made the offence is, once and for all, constituted and therefore in effect a conspiracy is an offence which begins and ends at one and the same time. That in my opinion, is an entirely fallacious argument. It is one thing to say that a mere agreement constitutes a conspiracy in certain circumstances, i. e., the gist of the offence under S. 120-A is the agreement, but it is entirely another thing to say that the agreement having been made it is impossible that the conspiracy should exist beyond the actual time at which the agreement is born, if I may so put it. The learned advocates appearing for the petitioners would have held that the birth and death of the conspiracy are simultaneous or at any rate so closely does one follow the other that there is no appreciable period of time between the two.

It seems to me that any such argument is based upon entirely a wrong interpretation of what the section means. The section cannot be used in aid of the defence where it is said that a criminal conspiracy was in existence for a certain period of time. It is true that a mere agreement may bring the conspirocy into existence but nowhere it is said in the Code that after that the offence no longer exists. It seems to me that it is only reasonable to hold that criminal conspiracy may come into existence, and may persist and will persist so long as the persons constituting the conspiracy remain in agreement and so long as they are acting in accord, in furtherance of the objects for which they entered into the agreement. Therefore in my opinion, the question whether this particular conspiracy was in existence or not at the time when the Dangerous Drugs Act came into operation in 1931 is solely a question of fact. No doubt in the course of the years some of the original conspirators fell out and others came in: some of the persons who entered into agreement to traffic in opium in the year 1930 might get tired of taking part in it, and some might have waxed fat on the illicit profits and thought it well to retire: others may have died and various new links in the chain I have described might have been forged by other persons coming in and taking the place of the others who fell out, or the large links, as I have called them, in the chain may have become more extensive, or some of them may have shrunk but in effect the conspiracy went on, beginning in 1920 and lasting up to the year 1930. There is a definite finding upon that point on the part of the Magistrate who tried the case. At p. 52 of the printed judgment he says :

" From a thorough consideration of all evidence, oral, documentary, and circumstantial, produced by the prosecution as enumerated above at length, I hold without hestitation that the main issues have been definitely established e. g. (1) The existence of a conspiracy to smuggle opium and cocaine between Northern and Central India at one and Burma ports and ports in the Far East at the other, Calcutta being the centre of the great secret trade ; (2) that the accused persons in general are parties to the above conspiracy. Then he proceeds to consider the case of each of the accused persons."

The learned Additional Sessions Judge touching the matter as regards the duration of the conspiracy at p. 8 of the print says : If Exs. 87/8, 106, 88/9, 87/47, 105/5, 102/24 C are significant of smuggling transactions at all, they are evidence that the conspiracy was still in existence till 30th August 1931 and 31st July 1921 :"

" Perhaps it would be more correct if those dates are reversed but it is quite clear from those dates that the learned Judge was of opinion that the conspiracy was in existence in the month of August 1931. Then he says : It is the Crown case that these transactions were the concluding parts of the general conspiracy. The law applying to the general conspiracy must be that law which is in existence on its last day, which was the day on which the charge was framed. Then he proceeds to say: It was argued for the Crown that S. 41, Dangerous Drugs Act, also covered the matter."

I regret that I am unable to agree with what the learned Judge says as regards the applicability of S. 41. In my opinion it has no application to the present case at all. The importance of those passages in the judgment to which I have just referred is that there is a definite finding that the conspiracy, that is to say, the unlawful agreement was still in existence in the year 1931, and findings of both the Courts indicate in my opinion, that this illegal conspiracy, that is to say, this vast organisation having unlawful objects had been functioning continuously from some date even anterior to the year 1920. Both the Courts have dealt with the matter upon the footing that the conspiracy was in existence and that the agreement was in operation continuously between the years 1920 and 1931. Both the Courts having formed that opinion, proceeded to satisfy themselves as to how many or which of the accused persons were members of that conspiracy. The learned Magistrate, it is to be observed, said (at p. 52 of the printed judgment) :

" It was represented by the learned counsel for defence that as the period of the charge has been taken to commence from 1920, no evidence has been given to show that the conspiracy was hatched in that year, nor has any evidence been given as to when, where and what agreement was made between the parties to the conspiracy from one end of the chain to the other, or when each individual conspirator joined the conspiracy. The evidence however is definite that the conspiracy existed from long before 1920 and a particular period was taken for this case for confining the evidence to that period. The agreement in the present case can be easily and very strongly inferred from the oral, documentary and circumstantial evidence which raise the strongest presumptions of the existence of a common concerted plan among the accused persons to carry out their unlawful design."

It was argued before us that there was a mis joinder in this case, in that all the forty-six persons ought not to have been tried together on one and the same charge. That would have been a more satisfactory course from some points of view, but the Crown chose to think and no doubt rightly, as the case was presented to the advisers of the Crown, that it was better to charge all these persons as being parties to one conspiracy. The Crown took the risk of being able to establish that charge, and in the opinion of the two Courts below, they succeeded in doing so. The matter comes before us in this position: that there is a finding that there did exist a general conspiracy, and that is a finding which cannot be challenged before us. Therefore we have to decide this matter upon the footing that there was a conspiracy from the year 1920 until late in in the year 1931, and that the twenty-six persons who have come before this Court were parties to this conspiracy.

When one realizes that position it seems quite clear that in order to deal with these twenty-six persons on the footing that they had contravened not only the provisions of the Opium Act, but the provisions of the Dangerous Drugs Act, we may recall for what it is worth, that some of these persons continued in their nefarious acts even when they were on bail. The findings of the Court below are entirely destructive of any argument which is based upon the suggestion that there were no overt acts after the Dangerous Drugs Act came into force, because the findings indicate that the conspiracy was extant at the time and these persons were still in agreement, and either acting in accordance with that agreement, or ready to act when occasion arose. On the view

that there was this conspiracy there is nothing in the argument that there was any misjoinder and that the trial was bad, because so many persons were tried jointly. They were all alleged to be members of a criminal conspiracy, and they have been found to be members of a criminal conspiracy. What I have said disposes of third point put forward on behalf of the defence and inferentially it disposes of the fourth point.

The fourth point was that it was not competent to the Crown to include in the charge any reference to the Dangerous Drugs Act, 1930, i. e., it was not right to charge any of the persons, with a contravention of the Dangerous Drugs Act, and none of them should be punished with the punishment provided for in the relevant sections of the Dangerous Drugs Act, and that therefore the maximum penalty which could have been imposed, was not two years but one year's rigorous imprisonment. That being the position the majority of the sentences imposed were illegal. There was a further argument that if the Dangerous Drugs Act, 1930, be ruled out altogether, as the defence contended, then it was not competent either to the appellate Court below or to this Court, or to any other Court to require security to be furnished in the manner ordered by the learned Additional Sessions Judge of Alipore. This argument has no substance in it, and fails completely, one comes to the conclusion, as we have for the reasons which I have already given, that it was quite in order and lawful for these persons to be charged with being members of a conspiracy which was punishable not only by reading S. 120-B with cerain sections of the Opium Act, but also by reading S. 120-B I. P. C., with certain sections of the Dangerous Drugs Act, 1930. Upon the view that the Dangerous Drugs Act, 1930, does have application to the circumstances of this case, it follows that the order made by the learned Additional Sessions Judge with regard to the giving of security was a valid order.

I have now dealt with the four main points which were relied upon directly or indirectly by all the petitioners before us. As already explained some of the Advocates appearing pressed some or all of these points made quite clear to us that the latter associated themselves with the arguments of the former and relied upon these points as being of vital importance to their respective clients. I now come to the point which is taken on behalf of certain of the accused, namely, the petitioners Abdul Rahaman in R. 951, Fazaldin in 952, Fazaldin described as the brother of Golam Jelani in 958, Din Mohamed in 959, Chunu Mia, Hafizar Rahman and Mokleswar Rahaman in 960, Amiruddin in 962 and lastly Ali Azam Pundit in 965. This point amounted in effect to a plea under the principle of English Criminal Jurisprudence of autrefois convict or in one or two instances autrefois acquit. This plea was, it was urged, available to these convicted persons respectively by reason of the provisions of S. 403, Criminal P. C. The point was argued very fully and very forcibly by four of the learned Advocates appearing for the persons whose name I have just mentioned, namely, by Mr. N. K. Basu on behalf of Abdul Rahaman, by Mr. A. K. Fazlul Huq on behalf of Fazaldin and Amiruddin and Ali Azam Pandit, by Mr. Talukdar on behalf of Fazaldin of Amposta the petitioner in R. 952, and further by Mr. Daud on behalf of Din Mohamed, Chunu Mia and Hafizar Rahaman. The arguments put forward by the four learned Advocates I have mentioned, follow the same lines.

Mr. Talukdar however in arguing the case of Fazaldin of Amposta, called our attention to certain chronological facts, Mr. Talukdar pointed out that the first statement made by the witness Rokunali was made on 15th June 1930, and that at or about the same time certain accounts which are said to bear upon the conspiracy, were in the hands of the police. The second statement made by Rokunali was on 19th July 1930, on that occasion also other accounts came into the possession of the police, and thereupon the house of Fazaldin who was also described as Fazlu, was raided. In December 1930, the third set of accounts came into the hands of the police. These accounts constitute the first set of accounts which, according to the arguments put forward by Mr. N. K. Basu on behalf of Abdul Rahaman, were not properly proved in evidence at the trial and ought not to have been taken into consideration. Mr. Talukdar however put these dates before the Court

for the purpose of founding his argument that in December 1930, the police were or ought to have been in a position to charge Fazldin with an offence very similar if not entirely identical with the offence with which he stood charged in the present proceedings, and that therefore the fact that he was convicted of certain offence under the Opium Act by the Chief Presidency Magistrate of Calcutta on 3rd December 1930, ought to operate in such as way as to enable Fazaldin to rely on the plea of autrefois convict as provided for in S. 403, Criminal P. C.

It is to be observed however that the third statement which was made by Rekunali and which seems to have been much more detailed and much more comprehensive than either of the previous ones, was made in April 1931 and we must take it that it was only after the third statement came before the authorities that it was decided that there was sufficient material to justify a wholesale prosecution of the kind, which was ultimately commenced on 5th October 1931. The question of the applicability of S. 403, Criminal P. C., to the accused persons whose names I have enumerated, is one by no means free from difficulty, and we have given to it our most anxious and careful consideration. The arguments put forward and so well put forward by the four advocates whose names I have given, were undoubtedly impressive, and at first sight it had appearcd that the clients of those four learned advocates might be entitled to be let out of these proceedings by reason of their previous convictions, or in one or two instances by reason of their previous acquittals on charges made against them in connexion with trafficking in opium or raw cocaine.

It is to be borne in mind however that the principle that no one ought to be put in jeopardy twice for the same offence (which is of course an agelong principle of the Common Law in England) has so far as this country is concerned, been laid down in the precise provisions of S. 403, Criminal P. C. No doubt the legislature did intend to embody in that section as far as possible that fundamental principle of English criminal jurisprudence, but it has to be borne in mind that the provisions of statutory enactments must always and necessarily be somewhat less elastic than those to be gathered from the Common Law which in effect, at this time of day is enshrined in judgments in decided cases. We have to administer and to apply as accurately as lies in our power, the precise words of the relevant statutory enactments. Therefore it is essential for our present purpose to see and understand the precise language of the section under consideration. S. 403, sub-S. (1), Criminal P. C., reads as follows:

"A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under S. 236, or for which he might have been convicted under S. 237."

Sub-S. (2) says:

"A person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under S. 235, sub-S. (1)."

And sub-S. (3) says:

"A person convicted of any offence constituted by any act causing consequences which, together with such act, constituted a different offence from that of which he was convicted, may be afterwards tried for such last mentioned offence, if the consequences had not happened, or were not known to the Court to have happened at the time when he was convicted."

For our present purpose I no not think it necessary to do more than to emphasize the precise words of sub-S. (1); and the effect of that sub-section comes to this : that a person who has once been tried for an offence and either convicted of it or acquitted of it, shall not be tried again either for the same offence or for any other offence based on the same set of facts.

Mr. Talukdar referred us to a number of authorities, but in a matter of this kind previous decisions are, on the whole, of very little assistance, because in every case where this plea is raised the necessary answer must depend almost entirely upon the facts of each particular case. Amongst the authorities cited by Mr. Talukdar was the case of 1926 Cal. 450 (1). In that case the petitioners had on one occasion been tried

1. Cheragali Bepari v. Satis Chandra Ghose, 1926 Cal 450=87 I C 847=26 Cr L J 1023.

under S. 193, I. P. C., and after a careful and exhaustive examination of the whole evidence were acquitted. Subsequently they were put on their trial under Ss. 467 and 471 read with S. 120 B. I. P. C. As an outcome of these proceedings the matter came before this Court, where it was held by Suhrawardy, J., and Mukherji, J., that inasmuch as the facts on which the complaint had been founded, were inseparable from those upon which the previous case was proceeded with, the proceedings should be quashed. It appears from the judgment that the learned Judge came to the conclusion that the facts of the case with which they were then concerned, were wholly inseparable from the facts on which the previous case had proceeded. We do not in any way dissent from the principles which were applied in that case, and in so far as that case is of any assistance for our present purpose, it seems to apply against rather than for the contention put forward by Mr. Talukdar, because as far as we can see it is impossible to say that the facts of the present case are inseparable from those of the case previously brought against Mr. Taludar's client. It is necessary I think that I should state what were the charges previously made against those of the petitioners who are seeking to to rely upon the protection afforded by S. 403, Criminal P. C.

Abdul Rahman, Din Mahammad and Amiruddin were prosecuted at Delhi on 6th January 1932 on charges under S. 120 B read with S. 9, Opium Act, as amended by the Punjab Act 3 of 1925, in respect of the export of five consignments of opium from Delhi and one consignment from Rajputana between the months of January and July 1930; they were also charged with S. 9, Opium Act, read with S. 109, I. P. C., in respect of possession of 4 mds. and 25-1/2 seers of opium which was conveyed by or was, at any rate, in the possession of a man named Mathews on 25th July 1930. Mathews was a witness in the present case, and it is said that he was one of the agents employed for the purposes of conveying opium from Delhi to Calcutta and possibly between other places. With regard to these charges against Abdul Rahaman, Din Mahammad and Amiruddin, it is to be observed that they were limited to certain definite operations which took place during certain period. The same man Amiruddin was again charged with Din Mahammad on 19th February 1929 with being in possession of a quantity of cocaine, charash and opium on 20th November 1928 contrary to the provisions of S 9, Opium Act, and S. 46, Bengal Excise Act, and also with conspiracy to possess that quantity of drugs between 1st November 1928 and 20th November 1928 in Calcutta. Both charges related to one and the same discovery of drugs.

Fazaldin of Amposta (Mr. Taludar's client) was charged jointly with Ali Azam Pundit, one of Mr. Huq's clients on 3rd December 1930, before the Chief Presidency Magistrate, Calcutta, with an offence under S 9, Opium Act, for having possession of 9 seers of opium on 11th August 1930 and under S. 46, Bengal Excise Act, in respect of a quantity of cocaine. They were convicted only in respect of the opium, under S 9, Opium Act, and also for conspiracy to possess opium under S. 120-B, I. P. C., read with S. 9, Opium Act. There had been a charge laid against them under S 120-B, I. P. C., read with S. 9, Opium Act and S. 46, Bengal Excise Act, that is to say, conspiracy to possess opium between 27th May 1929, on 11th August 1930. Choonnoo Mia and Hafizar Rahaman, two of Mr. Daud's clients were charged in the year 1931 before the Police Magistrate at Alipore with charges under S. 9, Opium Act, in respect of possession of 29 1/2 seers of opium on 18th March 1931 at Choonnoo's house at Kidderpore. Choonnoo was convicted but Hafizar Rahaman acquitted. They were also charged under S. 120-B read with S. 9, that is to say, with conspiracy to possess a quantity of opium. Fazldin (described as brother of Golam Jelani deceased) another client of Mr. Huq, was charged on 17th December 1925, before the Chief Presidency Magistrate of Calcutta under S. 9, Opium Act, in respect of the possession of 35 seers of opium and also under S. 46, Bengal Excise Act, in respect of the possession of 37 ounces of cocaine which was found in the house of Golam Jelani who was convicted on his own plea of guilty, and Fazldin was discharged under S. 253, Criminal P. C.

It is of course the fact that all these charges which I have enumerated, were charges in respect of illicit dealings in drugs and in most of the cases there was a charge of conspiracy extending over short period of time and those periods of time were part of the period of time set forth in the charge of the present proceedings. It was therefore argued on behalf of Abdul Rahaman Amiruddin Fazldin Choonnoo Mia, Hafizur Rahaman, Fazldin and Ali Azam Pundit, that they had no previous occasions been convicted or acquitted, as the case might be, of conspiring with one or another of the persons who are now said to be parties to the larger and main conpiracy and have been invited to take the view that it was not open to the Crown to pick out two or three or more conspirators from a larger body of conspirators and charge them with offences which for all practical purposes were merely overt acts or as Mr. Camel very happily put it manifestations of the existence of the widespread conspiracy: that argument has a great deal of force in it.

Nevertheless when one applies the criterion laid down by the precise words in S. 403 itself, it does not seeem to us possible to say that any of these persons had on any previous occasion, either been charged with the same offence with which they are now charged or that they are now being charged with an offience founded on facts which are the same as those upon which the previous charges were founded. Having regard to a fact which Mr Talukdar brought to our attention which is a decisive and dominating factor in the case, namely that the third statement of Rokunali was not in existence at the time when any of the previous charges were made can it be rightly said that at the time when the provious charges were made, the Crown was in a position to have made a charge against these persons identical with or even similar to the charge which was made in the present proceedings. In none of the previous cases was there any question of exporting opium out of India or importing cocaine into India, and it is crystal clear, in my opinion that the gravamen of the present charge was the international trafficking of opium and cocaine.

I have endeavoured to describe the nature of the vast conspiracy which at the trial, was proved to have existed. It is abundantly clear that the prime object of that conspiracy was to send opium out of India and to bring cocaine into India. If it were possible to conceive of an unlawful organazation having the formal constitution of a limited liability company with a proper memorandum of association and articles of association no doubt in this case in the memorandum of association we should have found set out as two of the main objects for which the company was formed: one the exportation of the opium and secondly the importation of cocaine. In these circumstances after giving the matter our very careful and anxious consideration we feel that we should not be justified in saying that the previous convictions to which I have referred in detail afford any protection to the persons relying on them by reason of the provisions of S. 403, Criminal P. C.

The learned Magistrate at the trial considered this point fully and carefully and the learned Sessions Judge has also given it his serious and careful attention. At page 6 of the print of his judgment he says

"I shall now discuss the other law points upon which the defence relies. The first of these was the claim by some of the appellants that their previous trial and conviction before a Court at Delhi before the Chief Presidency Magistrate and the Police Magistrate here have attracted the protection afforded by S. 403, Criminal P. C. Under the Evidence Act the burden oi proving that claim rests upon the persons who will thereby profit. A perusal of the section shows that its intention is to protect any man from being tried twice on the same facts whether those facts would have justified a graver charge or a different one from that upon which he was tried or not."

Then he gives an example and continues:

"The test is therefore whether the facts are the same or not whether an ordinary inteligent man using ordinary common sense which I take to be the measure of the legislature would on reading both charges infer that the facts were the same. If the matters common in both charges and pleaded in the second can be subtracted from the first without altering the substantial identity of it, it becomes obvious that they are not the same and S. 403 will not be attracted. We find here that the points of similarity between the two trials are much more apparent than real. Some of the individuals are the same, the offences laid are the same, but the conspiracies are different, the confederations are different and the times do not coincide."

Later on he says:

"The section (S. 403) means what it says which is that a man is not to be put on his trial twice on the same facts even though they would jusitfy other charges under other Acts or sections or interpretations."

At the end he says:

"It prevents a man from being tried in Delhi and in Calcutta for the same conspiracy. But it does not save him from trial in either place for a conspiracy in either place unless he can prove that it was the same conspiracy."

There are definite findings of facts in this case that it was a different conspiracy, and those findings are not matters behind which we can go, and we must therefore accept the position that this was a different conspiracy at any time, in the sense of having an organisation and objects different from those charged in the previous case. We therefore hold that S 403, Criminal P. C., has no application to the present proceedings. The sixth point which has been put before us has reference to the admission of certain items of evidence namely, the accounts of Fazldin, which I have already mentioned and those of Amiruddin. Mr. N. K. Basu said that these accounts were not proved to be Fazldin's accounts or Amiruddin's accounts at all, and that from the mode in which they were presented to Court, they were not admissible in law.

These accounts have been discussed by the learned Sessions Judge at some length at p. 7 of the print of his judgment. He says :

"The next law point taken by the defence was the admissibility of the accounts, the plea being that they do not conform to the Evidence Act. The crux of S. 10 is whether there is reasonable ground to believe that two or more persons have conspired together. There can be no doubt that the belief was reasonable. In other words the learned Judge says that there was a good ground for satisfying that there was conspiracy and therefore the accounts might be used as evidence against persons other than the conspirators who actually made the accounts or kept the account. The second impeachment was that the accounts were inadmissible and unreliable because they were not drawn up in the ordinary course of business, nor were they in regular form. The learned Judge says : If I say so there is here betrayed a certain casuistry. The ordinary course of business means the habit of any business at all not merely of any honest business whether the irregularity of the entries is such as to destroy their reliability is a question of fact, but it was certainly never the intention of the legislature to rule that only accounts kept in a certain form are admissible. These particular accounts are drawn out to aid smugglers in breaking the law, and in disposing of the proceeds thereof, they were never to be the basis of a civil suit. The facts to which they related were a matter of common knowledge when only dates and sums were really necessary to keep on record to explain a certain balance to a partner, or an agent, or to a Selish. If they conveyed these facts to the parties, it was sufficient for their purpose and if it was sufficient for that, it is sufficient to infer their purpose from it."

In other words the learned Judge seems to have come to the conclusion that these accounts were kept by some of the conspirators for the purpose of recording transactions in which others of the conspirators were concerned. The accounts were used for the purpose of linking up one or other of the conspirators as parties to the general conspiracy. The question of the value as evidence of these accounts really seems to resolve itself into a question of fact. It is quite impossible for us to say that the accounts ought to have been excluded without undertaking a lengthy and detailed examination of the great deal of the evidence given in the course of the trial. We are of opinion that we must accept the learned Judge's view with regard to the accounts to all intents and purposes, as a finding of fact.

The same observation applies with regard to the argument very fully put forward by Mr. Camel. Counsel on behalf of Abdul Majid in R. 956, Mr. Camel, referred us in detail to the items of evidence set forth by the learned Additional Sessions Judge as being sufficient in his opinion to sustain the conviction of that particular accused. Mr. Camel argued that the conviction had been upheld by the appellate Court below upon a consideration of evidence which was inadmissible and ought not to have been received in evidence at all and which in any event was not reliable. As regards one of the findings of the learned Additional Sessions Judge, Mr. Camel said that that was based on no evidence whatever. We can only say with regard to Mr. Camel's argument .... and with regard to all the other arguments put ..... forward on questions of fact, that as these are proceedings in revision we have not thought it right any challenge to the findings of facts of the two Courts below. It is clear to us that the learned Magistrate who tried this case fulfilled his task in a very able and conscientious and careful manner. A tribute to him was paid by the learned Sessions Judge who heard

the case on appeal. The learned Judge said :

" He (i. e., Mr. Ghose) has conducted a trial of great size and difficulty very competently and fairly and written a judgment which had placed all material matters before me in an admirable way, fittingly bringing his 18 months work to a close."

We have read the judgment of Mr. Ghose, and we are therefore in a position to endorse what the learned Sessions Judge has said with regard to it, at all events to the extent of forming the opinion that the learned Magistrate at the trial did consider with great care the case of every single one of the accused persons, in order to ascertain whether or not they and which of them were members of the conspiracy which was the basis of the charge. Equally too the learned Sessions Judge adopted the very proper and right course of taking the case of each of the accused separately in order to ascertain whether the conviction of the 32 persons who were convicted by the Magistrate should be maintained or not. The learned Judge considered the case of each of the accused in the same order as that in which it was considered by the trial Magistrate and in the result as I stated at the outset the learned Sessions Judge came to the conclusion that he ought to set aside the conviction of seven out of the 37 persons who had been convicted by the Magistrate.

In our opinion after examining that part of the judgment of the learned Additional Sessions Judge which deals with the individuals cases, there was evidence on which the appellate Court below could come to the decision at which he is in fact arrived. It is not open to the petitioners in these revisional proceedings to ask us to estimate whether that evidence was sufficient or not. So far as the facts are concerned we must accept the findings of the Court below.

There is one point I ought to refer to in connexion with the conclusion of the learned Judge and it is this : Mr. N. K. Basu on behalf of Abdul Rahaman, complained that the learned Additional Sessions Judge upheld the conviction of that particular accused upon the basis of the oral evidence given against him by the first three of the prosecution witnesses. Mr. N. K. Basu voiced his grievance in no uncertain terms, because he said that he personally had been misled by an observation which fell from the learned Sessions Judge to the effect that he need not perhaps rely upon the evidence of the second and the third of the prosecution witnesses upon which Mr. Basu who was appearing for that particular appellant formed the opinion that it was unnecessary for him to address the learned Judge upon the matter of evidence given by those witnesses. It is impossible for us of course in the absence of further testimony on a point of this character to come to any conclusion as to how far the petitioner Abdul Rahaman might have been prejudiced by reason of the incident complained of by Mr. N. K. Basu. It seems to us that the learned Advocate must either have misunderstood what the learned Additional Sessions Judge said or attached greater importance to what he said than the occasion warranted. It may well be that any observation made by the learned Additional Sessions Judge with regard to the evidence of these two particular witnesses might have meant nothing or very little more than that the learned Advocate need not trouble to stress the nature or quality of the evidence given by these witnesses because they were in a sense accomplices and it may be well that the learned Sessions Judge might have only meant to indicate that he did not propose to rely upon those two witnesses save in so far as they were corroborated by other testimony or possibly save in so far as they were corroborated by the testimony given by the first witnesses. In order that Mr. Basu's client should have the satisfaction of knowing that the incident has not really prejudiced him we have looked into some of the other evidence against him, and we are quite satisfied that his conviction was warranted.

There is one more topic with which I desire to deal. The learned Additional Sessions Judge at the end of his judgment thought it right to animadvert on what he considered to be the inadeqaacy of the penalties provided under the existing law for offences in connexion with trafficking in dangerous drugs. The learned Additional Sessions Judge at page 23 of the print of the judgment says :

"The very lucrative nature of the trade raises up for it allies everywhere, and it is not inconceivable that in the world financial stringency which now exists the less enlightened Governments within and without India might wink at a trade from which a great deal of indirect revenue is brought into account while their own nationals are not much affected by the results."

Then he says :

"The alternative seems to be to attack the trade itself on the lines of decreasing the profits and increasing its dangers and that entails a full dress campaign of adequate detection and adequate sentences."

At present even when prosecutions are made, and convictions are the result the maximum punishment is out of all proportion. In the "Talma" case cocaine to the value of £7,500 was seized, but no one was caught. If any one had been convicted the sentence would have only amounted at most to two years and a fine of a couple of thousand rupees which compared to the sums noted in these exhibits is merely ridiculous. Two years would keep an individual smuggler out of business for that time but the fear of the fine would not persuade a single gang to suspend even one operation. When this case was being opened before us we made some comments ou the gravity of the offences with which these persons were charged. The wholesale trafficking in drugs on the scale which seems to have taken place through the operations of the unlawful conspiracy of which these persons have been found to be the members, is not only a fraud on the revenue but is something far more pernicious having regard to the physical and mental effects which accrue from the use of these dangerous drugs I am not at all sure that I should not be right in saying that any person, who habitually supplies drugs of this character for the use of other persons is almost as blameworthy as if he had committed murder. We entirely agree with the comments made by the learned Additional Sessions Judge with regard to the inadequacy of the penalties provided for both under the Opium Act 1878, and the Dangerous Drugs Act 1930.

It seems manifest on the face of it that the sentence of two years rigorous imprisonment imposed upon the persous found guilty is likely to exert only a very slight if any deterrent effect. I have given the reasons why in our opinion the learned Additional Sessions Judge was competent to superimpose and was justified in imposing the requirements with regard to the giving of security. We feel however that in some of these cases the the amount of security required ought to be increased, sub S. (4), S. 18, Dangerous Drugs Act provides that an order under this section may be made by an appellate Court or by the High Court when exercising its powers of revision. We have accordingly power to order any of these petitioners to execute a bond for such sums as we think might in order to bring about as far as possible that they shall abstain from the commission of offences punishable under Ss. 10, 12, 13 and 14 of the Act, for a period of not exceeding two years. A point was raised that the accused in this case had been sentenced not under the section of the Opium Act of 1878 nor under the section of the Dangerous Drugs Act, but because this was a charge of conspiracy they were really sentenced under the provisions of S. 120 B. I. P. C. itself. But when one looks at that section one finds that no definite penalty is there provided and that in order to ascertain what the penalty in any particular case should be one has also to look at S. 109, I. P. C. and then to look at the relevant sections of the Opium Act and to those of the Dangerous Drugs Act. In these circumstances I think it would be unreasonable to hold that these persons have not been sentenced under the Dangerous Drugs Act. In that view of the matter S. 18, Dangerous Drugs Act, is applicable. We propose to mark our sense of the gravity of the offence of which these persons have now been found guilty and our approval of the course adopted by the learned Additional Sessions Judge and at the same time to endeavour to do something more to put a stop to this trafficking in drugs by varying the requirements with regard to the giving of security in an upward direction. With regard to Abdul Rahman, the petitioner in R. 951, we think that he must be ordered to execute a bond for Rupees 10,000 with four different sureties. As regards Fazldin in 952 the amount should be increased from Rs. 5,000 to Rs. 8,000. In the case of Abdul Karim the petitioner in R. 955 the amount should be increased to Rs. 6,000; in the case of Abdul Majid the petitioner in

R. 956 the amount should be increased to R. 1,000. In the case of Ibrahim Sadaghar, the petitioner in R. 957, the amount should be increased from Rupees 3,000 to Rs 5,000. In the case of Motiyar Rahman the petitioner in in R. 961 the amount should be increased from Rs. 500 to Rs. 1,000. In the case of Saleh Ahmed, the petitioner in R. 963, the amount should be increased from Rs. 500 to Rs. 1,000 so also in the case of Abdul Rashid the petitioner in Rule 964 and Ali Azzam Pandit the petitioner in R 955 and lastly in the case of Yakubali, the petitioner in R. 972 we, increase the amount from Rs. 500 to Rs. 1,000. We desire to say that we are much obliged to the learned Advocates who appeared for the petitioners in these cases for the able and clear way in which all the points were put before us; they have been of very great assistance to us; we are also much indebted to the learned Advocate General and Rai Bahadur Banerjee for the arguments they have put forward on behalf of the Crown. We have derived much assistance from the learned Advocates and the matter has been put before us in the way which has enabled us to deal with it expeditiously and I hope, satisfactorily. The result is that all these rules are discharged and that the order of the learned Additional Sessions Judge at Alipore with regard to the giving of security will be varied in the way we have indicated. The petitioners must surrender to their bail and serve out the sentence imposed upon them respectively. Rr. 953 and 973 were struck out at the beginning of the hearing as the petitioners are dead.

M. C. Ghose, J.—I agree.

K.S. *Order accordingly.*

A. I. R. 1935 Calcutta 333

NASIM ALI AND KHUNDKAR, JJ.

Jateendra Chandra Bandopadhyay and *others*—Appellants.

v.

Rebateemohan Das and *others*—Respondents.

Appeal No. 251 of 1932, Decided on 10th July 1934, from original order of Fifth Sub-Judge, Dacca, D/- 14th May 1932.

(a) Limitation Act (1908), S. 15 — Application under O 21, R. 97 cannot be treated as execution application.

Section 15, Limitation Act, refers to a suit or an application for the execution of a decree. An application for delivery of possession by the auction purchasers may be treated as an application in an execution proceeding, but it cannot be treated as an application for execution. [P 334 C 2]

(b) Limitation Act (1908), S. 3—Exemption cannot be claimed apart from the Limitation Act.

In view of the provisions of S. 3, it is not permissible to claim any exemption apart from what is contained in the Act. [P 335 C 1]

(c) Limitation Act (1908) S. 9 and Art. 180—Application for delivery of possession by auction purchaser—Declaration obtained by another that auction purchaser had obtained no right—Declaration set aside on appeal—Auction purchaser is entitled to avail of fresh cause of action for subsequent application for delivery of possession—S. 9 is not applicable—Civil P. C. (1908), O. 21, R. 97.

The auction-purchaser had applied for delivery of possession. In a suit for a declaration by another, it was declared that the auction-purchaser had obtained no right on the basis of the auction-purchase. This declaration was set aside on appeal whereupon the auction-purchaser again applied for delivery of possession. It was contended that it was barred by time.

Held : that there was a cancellation of the cause of action for delivery of possession by the declaratory decree operating to suspend the rights of the auction-purchasers. Consequently they were entitled, on removal of the cancellation by the Court of appeal, to avail of a fresh cause of action, which arose by reason thereof.

Held further : that assuming that the words 'to sue' in S. 9, Limitation Act, include an application for delivery of possession, the section contemplates cases where the cause of action continues to exist. It cannot apply to cases, where the cause of action is cancelled by reason of subsequent events : 1920 *Mad* 1 ; 23 *Cal* 775, *Ref.* [P 335 C 1,2]

(d) Limitation Act (1908), Sch. 1—Cause of action should be dated from date when remedy is available to party.

The language of Col. 3, Sch. 1, Lim. Act, should be so interpreted as to carry out the true intention of the legislature, that is to say, by dating the cause of action from a date when the remedy is available to the party. [P 335 C 2]

Amarendranath Basu, Manmathanath Das Gupta and *Apoorbachandra Mukerji*—for Appellants.

Saratchandra Basak Rajendrachandra Guha and *Gopaldas Chatterji*—for Respondents.

Judgment.—The facts, which give rise to the present appeal, are as follows: One Rajchandra was the owner of certain properties. He executed a will on 18th September 1888, by which he bequeathed his properties to his grandsons, i. e., son's sons, Rajendra and Jogendra. Rajchandra died on 28th November 1899, leaving Girish as his only son. On 29th October 1911 Girish

mortgaged the properties, which are the subject matter of the present litigation, to the respondents. The respondents obtained a mortgage decree on the basis of the said mortgage against Girish on 3rd December 1917. On 2nd December 1924, Chandrakala, the wife of Girish, who was appointed executrix by the will of Rajchandra, obtained probate in common form. Subsequently, the probate proceedings were contested and the probate was ultimately issued to Chandrakala on 25th May 1927. On 2nd January 1925 Chandrakala instituted a suit for a declaration that the mortgaged properties were not liable to be sold on the allegation that the mortgagor had no title to the property, that the property vested in her by virtue of the will and that she was in possession thereof as executrix to the estate of Rajchandra.

The said suit was numbered and registered as suit No. 1 of 1925 of the first Court of the Subordinate Judge at Dacca. A temporary injunction was issued by the Subordinate Judge, restraining the decree-holder from selling the mortgaged properties during the pendency of the suit. The said injunction however was ultimately dissolved on the 1st December 1925. The mortgaged properties were sold on 7th April 1926, and purchased by the decree-holders. On 10th May 1926, the sale was confirmed. On 23rd August 1926, the decree-holder purchasers applied for delivery of possession. The auction-purchasers could not however get possession on account of the resistance offered by Chandrakala at the time, when the nazir of the Court went to deliver possession. The application was thereafter dismissed for default on 13th November 1926. The suit instituted by Chandrakala was decreed on 14th May 1928, and it was declared that Girish had no right to mortgage the properties in question and that the mortgage by Girish was infructuous and inoperative against those properties and the execution sale in execution of the decree was not binding against the properties. It was also declared that the plaintiff as executrix had a right to the properties. An appeal was thereupon taken by the decree-holder, auction-purchasers, to this Court which was registered as First Appeal No. 352 of 1928. On 15th July 1931, this Court allowed the appeal and dismissed Chandrakala's suit. On 8th October 1931, the auction-purchasers applied to the Court for delivery of possession. Thereupon the judgment-debtors took the objection that the application was barred by limitation. The learned Subordinate Judge overruled the objection of the judgment-debtors and ordered delivery of possession. Hence the present appeal by the judgment-debtors.

The only point for decision in this appeal is whether the application for delivery of possession is barred by limitation. Under S. 3, Lim. Act, subject to the provisions contained in Ss. 4 to 25 of the said Act, an application made after the period of limitation prescribed therefor by the first schedule shall be dismissed, although limitation has not been pleaded. Under Art. 180, Sch. 1, Lim. Act, an application by a purchaser of immovable property at a sale in execution of a decree for delivery of possession is to be made within 3 years from the time when the sale becomes absolute. The present application by the auction-purchaser was admittedly made beyond three years from 10th May 1926, when the sale was confirmed. It was however contended by the learned advocate for the respondents that under S. 15, Lim. Act, in view of the decree of the Subordinate Judge on 14th May 1928, in the suit of Chandrakala, the auction-purchasers were entitled to deduct the period from 14th May 1928 to 15th July 1931 in computing the period of limitation prescribed by Art. 180. S. 15, Lim. Act however refers to a suit or an application for the execution of a decree. The application for delivery of possession by the auction-purchasers may be treated as an application in an execution proceeding but it cannot be treated as an application for execution. S. 15, Lim. Act, therefore does not help the auction-purchasers in this case. S. 14, Lim. Act, also is not attracted in this case, inasmuch as the auction-purchasers were not in the plaintiffs in the suit before the Subordinate Judge, which was instituted on 2nd January 1925, but were resisting the claim of Chandrakala in the suit as defendants. It was however contended by Dr. Basak on the authority of the observations of the Judicial Committee in 1916 P. C. 96 (1),

1. Nrityamoni Dassi v. Lakhan Chandra Sen, 1916 P C 96=33 I C 452=43 Cal 660 (P C).

on the principle analogous to the provisions of S. 14, Lim. Act, limitation would remain in suspense at least from 14th May 1928 to 15th July 1931, as the auction-purchasers were bona fide litigating their rights in a Court of Justice. In view of the provisions of S. 3, Lim. Act, it is not permissible to claim any exemption apart from what is contained in the Limitation Act.

It is contended by Mr. Basu appearing on behalf of the appellants that limitation began to run from 10th May 1926, when the sale was confirmed and that the subsequent inability of the auction-purchasers to get possession, in view of the decree of the Subordinate Judge on 14th May 1928, could not stop it. In support of this contention reliance was placed upon S. 9, Lim. Act. The effect of the decree of the learned Subordinate Judge however was that it was declared by a competent Court that the decree-holders had acquired no right on the basis of their auction-purchase in execution of the mortgage decree and consequently had no right to get possession. This decree was binding on the auction-purchasers until it was set aside by the Court of appeal. Consequently, the position is that there was a cancellation of the cause of action for delivery of possession by the decree of the Subordinate Judge on 14th May 1928 operating to suspend the rights of the auction-purchasers. Consequently they are entitled, on removal of the cancellation by the Court of appeal, to avail of a fresh cause of action, which arose by reason thereof: see the observation of Mukerji, J., in 1926 Cal. 65 (2). As already stated the net result of the decree, passed by the Subordinate Judge on 14th May 1928, was that

"there was no actual sale which would give the purchaser a title to enter into possession or to enjoy the fruits of the sale."

In other words there was no real sale, to the benefit of which the purchaser was entitled: see 23 Cal. 775 (3). Assuming that the words 'to sue' in S. 9, Lim. Act, include an application for delivery of possession, in our judgment the section contemplates cases, where the cause of action continues to exist. It cannot apply to cases where the cause of action is cancelled by reason of subsequent events.

The language of Col. 3, Sch. 1, Lim. Act, should be so interpreted as to carry out the true intention of the legislature, that is to say, by dating the cause of action from a date when the remedy is available to the party: see the case of 1920 Mad. 1(4).

If the auction-purchasers applied for delivery of possession during the period between 14th May 1928 and 15th July 1931, they would have been successfully met with the plea that they had no right to get possession in view of the decree passed on 14th May 1928. Mr. Basu however contended that the auction-purchasers should have made a formal application for possession and, if their applicaiton failed, they could have filed an appeal against the order rejecting their application and thereby could have kept their application for delivery of possession pending till the question of title was finally decided by the appellate Court. In other words, the contention of Mr. Basu is that it was the duty of the auction-purchasers to apply for possession even though it was not possible for them to get possession till the question of title was finally decided. But the utmost benefit that the auction-purchasers could have got by such a proceeding would have been to have it suspended till the question of title was finally decided by the Court of appeal.

"It would be an inconvenient state of the law if it were found necessary for a man to institute a perfectly vain litigation under peril of losing his property if he does not: see the case of 11 All. 47 (5).

We are therefore unable to give effect to the contention of Mr. Basu. This view is not inconsistent with the decision of the Judicial Committee in 1934 P. C. 134 (6). In that case the sale was confirmed by the Subordinate Judge and the appeal by the judgment-debtor was dismissed. In that case there was no question of suspension of any cause of action. Again the delivery of possession to the auction-purchasers in 1926 was interrupted and was rendered infructuous by the resistance occasioned by the executrix, who was claiming in good faith to be in possession of the property

2. Sarat Kamini Dasi v. Nagendra Nath Pal, 1926 Cal 65=89 I C 1000.
3. Baijnath Sahai v. Ramgut Singh, (1896) 23 Cal 775=23 I A 45=7 Sar 1 (P C).
4. Muthu Korakkai Chetty v. Madar Ammal, 1920 Mad 1=54 I C 606=43 Mad 185 (F B).
5. Bassu Kuar v. Dhum Singh, (1889) 11 All 47 =15 I A 211=5 Sar 260 (P C).
6. Chandramani Shaha v. Anarjan Bibi, 1934 P C 134=150 I C 11=61 I A 248=61 Cal 945 (P C).

on her own acccunt. In fact, as stated above, she had instituted a suit long before the sale for a declaration that the property belonged to her on the distinct assertion that she was in possession of the property as executrix. It is therefore clear that delivery of possession to the auction-purchasers was rendered infructuous not by any fault or laches on the part of the auction-purchasers, but by an obstacle, which could not be removed even in a proceeding under O. 21, R. 97, Civil P. C. The position then was that the obstruction could not be removed until the suit terminated in favour of the auction-purchaser. In these circumstances, we are of opinion that the real effect of the order dated 13th November 1926, dismissing the application for delivery of possession for default, is that the application for delivery of possession was not finally disposed of but remained pending in the eye of the law. The present application for delivery of possession should therefore be treated as one for continuance or revival of the former one. We are accordingly of opinion that the learned Subordinate Judge was right in holding that the application for delivery of possession is not barred by limitation. The appeal is, accordingly, dismissed, but there will be no order for costs.

K.S. *Appeal dismissed.*

A. I. R. 1935 Calcutta 336 (1)

S. K. GHOSE AND HENDERSON, JJ.

Birendra Nath Bakshi—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1185 of 1934, Decided on 7th February 1935.

Criminal P. C. (1898), S. 514—Person denying execution of bail bond—Without evidence proving execution by him, Magistrate cannot order forfeiture.

Where a person denies the execution of a bail bond and the Magistrate without taking any evidence at all passed orders forfeiting the bond.

Held : that the Magistrate's order could not be supported as it was necessary that there should be some evidence to prove execution of the bail bond. [P 336 C 2]

Benode Lal Ghose—for Petitioners.

Henderson, J.—This is an application against an order of the learned additional Chief Presidency Magistrate forfeiting a bail bond which is said to have been executed by the petitioner. The petitioner himself denied that he had ever executed the bond. The Magistrate had an inquiry made by the police, which did not really carry the matter very far. As a result the Magistrate passed an order forfeiting the bond without giving any reasons. In his explanation he says that the petitioner was picked out in a test identification held by the inquiring police officer. The Magistrate's order cannot possibly be supported. Since the petitioner denied the execution of the bond it was obviously necessary that there should be some evidence to prove that he did. The Magistrate took no evidence at all, with the result that he based his order on nothing. The Rule must therefore be made absolute. The Magistrates' order is set aside and anything paid in compliance with it will be refunded to the petitioner.

S. K. Ghose, J.—I agree.

K.S. *Rule made absolute.*

A. I. R. 1935 Calcutta 336 (2)

NASIM ALI AND KHUNDKAR, JJ.

Saratchandra Sen - Petitioner.

v.

Mrityunjay Ray Chaudhuri—Opposite Party.

Civil Revn. No. 766 of 1934, Decided on 10th July 1934, against order of Sub-Judge, Rangpur, D/- 23rd April 1934.

Civil P. C. (1908), Ss. 151 and 115 and O. 7, R. 11 (c) — Suit filed when claim is about to be barred — Rejection of plaint—No appeal filed from order—Court cannot use inherent power to set aside order—If it uses it, High Court can interfere in revision.

Where in a suit filed just at the time when the claim is about to be barred by limitation, the Court orders rejection of the plaint and the plaintiff fails to vacate the order rejecting the plaint, within the time prescribed by law, by an appeal against that order, the Court has no jurisdiction to set aside the order under S. 151, and thereby to deprive the defendant of a valuable right which he has already acquired by virtue of the law of limitation : 1933 *Pat* 132 and 1933 *Mad* 258, *Applied*.

And if the Court sets aside the order and revives the limitation, the High Court can interfere in revision. [P 337 C 1]

Jitendrakumar Sen Gupta—for Petitioner.

Karunamay Ghosh — for Opposite Party.

Order.—This rule is directed against the orders of the Subordinate Judge of Rangpur, dated 1st August 1933, 8th August 1933, 11th August 1933 and also 23rd April 1934. It appears that the plaintiffs, opposite party, instituted a

suit against the petitioner in the Court of the Subordinate Judge of Rangpur on 13th July 1932, for recovery of Rs. 10,000 on the allegation that the cause of action for the suit arose on 13th July 1929. The plaint was filed on payment of a court-fee stamp of annas two only, though the requisite court-fee payable was Rs. 750. The Court, thereupon, granted extension of time for filing the deficit court-fee. Ultimately the plaintiff having failed to put in the deficit court-fee, the plaint was rejected on 4th August 1932. About a year after the rejection of the plaint, the plaintiffs filed an application on 18th July 1933 before the learned Subordinate Judge, purporting to be under S. 151, Civil P. C., for revival of the plaint which was rejected on 4th August 1932, after reducing the claim to Rs. 6,000 from Rs. 10,000 and also for leave to file the deficit court-fee on that reduced valuation. The learned Subordinate Judge, without any notice to the petitioner, allowed the plaintiffs' prayer. The plaintiffs having again defaulted in filing the court-fee within the time fixed by the Court, further time was granted till 11th August 1933, on which date the plaintiff paid the court-fee and thereupon the plaint was registered. Thereafter, the petitioner, having come to know about the previous proceedings, after service of summons in the suit upon him, made an application before the learned Subordinate Judge for reviewing the said order.

The said application of the petitioner was however rejected. The petitioner has, thereupon, obtained the present rule for setting aside the orders stated above. The first ground urged in support of the rule is that the Court had no jurisdiction under S. 151, Civil P. C., to set aside the order rejecting the plaint, which was made on 4th August 1932. It is argued that the order rejecting the plaint is a decree and was consequently appealable. In view of the fact that the plaintiff did not take steps within the time allowed by law to get the said order set aside either by an appeal, as provided by the Code, or by review, if really there were any grounds, which could attract the provisions of O. 47, R. 1, Civil P. C., the plaintiff was not entitled to get the order set aside under S. 151, Civil P. C. It is however contended by the learned advocate for the opposite party that the order rejecting the plaint is not appealable, first, because in this case there was no dispute between the parties about the valuation of the suit and secondly because the plaint was rejected before it was registered as a suit.

We are of opinion that this contention has no force, because in view of the definite provisions of O. 7, R. 11, Cl. (c), Civil P. C., it is clear that the order in question was an order rejecting a plaint as contemplated by S. 2, Cl. (2) of the Code. It is doubtful whether such an order could be reviewed under O. 47, R. 1, Civil P. C., but there cannot be any doubt that it was appealable as a decree. From what has been stated above it is clear that the suit was filed just at the time when the claim was going to be barred by limitation. The Court has no power in those circumstances, under S. 151, to deprive a defendant of the rfght obtained by him by the operation of the law of limitation on account of the rejection of the plaint and to order the litigation to be revived: See 1932 Pat. 132 (1). The inherent powers of the Court, which are saved by S. 151, are exercised by the Court for the ends of justice.

"The defendant after the plaintiff has exhausted his statutory limit of time clearly has justice on his side and the Court has no right to interfere in order to override a lawful bar of limitation: see 1933 Mad. 258 (2)."

We are therefore clearly of opinion that, when the plaintiff failed to vacate the order rejecting the plaint, within the time prescribed by law, by an appeal against that order, the Court had no jurisdiction to set aside the order under S. 151, Civil Procedure Code and thereby to deprive the defendant of a valuable right, which he had already acquired by virtue of the law of limitation. It was next contended by the learned advocate for the opposite party that this order reviving the plaint is an interlocutary order and therefore this Court should not interfere under S. 115, Civil P. C. In view of the facts of this case we are however of opinion that this is a fit case in which we should interfere and put an end to this litiga-

1. Kakraul Co-operative Society v. Durganand Jha, 1933 Pat 132=144 I C 147.
2. M. V. Sundaresa Ayyar v. P. Subba Rao, 1933 Mad 258=143 I C 246.

tion, which came to an end as soon as the time for appealing against the rejection of the plaint had expired. The plaintiff had no right to bring a fresh suit on the same cause of action in view of the bar of limitation, when the order rejecting the plaint was set aside by the Subordinate Judge under S. 151. In fact, by setting aside the order rejecting the plaint, the Court has revived a litigation, which should not have been revived and has thereby deprived the defendant of a very valuable right.

We are therefore of opinion that this is a fit case for our interference under S. 115, Civil P. C. The result therefore is that this rule is made absolute. The orders of the learned Subordinate Judge dated 1st August 1933, 8th August 1933, 11th August 1933 and all the subsequent orders based on them are set aside. The order dated 23rd April 1934 is also set aside. The order of the learned Subordinate Judge dated 4th August 1932 is restored and the plaint filed by the plaintiff, opposite party, stands rejected. In the circumstances of this case however we make no order as to costs.

K.S. *Rule made absolute.*

✻ A. I. R. 1935 Calcutta 338

MITTER AND EDGLEE, JJ.

Gajendra Nath Saha Chowdhury — Appellant.

v.

Sulochana Chaudhurani and *others* — Respondents.

Order No. 1607 of 1934, Decided on 16th August 1934.

(a) Court-fees Act (1870), S. 12 — Appellate Court can correct error in decision on matter of court-fees where first Court decides to detriment of public revenue.

Section 12 makes the decision of the first Court as to value final as between the parties and enables a court of appeal to correct any error as to this only, when the first Court decides to the detriment of public revenue. [P 339 C 1]

(b) Court-fees — Mere form and language is not final test — Real substance must be looked into.

The mere form and language of a plaint is not the final test in determining the court-fee to be paid and to arrive at a sound conclusion the Court has to look beyond the mere form and verbiage of the plaint and to arrive at what is the real substance. [P 340 C 1]

✻ (c) Court-fees Act (1870), S. 7 (4) (c) and Sch. 2, Art. 17 (6)—Suit for restitution of conjugal rights and injunction — Suit valued at certain amount by plaintiff for purpose of jurisdiction—Ad valorem Court-fee should be paid on such amount — S. 7 (4) (c) and not Sch. 2, Art. 17 (6) applies—Husband and wife.

Where in a suit for restitution of conjugal rights and for an injunction restraining the parents and other relations from obstructing the recovery of the wife, the plaintiff values it for purposes of jurisdiction at a certain amount, ad valorem court-fees must be paid on that amount. The suit is governed not by Sch. 2, Art. 17 (6), but by S. 7 (4) (c) and has to be valued as a suit for declaratory decree and an injunction and the value for purposes of jurisdiction and purposes of court-fees is same in both cases. The plaintiff after having chosen the forum according to what he regards as the pecuniary value of the suit to him, cannot, after he has enjoyed the advantage resulting from his choice of forum, be heard to say that this valuation was made by him merely for the purpose of jurisdiction: *Case law discussed.* [P 341 C 1; P 343 C 2]

(d) Court-fees Act (1870), Sch. 2, Art. 17 (6)—Art. 17 (6) should be construed strictly—Suit for restitution of conjugal rights does not come under this.

Article 17 (6), Sch. 2 of the Act should be very strictly interpreted. To bring a case within the scope of this clause, it must be established that it is not possible even to state approximately a money value for the subject-matter in dispute; it cannot be said that a suit for the restitution of conjugal rights satisfies this test, though it may not be possible to value satisfactorily the subject-matter of such a suit: 15 *C W N* 815, *Ref.* [P 342 C 2; P 343 C 1]

Mitter, J.—The question which we have to decide in the present case comes before us under S. 12, Court-fees Act. It appears that an appeal has been preferred by the plaintiff in a suit for restitution of conjugal rights to which is added a prayer for injunction restraining the parents and other relations of the wife from obstructing the recovery of the wife by the husband. The suit was valued at Rs. 5,001 in the Court below and a fixed fee of Rs. 15 was paid on the same and the prayer for injunction was valued at Rs. 25 and court-fees paid on the same. The suit was dismissed by the Court below and appeal has been taken to this Court by the plaintiff.

On the Stamp Reporter reporting that the court-fees on the memorandum of appeal was insufficient the matter was dealt with by the Registrar who is taxing officer under S. 5, Court-fees Act, and he has held that the court-fees are insufficient and that ad valorem court-fees on Rs. 5,001 should be paid and that the appellant should pay the deficit both on the memorandum of appeal and on the plaint before the appeal can be further proceeded with. His deci-

sion so far as the court-fees on the memorandum of appeal is concerned is final under S. 5 of the Act and the appellant says that he is willing to pay the deficit so long as the order of the learned Registrar stands. But as stated above the Registrar has also directed the appellant to put in the deficit which would be due from the appellant on the ad valorem scale as fees payable on the plaint in the lower Court. With reference to this order about deficit court-fees in the trial Court, the interference of this Court is sought under the provisions of S. 12, Court-fees Act. At the outset I had some doubt in my mind if S. 12 could apply to such a case seeing that it would lead to anomalous results. On the one hand, the Registrar's decision regarding court-fees on the memorandum of appeal would be final whereas if the Court did not agree with the Registrar a different result would be reached with reference to the court-fees payable on the plaint in the suit in which the appeal has arisen. But, having regard to the wide language of S. 12, Court-fees Act, it seems that we can determine the matter, notwithstanding the anomaly. It is for the legislature to cure it. We must administer the law as we find it. S. 12, in my opinion, makes the decision of the first Court as to value final as between the parties and enables a Court of appeal to correct any error as to this only when the first Court decided to the detriment of public revenue.

The question we have to decide is whether a fixed fee is payable or an ad-valorem fee. The three cases on which the learned advocate for the appellant has relied are 13 Cal. 232 (1), 18 Cal. 378 (2), 33 All. 767 (3). These cases seem to suggest that in a suit for restitution of conjugal rights pure and simple a fixed fee is payable. When these cases were decided under Art. 15, Sch. 2 a fixed fee of Rs. 5 was payable; when the case of 34 Cal. 352 (4) was decided Art. 15, Sch. 2 was on the statute book, but it was repealed by Act 5 of 1908: see Sch. 5 to the Act of 1908. The following passage from the judgment of that case would show that a fixed fee is payable in a suit for restitution of conjugal rights. Mitra and Caspersz, JJ., observe this:

"For fiscal purposes, the court-fee is a fixed sum under the Court-fees Act irrespective of valuation for the purposes of jurisdiction, and the jurisdiction was determined by the value put by the plaintiff."

It is true that in this case it has been held that in the absence of rules under S. 9, Suits Valuation Act, the plaintiffs should put any valuation he likes, but that is only for the purpose of jurisdiction and not for fiscal purposes, in other words for the purpose of stamping his plaint with the ad valorem court-fees calculated on that valuation. This would appear clear from the following passage in the judgment of the learned Judges at p. 356 of the 34 Cal. 352 (4):

"Ss. 18, 19 and 24 of the Bengal, North-Western Provinces and Assam Civil Courts Act and the Suits Valuation Act, contemplate the valuation of every suit for the purposes of jurisdiction even if it is not capable of satisfactory money-estimate."

The question therefore is whether this is a suit for restitution of conjugal rights pure and simple between husband and wife. I have read the plaint which has been placed before us and it is clear that this is a suit for declaration that the defendant is the legally married wife to the plaintiff. There is no contest on that point between the husband and wife and it is true but the question that the defendant is the legally married wife of the plaintiff will have to be determined in presence of the other defendants and a declaration to that effect has to be obtained in their presence and it would appear from prayer (ka) that the plaintiff is asking for a decree in the first instance declaring that the plaintiff is entitled to restitution of conjugal rights and then for a decree directing her to live with the husband and then for an injunction on defendants 2 and 3 restraining them from preventing the wife from living with her husband. The decision in 28 Cal. 567 (5) is attracted to the facts of the present case. There are passages in the decision of Rampini and Brett, JJ., which would suggest that in a case of restitution of conjugal rights pure and simple where

1. Golam Rahaman, v. Fatima Bibi, (1886) 13 Cal 232.
2. Mowla Newaz v. Sajidunissa Bibi, (1891) 18 Cal 378.
3. Aisha Bibi v. Faiyaz Husain, (1911) 33 All 767=11 I C 186.
4. Jan Mahomed Mandal v. Mashar Bibi, (1907) 34 Cal 352=5 C L J 400=11 C W N 458.
5. Amirnl Hossain v. Khairunnissa, (1901) 28 Cal 567.

no declaration that the defendant is the legally married wife is sought for the fixed fee would be payable as would be payable under the law as it then stood.

The Stamp Reporter whose note we called for in this matter states that the suit really comes under S. 7 (iv) (c), Court-fees Act, and if it does there can be no question that the valuation for the purposes of court-fee and valuation for the purpose of jurisdiction must be the same and in that case by valuing the relief sought at a certain figure for purposes of jurisdiction the plaintiff has committed himself to the value of the suit at that figure and it will be taken to be the proper value both for the purposes of court-fees and jurisdiction. Here the plaintiff states at the beginning of the plaint that he values the relief at Rs. 5,001 and files the suit in the Subordinate Judge's Court and by so valuing he gets an appeal direct to the High Court. But he states distinctly in para. 8 of the plaint that as under Art. 17, Cl. (6) a suit for restitution is incapable of valuation he will pay fixed under that article. It is difficult to say that this is not a suit for a declaratory decree, for in the prayer portion, as has been pointed out, he says that his right to be able to exercise conjugal rights be declared. But what is the substance of the plaint? In substance the plaint: (1) asks for declaration of the plaintiff's right to exercise conjugal rights, and (2) for an order that the wife may be directed to live with the husband although under O. 21, R. 32, Civil P. C., as amended by Act 29 of 1923, a decree for restitution of conjugal rights cannot be enforced by detention in civil prison.

We are not unmindful of the rule that the mere form and language of a plaint is not the final test and to arrive at a sound conclusion the Court has to look beyond the mere form and verbiage of the plaint and to arrive at what is the real substance. But the plaint as framed asks in substance for declaration that plaintiff is entitled to exercise conjugal rights and injunction and before the plaintiff can get a decree for injunction as against the other defendants he will have to get a declaration that defendant 1 is his legally married wife. It may be easy to get that declaration by reason of admission of defendant 1, the wife, but still declaration has to be made in the first instance. Besides the case of plaintiff does not depend on the defence set up.

The suit in my opinion is a suit for a declaration that the plaintiff is entitled to exercise conjugal rights and injunction and comes within S. 7, Cl. (4) (c). He has been valued his injunction at Rs. 25 and it was optional to so value the same. In 28 All. 545 (6) has been held to lay down that the value of a suit for restitution of conjugal rights is as a rule the value which the plaintiff chooses to put upon it provided that the suit is not unwarrantedly overvalued for purposes of jurisdiction. The real question is whether the value put by the plaintiff is the value for jurisdiction as also for computation of court-fees. The rule deducible from the authorities is that in a suit for restitution of conjugal rights pure and simple where no injunction against third parties is sought for, the plaintiff's valuation will determine the jurisdiction of the Court to try it. On this point all the High Courts in India are agreed : see 28 All 545 (6), 13 Cal 232 (1), 34 Cal 352 (4), 34 Bom 236 (7), and the case of 1927 Mad 563 (8). In the last Madras case Wallace, J., makes a very useful statement of the law in the following passage :

"The general principles deducible for valuation for purposes of jurisdiction where no special method of valuation has been provided by statute, then, would seem to be (1) that where the subject-matter of a suit is wholly unrelated to anything which can be readily stated in definite money terms, then the plaintiff, having to put some money value for the purpose of jurisdiction, must put a more or less arbitrary value and there being no factors in the case from which the Court can say his valuation is wrong, or dishonest, the Court will accept that valuation. Such is the case of a suit for restitution of conjugal rights."

In a recent case 1930 Cal 686 (9), Sir George Rankin, C. J., makes the following weighty observations :

"They are cases which are not easily valued and in many cases not capable of being valued in money terms on any precise principle. It does not strike me as being at all incredible that with regard to that limited class of cases the legislature should have thought it right to give to

6. Zair Husain Khan v. Khurshed Jan, (1906) 28 All 545=3 A L J 266=1906 A W N 99.
7. Jasadha v. Chotu, (1910) 34 Bom 236=4 I C 836.
8. Vasireddi Veeramma v. M. Butchayya, 1927 Mad 563=101 I C 379=50 Mad 646.
9. In the matter of Kalipada Mukherji, 1930 Cal 686=131 I C 587=58 Cal 281.

the plaintiff a certain amount of option as to the value which is to be put upon the claim, especially as I find that in certain cases the legislature has thought fit to allow people to pay a small fixed court-fee in respect of the relief claimed."

Ordinarily under S. 8, Suits Valuation Act, the valuation for the purposes of pecuniary jurisdiction is the same as the valuation for the purpose of court-fees except with reference to cases mentioned in that section, namely, cases which fall under S. 7, paras. 4, 5 and 9 and para. 10, Cl. (d), Court-fees Act. Under S. 9, Suits Valuation Act (Act 7 of 1887) :

"where the subject-matter of suits of any class other than suits mentioned in the Court-fees Act 1870, S. 7, paras. 5 and 6, and para. 10, Cl. (d), is such that in the opinion of the High Court it does not admit of being satisfactorily valued, the High Court may with the previous sanction of the Local Government direct (a) that suits of that class shall for the purposes of the Court-fees Act 1870, and of this Act and any other enactment for the time being in force, be treated as if their subject-matter were of such value as the High Court thinks fit to specify in this behalf."

It is unfortunate that the High Court has not yet framed any rule under S. 9, Suits Valuation Act. In my opinion Art. 17, Cl. (6), Sch. 2, Court-fees Act, which prescribes the court-fee for every other suit where it is not possible to estimate at that money value the subject-matter in dispute, and which is not otherwise provided for by this Act, does not apply to the present case for the reasons given above, but it comes under S. 7 and has to be valued as a suit for declaratory decree and an injunction and the value for the purposes of jurisdiction and the purposes of court-fees is the same in both cases. The plaintiff has chosen to put the valuation at Rs. 5,001 in order to get an appeal to the High Court and he must be taken to have valued the suit both for the purposes of jurisdiction and the computation of court-fees. This decision will not make it difficult for a poor person to institute suits for declaration that he is entitled to exercise conjugal rights and to obtain an injunction for he can put any value he likes on his plaint. In this view the learned Registrar's decision seems to me to be right. The deficit in the plaint should be called for and the plaintiff ordered to furnish the deficit court-fees within a month from this date.

Edgley, J.—This is a matter which presents some considerable difficulty which is largely due to the fact that most of the decisions, in connexion with which the question of the valuation of suits for the restitution of conjugal rights has been considered, were decided with reference to the question as to the Court which had jurisdiction to entertain such suits, or to hear appeals in connexion with such suits. As pointed out by Mitra and Caspersz, JJ., in 34 Cal. 352 (4), the cases of 13 Cal. 232 (1) and 18 Cal. 378 (2), turned on the construction of statutes which contemplate a strict money value and not merely a valuation by a plaintiff for the purposes of ordinary jurisdiction. The same considerations appear also to govern the decision of the Court in 31 Cal. 849 (10), and even in 34 Cal. 352 (4) cited above. The main question before the Court was whether or not the District Judge was competent to entertain an appeal against a decision in a suit for the restitution of conjugal rights. In the abovementioned cases the question of the valuation of these suits for fiscal purposes was not one which came directly under the consideration of the Court. It is true that in 34 Cal. 352 (4) the judgment of the Court contained an observation to the following effect:

"For fiscal purposes, the court-fee is a fixed sum under the Court-fees Act, irrespective of valuation for the purposes of jurisdiction and jurisdiction was determined by the value put by the plaintiff, if the valuation was not unwarrantably and obviously improper,"

It must however be remembered, with reference to this particular observation, that in 1907 when 34 Cal. 352 (4) was decided, the provision of the law which appears to have been applicable for fiscal purposes to suits for the restitution of conjugal rights, was Art. 15, Sch. 2, Court-fees Act, which read as follows:

"Plaint or memorandum of appeal in a suit for possession of a wife." ... Rs. 5

Article 15, Sch. 2 was repealed by Act 5 of 1908: it follows therefore that, after this appeal, the Court-fees Act of 1870, and the schedules annexed thereto, contained no express provision which directly regulated the valuation for fiscal purposes of suits for the restitution of conjugal rights. It therefore becomes necessary to examine the existing provisions of the law in order to

10. Aklemannessa Bibi v. Mahomed Hatem, (1904) 31 Cal 849=8 C W N 705.

ascertain how such suits should be valued for the purposes of the Court-fees Act. In this particular case both the Stamp Reporter and the Registrar are of opinion that the suit falls within the scope of S. 7 (4) (c) of the Act. This section relates to declaratory decrees or orders in which consequential relief is prayed.

Although S. 42, Specific Relief Act, is not exhaustive, it contains some indication as to what should be regarded as a suit for a declaratory decree. This section lays down that any person entitled to any legal character or to any right as to any property, may institute a suit with a view to obtaining a declaration that he is so entitled. Ordinarily in a suit for restitution of conjugal rights the plaintiff asks for a declaration to the effect that he is married to the defendant. In such a case, as held in 28 Cal 567 (5) there is no doubt that S. 7, iv (c), Court-fees Act would apply. In the present suit as it has been framed, there is no specific prayer for any such declaration but it appears that the plaintiff in a suit such as the one that is now before us does, in effect, ask for a declaration that he is entitled to the society of his wife. In this connexion the remarks of Markby, J., in 23 W R 179 (11), are highly relevant. They are to the following effect:

"Wherever the law recognises that the relation of husband and wife exists, it also recognises that the husband is bound to live with the wife, and the wife with the husband, and if that obligation be denied by either of the parties to the marriage the Court ought certainly to declare the right to exist. If also any person should interfere and prevent the wife from returning to her husband or the husband to the wife, there is no difficulty, as far as I can see, in punishing this invasion of the rights of others, and even in compensating the injured party to some extent. The real difficulty arises when we come to deal with a refusal to perform the conjugal duties by one of the parties to the marriage after existence of the matrimonial relation has been ascertained."

In the case now before us the marriage is admitted but the wife nevertheless seeks to avoid her obligation to live with her husband. The only legal method open to him to enforce his right is to obtain a decree for the restitution of conjugal rights, which would in effect declare him entitled to the benefit of his wife's society. In such a case it does not appear to be necessary that the plaint should contain an express prayer for a declaration. In this case the plaintiff asks for a decree for the restitution of conjugal rights and as consequential relief he also asks that his wife may be directed to live with him and that her parents may be restrained from interfering with any attempt that the plaintiff may make to take her to his house. I am therefore of opinion that this suit comes within the scope of S. 7 (iv) (c), Court-fees Act, and that the views of the Stamp Reporter and the Registrar as to its classification are correct. It has been argued before us at some length that for fiscal purposes a suit of this nature must be governed by Art. 17 (6), Sch. 2, Court-fees Act, which refers to

"Every other suit, where it is not possible to estimate at a money value the subject-matter in dispute and which is not otherwise provided for by this Act."

Even if it could be held that this case did not appropriately fall within the scope of S. 7 (iv) (c), Court-fees Act, it is difficult to see how Art. 17 (6), Sch. 2, could in any event apply to the case now before us. As pointed out above, the earlier cases in which it was held that a suit for the restitution of conjugal rights was incapable of valuation were decided with reference to different considerations and, even with respect to the question of jurisdiction, it was recognized by Aikman J. in 28 All. 545 (6) and by Mitra and Caspersz J J. in 34 Cal. 352 (4) that the earlier view was difficult to accept and would lead to serious practical difficulties. In this view Mitra and Caspensz, JJ. came to the following conclusion in 34 Cal. 352 (4).

"We must, as pointed out by Aikman, J., read the words 'incapable of valuation' as meaning incapable of satisfactory valuation, if we have to give effect to the obvious intention of the framers of the Bengal, North Western Provinces and Assam Civil Courts Act and the Suits Valuation Act."

It appears to have been the intention of the legislature that Art. 17 (6), Sch. 2 to the Court-fees Act should be very strictly interpreted, and this view seems to have beeen adopted by Mookerjee J., in 1 I C 670 (12). In that case he held that

11. Gatha Ram Mistree v. Mohita Kochin, (1875) 23 W R 179=14 Beng L R 298.

12. Banwari Lal v. Sheo Sanker Misser, (1911) 1 I C 670.

"to bring a case within the scope of this clause, it must be established that it is not possible even to state approximately a money value for the subject matter in dispute."

In my opinion, it cannot be said that a suit for the restitution of conjugal rights satisfies this test. It may not be possible to value satisfactorily the subject-matter of such a suit, but there are ordinarily several criteria available, to enable the plaintiff to arrive at an approximate valuation e. g. the dower, the amount which the husband may have to spend on the maintenance of his wife elsewhere than in his own house or the extra cost of domestic assistance for the performance of household work. It was clearly in order to provide, among others, for cases of this nature that the legislature enacted S. 9, Suits Valuation Act, which refers to cases the subject-matter of which "does not admit of being satisfactorily valued", an expression sufficiently wide to permit to be framed for the valuation of such subject-matter which can only be valued approximately e. g. in suits for the restitution of conjugal rights and certain other suits falling under S. 7 (iv), Court Fees Act.

The difference in the language used in Art. 17 (6), Sch. 2 and that which has been employed in S. 9, Suits Valuation Act, is significant. As pointed out by Mitra and Caspersz, JJ., in 34 Cal. 352 (4), there are certain classes of suits which may for obvious reasons be really impossible to value, but, as regards suits for the restitution of conjugal rights, the true position appears to be that which was adopted by Aikman, J., in 28 All. 545 (6), in which the learned Judge remarks as follows:

"It was argued before the learned Judges that a suit for restitution of conjugal rights was incapable of being valued and this contention found favour with them. In the case before us the suit has been valued, and therefore I think that it is scarcely correct to say that such a suit is incapable of being valued. It appears to me that it would be more accurate to characterize a suit of this nature as one the subject-matter of which does not admit of being satisfactorily valued. The Legislature (vide S. 9, Suits Valuation Act, 1887) has recognised the existence of classes of suits, the subject-matter of which does not admit of being satisfactorily valued".

It is of course unfortunate that no rules under S. 9, Suits Valuation Act, have yet been framed by the Calcutta High Court, as the object which the Legislature seems to have had in view in enacting that section, was to provide some check upon the practice under which the plaintiff in certain classes of cases, e. g., those under S. 7 (iv), Court-fees Act, sometimes puts a purely arbitrary valuation upon the relief which he claims. Be that as it may, I do not think that the suit out of which this matter arises can be held to fall within scope of Art. 17 (6) of Sch. 2 to the Court-fees Act. I have already stated that in my view this suit is governed by S. 7 (iv) (c), Court-fees Act, but, if it could be held that no other provision of this Act, were applicable, I think that an ad valorem fee would be payable under Art. 1, Sch. 1 to the Act. I am not unmindful of the fact that a different view was held by Tudball, J., in 33 All. 767 (3), but, with great respect, with that view I must disagree.

In a case of this sort, as no rules have been framed under S. 9, Suits Valuation Act, it is for the plaintiff to put some valuation on the subject-matter of the relief which he claims, and, having regard to the provisions of S. 8, Suits Valuation Act, it is clear that the forum in which the suit is tried must follow the plaintiff's valuation.

In the suit out of which the present appeal arises, the plaintiff has for fiscal purposes treated the suit as coming under Art. 17 (6) of Sch. 2, Court-fees Act, a provision of the law which I have held cannot apply to this case. He has further valued the relief sought by him at Rs. 5,001 although he professes to have made this valuation merely for the purpose of jurisdiction. The fact remains however that by fixing this valuation, he has indicated that, in his opinion, the suit is to him of sufficient pecuniary value to merit a trial in a Court of a Subordinate Judge rather than in that of a Munsif, and to justify him, if necessary, in filing an appeal direct to the High Court rather than to the District Judge. He has therefore chosen the forum according to what he regards as the pecuniary value of the suit to him, and, in these circumstances, in my opinion, after he has enjoyed the advantage resulting from his choice of forum he cannot be heard to say that this valuation was made by him merely for the purpose of jurisdiction. This appears to have been the principle ad-

opted by Sir George Rankin, C. J., in 1930 Cal. 686 (9).

The question as to the fee payable upon the memorandum of appeal to this Court is not before us as the Registrar's order in this respect is final under S. 5, Court-fees Act but, as regards the fee payable in the Lower Court, I agree that on the facts of this particular case, this fee should be assessed on an ad valorem basis on the sum of Rs. 5,001.

K.S. *Question answered.*

A. I. R. 1935 Calcutta 344

LORT-WILLIAMS AND JACK, JJ.

Sadhucharan Roy Chowdhury and *others*, In re.

Reference under S. 66 (2) of Indian Income-tax Act, Decided on 24th January 1935.

Income-tax Act (1922), S. 10 (2) (vi) — Letting out press at rent is business—Lessee is liable only for repairs and not for depreciation — Owner can claim allowance for depreciation.

The letting of a jute press at a rent is as much a business as the letting of a ship to freight or the letting of a motor-car or any other kind of machine, or machinery for hire. The fact that the lessor originally intended to work the press himself is immaterial. The lessees are liable only for repairs and not for depreciation, and in no circumstances could they claim an allowance for depreciation under S. 10 (2) (vi) because the buildings, machinery, etc., mentioned in that sub-section must be the property of the owner assessee and hence the owner assessee is entitled to claim allowance for depreciation in respect of buildings, machinery etc., leased : 1926 *Mad* 1032, *Rel on*; 1 *I T C* 50 and 1928 *Cal* 456, *Dist.*

[P 345 C 1, 2]

S. N. Banerjee—for Assessee.

M. K. Roy—for Income-tax Department.

Lort-Williams, J. — In this case the facts found are that the assessee purchased the Sulkea Jute Press in 1907, and worked it until 1930. In 1931 he leased it out for a term of one year to the Sulkea Jute Pressing Company Limited, a private company in which he holds more than 60 per cent of the shares, and that lease is subsisting, the lessee holding over under the terms of the lease. Those terms, inter alia, are : (a) You shall pay us a net annual rent of Rs. 22,500 only payable as follows, i. e., Rs. 2,500 to be paid by 31st August 1931 and the balance by four instalments of Rs. 5,000 each, on 1st November 1931, 1st February, 1st May and 1st August 1932. (b) During the said period of one year, we shall only pay the rents payable to the superior landlords and you shall pay the Municipal taxes, Fire Brigade License and all other outgoings and public charges. (c) You shall carry out all repairs to the engines, machineries and plants, godowns and buildings during the said period at your own expense.

The assessee's income from this source was assessed under S. 12 as income from "other sources." He claimed to be assessed under S. 10 as upon profits or gains of business, and to be entitled to an allowance for depreciation under S. 10 (2) (vi). The assessee had another Jute press which he purchased in 1915 and worked until 1921, when he leased it out until 1930, and subsequently, after a year's vacancy, leased it out again. The Commissioner decided against the assessee's contention and referred the following question for the decision of this Court :

"Whether in the circumstances set forth above, the assessee is entitled to an allowance for depreciation in respect of the buildings, plant and machinery leased to the Jute Pressing Company under S. 10 (2) (vi) of the Act ?"

The reasons for his decision are mainly that under S. 10 (2) (vi) depreciation is allowable only when the machinery and plant in question are the property of the assessee, and are used for the purpose of the business,the income of which is being taxed, and secondly that the assessee originally worked the jute press himself, and that was his intention at the time of acquisition. I cannot appreciate the cogency of the distinctions, which the Commissioner has sought to draw. The press is the property of the assessee, and is used for the purpose of the business the income of which is being taxed, namely the business of letting out the press. The fact that the assessee originally intended to work the press himself seems to be irrelevant. The decision in 1926 Mad. 1032 (1) supports the assessee's contention. That the lessor in that case was a registered company seems to me to be irrelevant. It was decided that where a limited company incorporated for the purpose of milling rice, acting in pursuance of authority given in the memorandum of association leased out the buildings,

1. Mangalagiri Sri Umamaheswara Gin and Rice Factory Limited v. Commissioner of Income-tax, Madras, 1926 Mad 1032=97 I C 850 (FB).

plant, machinery, etc., to another company for a fixed annual rent, the lessors bearing any loss by depreciation and the lessees being liable for repairs, the company was carrying on the business of letting a rice mill and was entitled to an allowance for depreciation under S. 10 (2) (vi), Income-tax Act. In 12 Tan. Cas. 63 (2), Lord Mackenzie stated that:

"It is clear, I think from what has already been read from the judgment of Lord Hardwicke in the case of 1 V. S. 497 (2), and a series of subsequent cases that the letting of a ship to freight is just as much a trade as any other."

In 1 V. S. 497 (3) Lord Hardwicke had said that:

"It must be admitted that the ship may be the subject of partnership as well as anything else; the use and earnings thereof being proper subject of trade; and letting a ship to freight is as much a trade as any other."

This statement was aproved by Thompson, C. B., in 1 Prices' Ex. Rep. 163 (4). The decision in 1928 Cal. 456 (5), that a company owning house property and carrying on only the business of letting such houses, is liable to income-tax under S. 9, Income-tax Act, in the same way as a private individual owning such property is clearly distinguishable, and so is the decision in 1 I. T. C. 50 (6). Such property consisted of buildings, or lands appurtenant thereto, within the meaning of S. 9, which specifically provides for the taxation of income from this kind of property. It has not been suggested by either party that income arising from letting out a jute press comes within the purview of this section, but that it comes under either S. 12 or S. 10. In my opinion the letting of a jute press at a rent is as much a business as the letting of a ship to freight, or the letting of a motor-car or any other kind of machine, or machinery for hire. In 1926 Mad. 1032 (1) (supra) the learned Judges pointed out that the Crown would not suffer if an allowance were made to the lessors for depreciation under S. 10 (2) (vi), because, under the conditions of the lease, the lessors had to bear the loss caused by depreciation. Therefore a similar allowance for depreciation could not be claimed a second time by the lessees, though they could claim an allowance for repairs for which they were liable under the lease.

Similarly in the present case the lessees are liable only for repairs and not for depreciation, and in no circumstances could they claim an allowance for depreciation under S. 10 (2) (vi) because the buildings, machinery, etc., mentioned in that sub-section must be the property of the assessee. The result is that the question referred to us for decision must be answered in the affirmative. The assessee is entitled to his costs of the reference.

Jack, J.—I agree.

K.S. *Reference answered.*

2. Sutherland v. The Commissioner of Inland Revenue, (1928) 12 Tax Cas 63.
3. Doddington v. Hallet, (1750) 1 V S 497.
4. Attorney General v. Borrodaile, (1814) 1 Prices' Ex Rep 163.
5. In re, Commercial Properties Ltd., 1928 Cal 456=113 I C 848=55 Cal 1057.
6. In re Kaladan Suratee Bazzar Co. Ltd., 1 I T C 50.

A. I. R. 1935 Calcutta 345

LORT-WILLIAMS AND JACK, JJ.

Norman O'Connor—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 637 of 1934, Decided on 4th February 1935.

Penal Code (1860), S. 498—Consent of woman is immaterial—Evidence of accused having taken or enticed away woman is necessary.

In cases under S. 498 consent is immaterial. But it is essential to see that there is evidence that the accused took or enticed away the woman, within the meaning of the section. The mere fact that the wife went away of her own accord from her husband's house, and was accompanied a part of the way by the accused, is not sufficient to show that the accused took or enticed the woman away within the meaning of the section. There must be some tangible evidence of taking or enticing. [P 347 C 1]

Monindra Nath Mukerjee — for Appellant.

Z. Rahim—for the Crown.

Lort-Williams, J.—In this case the appellant was charged with and convicted, by the Additional Presidency Magistrate of Calcutta, of an offence under S. 498, I. P. C., and sentenced to rigorous imprisonment for 12 months. The accused is 19 and the married woman whom, it is alleged, he took or enticed away from her husband, is aged 25. In cases under this section consent is immaterial. But it is essential to see that there is evidence that the accused took or enticed away the woman, within the meaning of the section.

The complainant and his wife and the accused have been on intimate terms of

friendship for a considerable time. The accused was constantly at the complainant's house and there is no doubt, that he knew quite well that she was married to the complainant, and the marriage was sufficiently proved. The complainant was not able to give any evidence himself with regard to the taking away of his wife, because he was not present at the time. All that he could say was that she disappeared from his house and, consequently, he charged the accused with having enticed her away. In cross-examination, he admitted that the accused was constantly at his house, playing cards with him and his wife and sister, that he used to give the complainant tips for the races, and that he was left in the house alone with the complainant's wife on many occasions. He stated that neither Stella, that is, his wife's mother, nor Daisy, his father's daughter, who was called by him stepsister nor some person, Charlie Davies, who also lived in the same house, knew when his wife left the house, nor was he able to say who carried her boxes. His wife did not tell him how this was done.

Mrs. Stella Davies, the girl's mother, stated that the accused took her daughter away. But it seems apparent that this evidence was merely hearsay because she was not actually present when the woman went away, though she lives in the same house. In cross-examination she stated that the accused was a frequent visitor at the complainant's house, but she was not sure whether he used to sleep there at night. She saw him in the house very early in the morning having his tea. He used to sit the whole day in the house, while the complainant was at work. Her son, apparently meaning the complainant, was very friendly with the accused and so he was allowed to live with them like the others.

Nur Mohammed is a servant employed in the house and he stated that he saw the complainant's wife and the accused go away in a taxi. In cross-examination he said that the accused carried down the memsahib's boxes. He was not able to say who called the cab. The complainant's wife gave evidence of her marriage, and stated that the accused took her away on 19th December. She stated that she was not happy; so she went to Asansol with him and then visited various other places. During this time they lived as man and wife. A letter was put in evidence (Ex. A) which was written by the woman's mother to her daughter, in which she stated that the complainant was not in any way concerned about her daughter and the accused, and that he had expressed himself that as she had gone away of her own free will, he did not want to have anything more to do with her, and that he was not going to spend any money with regard to her in any way. It is obvious, from this letter and the attitude of the mother, that whatever it was that happened with regard to the complainant's wife's departure from her home, it was concurred in and approved of by the mother.

The complainant's wife, in cross-examination, said that the accused used to play cards in the house at night and that on occasions stayed for the whole night. She used to go out on a cycle with him, and her husband used to leave her and the accused together in the house alone and made no objection. The accused and the complainant and his wife all used to sleep in the same bed, though she said that nothing improper took place at those times. She had no relations with the accused before she left home. Her marriage was unhappy, as it was arranged while she was still at school, and she did not like to get married so early. Though her husband has forgiven her, she is still unhappy and wants to be free and earn her own living.

One witness was called on behalf of the defence, the complainant's half-sister, Daisy Davies. Her evidence was that she used to live in the house with the complainant and his wife and they always quarrelled; the complainant's wife told her that she was not happy, and the complainant often told his wife that if she was not happy she could get out. On 19th December, the complainant's wife left the house. On the previous night the complainant and his wife had had a quarrel and he told her that she could go away. This witness was in the house when she left. She did not see the accused at that time. The complainant's wife went away in a cab and Nur Mohammed, the servant, took down her luggage. She had money with her. The witness told the com-

plainant that his wife had gone away, and he said that he was not anxious to get her back, but wanted his money. Further, she said that she tried to prevent her from going, but she said that if she did not go then, she would go away sometime or other.

In his written statement the accused said that the complainant's wife came to his place in a taxi at about 10-30 a. m. on 19th December, and asked him to accompany her to Howrah Station as she was going to a friend's place in Assansol. He got into the taxi and went with her to the station. There she begged him to go with her as she was afraid of travelling alone, so he went. According to this statement, the complainant's wife paid the whole of the expenses, both of the journey and during their absence from Calcutta. The accused, who was out of employment at the time, was unable to support himself, much less any one else. Now, these are the whole of the facts, and the learned Magistrate's opinion was that it was a sordid case, and that the story was a sad one. He came to the conclusion that the girl was very unhappy and wanted to be free of her marriage. He accepted the evidence that these three people had been sleeping in the same bed together. Nevertheless, he came to the conclusion that there was evidence that the accused enticed the woman away and for this reason, he found it necessary to convict him.

In this case there is an appeal upon facts, and we have carefully considered the evidence. In all the circumstances, we have come to the conclusion that there is considerable doubt whether the evidence is sufficient to show that the accused either took away or enticed away this woman within the meaning of S. 498, I. P. C. The mere fact that the wife went away of her own accord from her husband's house, and was accompanied a part of the way by the accused, is not, in our opinion, sufficient to show that the accused took or enticed the woman away within the meaning of the section. There must be some tangible evidence of taking or enticing. Having regard to the evidence given by the complainant's sister, Daisy, which seems to ring true, and probably gives a more accurate description of what took place on 19th December, we think there is considerable doubt in this case, and the benefit of that doubt ought to have been given to the accused. Therefore the conviction and sentence are set aside and the accused is acquitted. The accused who is on bail is discharged from his bail bond.

Jack, J.—I agree.

K.S. *Conviction set aside.*

A. I. R. 1935 Calcutta 347

MITTER AND PATTERSON, JJ.

Bengal Nagpur Ry. Co. Ltd.—Defendants—Appellants.

v.

Ruttanji Ramji and *others*—Respondents.

Appeal No. 162 of 1931, Decided on 23rd May 1934, from decree of Sub-Judge, First Addl. Court, 24-Parganas, D/- 12th May 1931.

(a) Contract — Labour costs — Chowka system and daily output system—Difference stated.

The labour costs could be worked out in one of two ways: (1) according to the chowka system or rate, and (2) according to the daily output system. The difference between the chowka system and the daily labour system is that in the former cooly is paid for unit of work whereas in the latter the cooly gets his wage daily. [P 350 C 2]

(b) Contract Act (1872), S. 70—Work done by contractor for company not gratuitousy—In absence of settlement of any rate contractor is entitled to get reasonable rate.

Where one has expressly or impliedly requested another to render him a service without specifying any remuneration, but the circumstances of the request imply that the service is to be paid for, the law will imply a promise to pay quantum meruit, i. e., so much as the party doing the service has deserved or as it is normally said a reasonable sum. [P 353 C 2]

Where the railway company has got the benefit of the work of the contractor and the contractor did not do the work gratuitously in the absence of any settlement of the rates, the contractors are entitled to get reasonable rates or market rates. [P 352 C 2]

(c) Contract—Whether there is variation or abandonment of original contract depends on facts of each case.

Whether there has been a mere variation of terms or abandonment depends upon the facts of each particular case and is often not easy to determine: the following test can be applied: [P 353 C 2]

In the first case (variation) there are no such executory clauses in the second arrangement as would enable one to sue upon that alone if the first did not exist; in the second (rescission) he could sue on the second arrangement alone, and the first contract is got rid of either by express words to that effect, or because the second dealing with the same subject matter as the first but in a different way, it is impossible that the two should be both performed. [P 353 C 2]

(d) Contract—Variation of original contract—Onus of proving it lies on person who alleges it.

The burden of proving that there has been a departure by consent of both parties from the terms of the original contract is on the person asserting it. [P 354 C 1]

(e) Interest—Though not recoverable either under Contract or Interest Act, Court can decree it for damages—Contract Act (1872), S. 73.

Even though the claim of the plaintiffs be or is limited to interest which is not recoverable either under a Contract or under the provisions of the Interest Act, it is open to the Court to make a decree of interest for damages : 1933 *Pat* 195, *Diss from*; *Case law referred.*

[P 354 C 2; P 355 C 1]

(f) Interest—Interest pendente lite can be awarded as damages—Contract Act (1872), S. 73.

For the period between the filing of the plaint and the determination of the suit the plaintiffs can be given to interest by way of damages.

[P 355 C 2; P 356 C 1]

Bagram, *Ambika Pada Chowdhury* and *Panna Lal Chatterji*—for Appellant.

Rupendra Coomar Mitter, *Promotho Nath Mitter* and *Nripal Chandra Roy Chowdhury*—for Respondents.

Mitter, J. — The action which has given rise to this appeal was brought by the plaintiffs, now respondents, to recover Rs. 1,66,493-4-0 from B. N. Ry. Co., on account of price of work done by the plaintiffs as members of a joint Mitakshara family in a certain section of the construction known as the Amda-Jamda Branch. The case stated in the plaint is that the defendants offered to the father of the plaintiffs Ramji Madhoji, who is now dead, contract work in the said construction subject to his signing certain schedules which are usually printed forms of agreement; that the plaintiffs' father signed the schedules for earthwork, bridgework and miscellaneous work and delivered the schedules to the District Engineer of Chaibasa; that after carrying on the works for two or three months plaintiffs and father discovered the work to be unusually difficult and expensive and the scheduled rates to be grossly inadequate and the conditions contained in the schedule were hard and unjust.

The contractors expressed their inability to work at the rates agreed upon and pressed for cancellation of the contract; and for settlement of higher rates and better conditions, that this led to a discussion and the result of the discussion was that the defendant company had abandoned the plaintiffs' schedules and had prepared new schedules containing higher rates which however were not accepted by the contractor (plaintiffs) and further that the defendant proposed to leave the question of rates open with a view to ascertain later on an estimate of the contractor's expenses after sufficient progress of the work and that the defendant company assured the plaintiffs of their well established policy to pay final rates at which contractors can make a profit and that reasonable rates will be paid; that on the faith of these assurances the plaintiffs went on with the work and completed the same; that during the progress of the work the contractor kept the defendant company duly informed of the difficulties and the costs from time to time so that these might be taken into consideration at the final determination of the rates; that although attempts were made by the defendant company as well as by the plaintiffs to settle final rates in advance the attempt failed but the work was not stopped on the mutual understanding that the final rates would be ascertained on the completion of the work; that the work was completed in December 1924 but notwithstanding attempts to settle the rates no agreement was reached; that the Company, while admitting its liability to pay reasonable rates maintained that the rates worked up by the District Engineer in the measurement book were sufficient. In para. 8 of the plaint the plaintiffs state their main objections to the rates worked up by the District Engineer as aforesaid.

The plaintiffs admit that in pursuance of an oral arrangement the Contractor was supplied by the defendant with explosives free of charge for blasting purposes and consequently the plaintiffs rates for the cuttings are based on their expenses and do not include the cost of explosives. The plaintiffs further state that in spite of repeated demands the defendant Company failed to pay their dues and as the defendant Company were having the benefit of plaintiffs' money the plaintiffs were entitled to get interest at 1 per cent per month since July 1925. The plaintiffs accordingly prayed for the following reliefs, viz., a decree for (a) Rs. 1,26,863-8-0 or any other amount found due as the value of the work done by plaintiff for defendant. (b) Rs. 40,629-12-0 or any other

amount of interest adjudged due. (c) Further interest for the period of the suit, until realization. on the total claim, (Rs. 1,67,493-4-0). (d) Costs of the suit. (e) Other reliefs.

The plaint gives an account of the work done and charges for the same in three schedules. Sch. A is the final bill for the earth work; Sch. B is the final bill for the bridge work and Sch. C is the final bill for miscellaneous work. Sch. D of the plaint after giving the total value of the several kinds of work done and after making deductions on account of previous payments and royalty and after charging interest at 1 per cent per month lays the total claim at Rupees 1,67,493-4-0 only. Several defences to the suit have been taken by the defendant railway company, but we will notice only those around which controversy has centred in the present appeal. Such defences are: (1) that the suit is barred by limitation as the works in respect of which the suit has been instituted were completed more than three years before the institution of the suit; (2) that the schedules of rates for earth work, bridge work and miscellaneous works form the foundations of the contract between the parties and the defendant relies on the schedule of rates and the terms and conditions appearing therein; (3) that the schedules of rates were not liable to variation as alleged by the plaintiffs; (4) that the plaintiffs pressed for some increases as a matter of favour and pointed out some difficulties in view of which certain increases of rates were sanctioned by the Chief Engineer as a matter of favour and were entered in the schedules; (5) that the defendant did not abandon the contractor's schedules but increased certain rates as permitted by condition No. 15 of the schedules; that as the contractor did not agree to or initial the enhanced rates as entered in the schedules the plaintiffs are bound by the lower rates of the original schedules, that the assistant engineer had no authority to make any new proposal with regard to the rates or give any assurance in respect thereof without the prior sanction of the District and Chief Engineers who alone have the right to alter them; (6) that the defendant never admitted its liability to pay any rates other than those entered in the signed schedules; the defendant states that the rates grantad by the defendant are fair and reasonable rates; that without admitting the plaintiff's right to re-open the question of rates the defendant submits with regard to Cls. B, C, D and E, para. 8 of the plaint as follows:

(b) That the defendant railway company submit that the scheduled rates as voluntarily amended by the defendant together with 25 per cent jungle allowance are just and adequate; (c) that over and above the jungle allowance a mileage allowance of annas six per cent per cft. was allowed on earth work on this contractor's length. This was the highest mileage allowance on the District. In the case of bridge work where special rates have not been allowed Rs. 2 per cft. special mileage allowance has been included in masonry rate and annas 12 per cent per cft. for concrete. That the plaintiffs are not entitled to get what they claim under this head. (d) It is submitted that 25 per cent is a fair allowance and ought not to be increased. (e) That special rates higher than the amended schedules rates with mileage and jungle allowance were approved by the Chief Engineer. These rates are on the average about twice those originally agreed to in the printed schedules. That a special road to the contractor's quarry was constructed by the railway and he was given other advantages. The defendant denies the allegations made in sub-para. (e) of the plaint; (7) that the plaintiffs are not entitled to re-open the question of the said rates and to have fresh rates assessed; that without giving up this position but strongly relying upon it the defendant makes the following submissions with regard to Cls. A, B and C, para. 9, of the plaint:

(a) That the principle of the agreed schedule is that the work should be done for an agreed price and not on an expenditure and commission basis. The contractor cannot claim the latter in view of the agreement signed by by him. (b) That the rates paid to this contract are in no way less than those paid to other contractors working near him. (c) That the District Engineer is the sole judge of the classifications. The plaintiffs are not entitled to what they call expert and experienced estimate of rates and expenses ; (8) that with regard to the allegations made in para. 16 of the plaint, the defendant

submits, that it is not true, that there was any oral agreement between the parties in pursuance of which the contractor was supplied by the defendant with explosives free of charges for blasting purposes, and that no account of such supply to a particular contractor was kept by the contractor or the defendant; on the contrary it was agreed that the contractor would pay for such explosives and that the cost of explosives would be deducted from the amounts due to the contractor and that in the account of bills for this contractor the cost of explosives was as a matter of fact recovered : the defendant denies that the contractors' rates for the cuttings are based on their expenses and do not include the cost of explosives; (9) that the plaintiffs are not entitled to any interest as claimed by them and that in any case the interest claimed is excessive.

On these pleadings the following issues remain for consideration in the appeal. (4) Is the suit barred by limitation ? This issue was not pressed eventually and nothing more need be said about it. (6) Are the plaintiffs bound by the signed schedules ? Or are they entitled to re-open the question of rates. (7) Are the plaintiffs entitled to be paid at the rates and for the quantity claimed by them ? (7-a) What are the reasonable rates of price for the work done ? (7-b) What is the correct quantity of earth work done in each bank ? On whom does the duty of correct measurement lie. (8) Are the plaintiffs liable to pay for the cost of explosives ? If so, how much ? Is such value included or not in the defendant's or plaintiffs' rates ? (13) What amount if any is due to the plaintiffs for the value of the work done ? (14) Are the plaintiffs entitled to interest ? If so, how much?

On 10th January 1929 the plaintiffs put in an application supported by an affidavit for local investigation and on the 12th February they supplemented that petition. On the 16th February the Court allowed the application of the plaintiffs and directed that a commissioner be appointed to assess the fair and reasonable rates for the works done remarking that such an investigation wasnecessary, it being the plaintiffs' case in the pleadings that the contract known as the schedule of rates was abandoned by the defendant who agreed to pay at reasonable and fair rates and remarking also that expert opinion was necessary for such investigation. The commissioners submitted a very long report covering about 250 pages of Vol. 2 of the paper book. This report was filed on 15th August 1930. On 8th January 1931 both sides filed petitions of objection to the Commissioners' report. The learned Subordinate Judge after taking oral and documentary evidence has granted a partial decree to the plaintiffs for the sum of Rs. 1,51,846 and it is against this decree that the present appeal has been brought by the B. N. Ry. Co. Ltd.

In order to understand the points which are involved in this appeal it is necessary to indicate briefly the reasons on which the Subordinate Judge has founded his judgment in favour of the plaintiffs. In the first place the Subordinate Judge has determined on the evidence the labour costs of the contractor. He added to that 10 per cent for supervision of establishment. Over and above that he was allowed 15 per cent for profits. In addition to that he has allowed 22½ per cent for jungle allowance and 2½ per cent for water allowance and he has added to all this a small mileage allowance as also 5 per cent for tools allowance.

The labour costs could be worked out in one of two ways : (1) according to the chowka system or rate and (2) according to the daily output system. The difference between the chowka system and the daily labour system is that in the former the cooly is paid for unit of work whereas in the latter the cooly gets his wages daily. The Subordinate Judge has in ascertaining labour costs proceeded in basing his cooly wages upon the chowka system and this he has done on the report of the commissioner. The Subordinate Judge has also taken an average cooly rate or wage instead of actual wages prevailing from time to time during the period of construction. The defendant Railway Company contended before the Subordinate Judge that in ascertaining cooly wages he should have proceeded on the cooly capacity system which is described fully in the evidence of their witness, one Mr. Austin, as also in the evidence of Mr. Das and Mr. Pearson.

Mr. Bagram who appears for the defendant-appellant has raised several grounds in support of his appeal. He contends in the first place that the labour costs should have been determined on the cooly capacity system as outlined in the evidence of Mr. Austin and not on the chowka system as adopted by the Subordinate Judge below. In the alternative he has submitted that if the chowka system be held to be the proper system for ascertaining labour costs then all extra additional lead and lift should be disallowed for the simple reason as he puts it, that although in the schedule of rates between the contractor and the Railway Company it is provided that the contractor is to get extra lead and lift there is no corresponding arrangement between the contractor and the coolies where the rate includes all the distance. Mr. Bagram has further complained that instead of taking the wages of men and women, cooly according to their variation during the different periods and adding them separately he has taken an average which has operated to the serious disadvantage of the defendant company. Mr. Bagram has next contended that the percentages given by the Subordinate Judge for tools, supervision and establishment, jungle allowance and water allowance are wildly extravagant and he contends that on the evidence no more than a consolidated 15 per cent on the labour costs should have been allowed. He has next contended that the interest allowed by the Judge is excessive both as regards rate and period. One of the submissions on the question of profits is that whatever percentage of profits may be considered necessary to give a contractor who is taking the risk of a loss a considerably lesser percentage should be given to a contractor who is not taking such a risk and as in the present case fair and reasonable rates are being calculated after the work is finished, the question of risk must be eliminated and in this view it is submitted that the percentage of profits given is too high. It is next contended that six annas mileage allowance should be disallowed.

Another ground taken is that the Subordinate Judge should have held that the Commissioner was clearly wrong so far as his blasting rates are concerned and in arriving at a conclusion as to these rates the Commissioner has proceeded on borer's wages at a higher figure than that deposed on behalf of the plaintiff. It is also argued that the Subordinate Judge is in error in his conclusion on the question of lead on cutting spoil. It is also one of the submissions of the appellant that the Subordinate Judge has gone wrong on the question of quantity of earth work done with respect to the banks and it is said that the amount of earth work in banks should have been held to be 59, 26, 135 cubic feet as claimed by the plaintiffs in the letter of their Solicitors Messrs. Pugh & Co. and not 60,46,008 cubic feet as claimed in the plaint. With regard to the costs of rock hard blasting the Commissioner originally put the rate at Rs. 4 per 100 cubic feet. The Subordinate Judge modified the Commissioner's report in this respect and directed him to re-calculate on the footing of taking the rate to be 13/14 of Rs. 4. The Commissioner however notwithstanding this modification arrived at a higher figure than Rs. 4 for 100 cubic feet, viz. Rs. 4-6-9, see Vol. 2, p. 517. It is argued that this is not permissible. The point last taken by Mr. Bagram was that plaintiffs are bound by the scheduled rates, i. e. rates given in the printed schedule of the B. N. Ry. to which the plaintiff Ramji put his signature as on the evidence plaintiff failed to establish the case made in the plaint that there has been abandonment of the scheduled rates and therefore of the original contract. Although this point was taken last logically it comes first in order and has been argued first by the respondent. We propose therefore to deal with this point first, for if a decision favourable to the Railway Company is arrived at on this head, no further points need be considered.

The last ground which we proposed to deal with first has just been indicated. The argument is that there might have been an alteration is one of the essential terms of the contract embodied in the printed forms of the scheduled rates, but there has been no abandonment of the original contract by the defendant Railway Company and that the plaintiffs are bound by the original rates as given in the agreement,

Ex. P, Vol. 3, p. 201. In order to understand this ground reference should be made to the case made by the plaintiffs in the pleadings. His case in para. 3 of the plaint is that defendant offered Ramji Madhoji who will be called "the contractor" contract work in the construction of the Amda-Jamda branch of the B. N. Ry. between revised miles 9 to 12, chainage 47,000 to 63,500 subject to his signing certain schedules in March 1920. In April 1920 the contractor signed the printed form of schedule then current for earth work, bridge work and miscellaneous work and delivered the same. In May 1920 the contractor found the work difficult and he found the rates grossly inadequate and the contractor began to complain to the higher authorities and the result of this complaint led to a discussion and in August 1920 the Railway Company definitely abandoned the contract. That the schedule rates were definitely abandoned by the Railway Company would appear from the mass of correspondence which have been exhibited in this case and to which we will presently refer. If it be established by that the old rates were abandoned and new rates were not accepted by the contractor and the Railway Company proceeded to ask the contractor to carry on the work, no rates being settled the contractor would be entitled to claim reasonable rates or market rates. That is the true legal position seems to be established on the authorities to be noticed presently. The first point to be noticed is that it will appear from an examination of the printed schedule that the old rates have been altered in the same schedule in ink either black or red and this fact is admitted by the Railway Company but the assent of the contractor was not taken to it and he did not agree to the revised rates it cannot be said that by agreement new rates were substituted for the old. That the Railway Company abandoned the original rates with mutual consent would appear even from the correspondence. Ex. 78 is a letter of 5th October 1920 (nearly six months after work had commenced): see Vol. 3, p. 47. That letter which was written by the Assistant Engineer communicated to the contractor the points which had been conveyed to him by the District Engineer as the result of the inspection of the work. The material portions of the letter are as follows:

"1. It is not the policy of the B. N. Ry. to cause loss to their contractors by paying them final rates at which they cannot make a profit. 2. Work has scarcely been started at present and it is far too early to judge whether a further increase in rates is necessary. The final rates necessary cannot be determined until the work is in full swing. 3. Any representations which you may have to make will be sympathetically considered after a good effort has been put forth (say for six months) which will enable an estimate to be made of the actual expenses incurred."

The respondent contends that the letter held out in essence a promise to allow reasonable profit to the contractor. Whether the letter lends itself to that construction or not it is clear that the Railway Company clearly understood that the scheduled (original) rates can no longer regulate the parties and in view of the difficulties they will have to be reconsidered so that a reasonable profit should be left to the contractor. (After examining the evidence His Lordship proceeded). The oral and documentary evidence point in our opinion to the conclusion that there was an abandonment of the original printed rates by mutual consent after the contract. It has been argued for the appellant that under the contract it was permissible to alter the rates after the work has commenced and reference is made to Cl. 15 of the general conditions on the back of Ex. P but that clause requires that any alteration in rates after the work has commenced must be noted in the schedule and initialed by the Engineer-in-charge and the contractor. S. 15 really does not assist the defendant for the alterations were not initialed by the contractor.

There being the abandonment of the old rates and no settlement of any new rates let us consider what the true legal position is keeping in view the fact that the Railway Company has got the benefit of the work of the Contractor and to the further fact that the contractor did not do the work gratuitously. We are of opinion that in the circumstances any actual transaction between the parties gave rise to the ordinary legal rights and in the absence of any settlement of any rates the plaintiffs are entitled to get reasonable rates or market rates. S. 70,

Contract Act, may be applied to the present case. That section runs as follows:

"Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered."

Reference may be made in this connexion to (1925) A C 445 (1), where the facts are stated as follows: By successive arrangements made before 1913 between an American firm and an English Company the American firm were constituted sole agents for the sale in the United States and Canada of tissues for carbonising paper supplied by the English Company. The greater part of these tissues was manufactured for this English Company by another English Company. By an arrangement made between the American Firm and both English companies in 1913 the English companies expressed their willingness that the existing arrangements with the American firm, which were then for one year only, should be continued on the same lines for three years and so on for further periods of three years subject to six months' notice. This document after setting out the understanding between the parties including several modifications of the previous arrangement proceeded as follows:

"This arrangement is not entered into nor is this memorandum written, as a formal or legal agreement and shall not be subject to legal jurisdiction in the Law Courts either of the United States or England, but it is only a definite expression and record of the purpose and intention of the three parties concerned, to which they honourably pledge themselve, with the fullest confidence based on past business with each other that it will be carried through by each of the three parties with mutual loyalty and friendly co-operation. This is referred to as the 'honourable pledge' clause."

Disputes having arisen between the parties, the English companies determined this arrangement without notice. Before the relations beween the parties were broken off the American firm had given and the first mentioned English Company had accepted certain orders for goods. In an action by the American firm for beach of contract and for non-delivery of goods it was held in the above state of facts that the arrangement of 1913 was not a legally binding contract; that at the rate of the arrangement of 1913 was not a legally binding contract; that at the rate of the arrangement of 1913 all previous agreements were determined by mutual consent but that the orders given and accepted consituted enforceable contracts of sale. The following passage in the speech of Lord Phillimore is pertinent to the present controversy:

"Any actual transaction between the parties however gave rise to the ordinary legal rights; for the fact that it was not of obligation to do the transaction did not divest the transaction when done of its ordinary legal significance. This, my Lords, will, I think, be plain if we begin at the latter end of each transaction. Goods were ordered, shipped and received. Was there no legal liability to pay for them? One stage further back. Goods were ordered, shipped and invoiced. Was there no legal liability to take delivery? I apprehend that in each of these cases the American Company would be bound."

This case rests on the wide general principle that where one has expressly or impliedly requested another to render him a service without specifying any remuneration, but the circumstances of the request imply that the service is to be paid for, the law will imply a promise to pay quantum meruit, i. e., so much as the party doing the service has deserved, or, as we normally say a reasonable sum. By the letter of 5th October 1920, Ex. 78 the contractor was asked to carry on the work and assurance was given that it was the policy of the railway company to see that the contractors get a certain amount of profit.

Mr. Bagram has contended that there has been no abandonment of the original scheduled rates but that there has been merely a variation of the contract in one particular and he has relied on the decision of the House of Lords in the case of 1918 A. C. 1 (2) in support of this proposition. Whether there has been a mere variation of terms or abandonment depends upon the facts of each particular case and is often not easy to determine, but the following test has been suggested by Lord Dunedin:

"In the first case (variation) there are no such executory clauses in the second arrangement as would enable you to sue upon that alone if the first did not exit; in the second (rescission) you could sue on the second arrangement alone, and the first contract is got rid of either by express words to that effect, or because, the second dealing with the same subject-matter as the first,

1. Rose & Frank Co. v. J. R. Crompton, (1925) A C 445=94 L J K B 120=30 Com Cas 163=132 L T 641.

2. Morris v. Baron, (1918) A C 1=87 L J K B 145=118 L T 34.

but in a different way, it is impossible that the two should be both performed. When I say you could sue on the second alone, that does not exclude cases where the first is used for mere reference, in the same way as you may fix a price by a price list, but where the contractual force is to be found in the second by itself."

(His Lordship then looked into the correspondence and the judgment proceeded.) Applying the test laid down by Lord Dunedin in 1918 A. C. 1 (2) at p. 23 in the passage already quoted it appears that the original contract was gone and as the contractor completed his work he is entitled to reasonable rates. The argument as I understand it, is that under Cl. 15 of the general conditions it was permissible to the railway company to vary the rates and the railway company altered it under the condition No. 15 and there was merely variation of a part of the contract and no rescission of the contract. But Cl. (11) was altogether disregarded in the correspondence' for increase was given in some of the letters without corresponding alteration in the schedule.

In this connexion reference is made to a decision of the House of Lords in 2 H. L. C. 43 (3) and reference is made to the following passage occurring in the speech of the Lord Chancellor at p. 60 :

"When parties who have bound themselves by a written agreement depart from what has been so agreed on in writing, and adopt some other line of conduct, it is incumbent on the party insisting on, and endeavouring to enforce, a substituted verbal agreement, to shew, not merely what he understood to be the new terms on which the parties were proceeding, but also that the other party had the same understanding—that both parties were proceeding on a new agreement the terms of which they both understood."

There can be no doubt in this case that both parties understood that the old rates as embodied in the printed schedules must be abandoned. Ex. 78 p. 47, Vol. 3, which is described by counsel for appellant as the sheet anchor of the respondent's case supports this view. The letter of the District Engineer dated 20th April 1921, p. 57, Vol. 3, supports the same view. He says :

"Your para. 6. You can see and sign the schedule in the Assistant Engineer's Office. Above these rates you will be paid 25 per cent, extra on all items involving labour provided you in return make reasonable arrangement to look after your coolies and make them so contented that they do not bolt."

Can there be any doubt on this letter that both parties correctly understood that the scheduled printed rates to which the contractor put his signature can no longer regulate the rights of the parties. The burden of proving that there has been a departure by consent of both parties from the terms of the original contract is on the person asserting it, and in my opinion that burden has been effectually discharged by the conduct of both parties as disclosed in the correspondence just referred to. (After dealing with the argument of the appellant, His Lordship proceeded to consider the cross-objection of the respondent and other questions and then proceeded to consider the question of interest.) The learned counsel for the appellants has raised a very important question with reference to the interest on the amouut claimed. He contends in the first place that no decree for interest should have been allowed as there was no contract express or implied to pay interest and he argues further that in any event interest at the rate of 12 per cent per annum is excessive and his further extreme contention is that interest pendente lite should never be allowed. The amount of interest claimed and due, if interest is payable, is considerable and the case becomes of importance to the parties in consequence of the amount. In support of the contention that no interest should have been allowed up to the date of the suit reliance has been placed on the decision of the Patna High Court in the case of 1933 Pat. 196 (4). That decision it is to be noticed is contrary to the view which has been taken consistently in this Court in the cases of 15 I. C. 911 (5) and the case of 1918 Cal. 448 (6). The Patna decision seems to be opposed to the decision of their Lordships of the Judicial Committee in the case of 17 All. 511 (7), which lays down that even though the claim of the plaintiffs be or is limited to interest

3. Darnley (Earl) v. L. C. & D. Ry., (1867) 2 H L C 43=36 L J Ch 404=15 W R 817=16 L T 217.

4. Pattinson v. Bindhya Debi, 1933 Pat 196=146 I C 56=12 Pat 216.

5. Mohamaya v. Ramkhelawan, (1912) 15 I C 911.

6. Khetra Mohan v. Aswini Kumar, 1918 Cal 448=45 I C 667.

7. Lala Chajmal Das v. Brijbhukhau Lal, (1895) 17 All 511=22 I A 199=6 Sar 624 (P C).

which is not recoverable either under a contract or under the provisions of the Interest Act (Act 32 of 1839) it is open to the Court to make a decree for damages for wrongful detention of their money. In the case before the Judicial Committee where the bonds stipulated for payment of principal in two years from its date with interest at 15 per cent and half yearly rests, but omitted to provide for interest after the expiration of the two years ; it was held that interest for the post diem period was nevertheless recoverable as damages for the non-payment at due date, and that prima facie the rate would be the same as that provided in the bond during the two years; in this case simple interest was ordered at 15 per cent. Wort, J., of the Patna High Court seems to think that this decision of the Judicial Committee cannot be reconciled with a later decision of their Lordships in the case of 1918 P. C. 53 (8), but if the facts of that case are examined it will be seen that there is no conflict between 17 All. 511 (7) and 1918 P. C. 53 (8). The facts are : In 1878 the mortgagees under the mortgage of 1863 got Rs. 6,988 on account of a redemption, which is only now taking place; therefore they received it over 30 years too soon; therefore they should not only allow it in account, which they have done, but should allow over 30 years' interest on it too. Alternatively, since 1878 the principal mortgage moneys under the mortgage of 1863 must be deemed to have been paid off in the proportion of Rs. 6,988 to Rs. 15,944 and as the enjoyment of the usufruct by the mortgagees was conceded only in consideration of the continuance of the mortgage loan, the enjoyment should be reduced pro tanto from that date ; in strictness on redemption a part of the rents and profits collected should be returned or credited in account to the mortgagors in the above proportion but for simplicity's sake interest at a sufficient rate will do as well. One cannot however help remembering here that the persons, who are asked to repay these profits are the respondents, whose predecessors never collected them or had anything to do with them, and that the persons to whom they are to be repaid are the successors of Debi Das, who collected and enjoyed them and probably bequeathed them to the appellants, but this inconvenient reminiscence is for present purposes outside the hypothesis. In this state of facts their Lordships of the Judicial Committee said this:

"To the first way of putting the matter their Lordships reply, as the High Court replied, that interest depends on contract express or implied or on some rule of law allowing it. Here there is no express contract for interest and none can be implied and no circumstances less capable of justifying the allowance of interest as matter of law can be imagined. The mortgage of 1863 is the answer to the second view. It treats the usufruct as a whole as a remuneration for the loan or any part of it so long as it remains outstanding."

The facts of this case are somewhat peculiar and all that was laid down was that a man cannot claim interest for money practically in his own pocket. After the abandonment of the original schedule rates the law implied a promise to pay at market rates and if there is a breach the Court is entitled to assess damages under S. 73, Contract Act. It appears that the work was completed in December 1924 and on 23rd September 1925 the plaintiff contractor wrote a letter to the Assistant Engineer in charge that he would charge interest on Rs. 65,714 at 15 per cent per annum as the amount though admittedly due was being unlawfully withheld from him. The interest before suit was claimed from 26th July 1925 to 29th November 1927. In this case the interest is really in the nature of damages for detention of the debt. In the case of 7 H. L. C. 27 (9), Lord Cairns refers to the well known principle that any claim in the nature of a claim for interest after the day up to which interest was stipulated for, would be a claim really, not for a stipulated sum and interest, but for damages, and then it would be for the tribunal before which that claim was asserted to consider the position of the claimant and the sum which properly and under all the circumstances should be awarded for damages. No doubt prima facie the rate of interest stipulated for up to the time certain might be taken, and generally would be taken, as the measure of interest but that would not be conclusive. It would be for the tribunal to look at all the circumstances

8. Kalyan Das v. Makhbul Ahmad, 1918 P C 53 =46 I C 548=40 All 497 (P C).

9. Cook v. Fowler, (1874) 7 H L C 27=43 L J Ch 855.

of the case, and to decide what was the proper sum to be awarded by way of damages.

And this is what was said by Lord Morris in 17 All. 511 (7). The appellant has also referred to a decision of this Court in the case of 1920 Cal. 912 (10) where Walmsley, J. held that interest by way of damages is not recoverable for the mere wrongful detention of an ordinary debt. Huda, J., did not agree with him. He held that the plaintiff in that case was clearly not entitled to any interest under the Interest Act. But observed the learned Judge:

"That in my opinion does not debar him from claiming interest by way of damages under S. 73, Contract Act."

Walmsley's J. view no doubt supports the appellant but we are not prepared to agree with him in view of the decision of the Judicial Committee and of this Court to which reference has already been made. The ground therefore that no interest should be allowed before suit should fail. The next point taken is that interest pendente lite should not be allowed. There is no authority for this proposition. On the other hand there is authority for the proposition that for the period between the filing of the plaint and the determination of the suit the plaintiffs are entitled to interest: see 1927 Mad. 99 (11). On the point of interest another ground is taken and it is said that 12 per cent. per annum is excessive. Considering all the circumstances of the case regard being had to the fact that there is no evidence that the contractor sustains actual damage or that he paid 12 per cent on his borrowings, we think that 9 per cent. per annum is the fair rate of interest that the plaintiffs can claim. We accordingly reduce the rate of interest from 12 per cent to 9 per cent and the decree of the Subordinate Judge must be varied in this respect. (The remaining portion of the judgment is not necessary for the purpose of this reporting).

Patterson, J.—I agree.

K.S *Order accordingly.*

10. Prosannamoyee v. Gopal Lal, 1920 Cal 912=55 I C 737.
11. Kandappa Mudaliar v. Muthuswami Ayyar, 1927 Mad 99=99 I C 609=50 Mad 94 (FB).

A. I. R. 1935 Calcutta 356

NASIM ALI, J.

Amirennessa and *others* — Plaintiffs—Appellants.

v.

Ananda Chandra Saha and *others*—Defendants—Respondents.

Appeal No. 759 of 1932, Decided on 7th December 1934, against decree of Addl. Sub Judge, Noakhali, D/- 22nd June 1931.

(a) Execution—Sale in execution of decree—Sale not void but only voidable—Unless sale is set aside, judgment-debtor cannot have his title declared.

Where a sale in execution of a decree is not void but voidable the judgment-debtors are bound to have the sale set aside before they can have their title to the lands sold declared and their possession there in confirmed. [P 357 C 2]

(b) Civil P. C. (1908), O. 21, R. 90—Execution sale—Ground to set aside it on basis of fraud in publishing sale comes under O. 21, R. 90—No separate suit to set aside sale lies.

Where sale is sought to be set aside on the ground of fraud in publishing the sale the grounds for setting aside the sale come within the scope of O. 21, R. 90. Hence no separate suit to set it aside lies : 1930 *All* 556, *Rel on.* [P 357 C 1, 2]

Nurul Huq and *Hamidul Huq Choudhury*—for Appellants.

Nagendra Chandra Choudhury — for Respondents.

Judgment.—The appellants who are the plaintiffs prayed the Court (1) for a declaration that a decree obtained by the principal defendants against the plaintiffs and the pro forma defendant 12 in Rent Suit No. 1194 of 1919 on 23rd June 1919 was obtained by fraud and was liable to be set aside (2) for a declaration that the sale which was held in execution of the said decree and at which the defendants purchased the plaint lands belonging to the plaintiffs was fraudulently effected, and (3) for confirmation of plaintiffs' possession of the said lands.

The trial Court held that the decree was obtained by fraudulent suppression of summons and the auction sale was also fraudulent as the sale processes were suppressed. The trial Court further held that the sale was void as no notice under O. 21, R. 22, Civil P. C., was served on the judgment-debtors. The trial Court was also of opinion that the suit was maintainable under law and was not barred by limitation. In the result it decreed the plaintiffs' suit. On appeal by defendants 1 to 5 to the lower

appellate Court the learned Judge came to the conclusion that the decree was not obtained by suppression of summons. The learned Judge however agreed with the trial Court in finding that the sale processes were suppressed. The learned Judge was further of opinion that notice under O. 21, R. 22 was not necessary. The learned Judge however held that the suit was barred by limitation. He accordingly allowed the appeal and dismissed the plaintiffs' suit. In the present appeal the only point argued by the learned advocate for the appellants is that the learned Judge was in error in holding that the suit was barred by limitation. Now in view of the finding of the Judge that the decree was not obtained by fraud, the decree is not liable to be set aside and consequently the plaintiffs' prayer for setting aside the decree must be disallowed. The question of limitation therefore arises only in connexion with the prayer for setting aside the sale.

It has been found by the learned Judge that there was a previous execution of the decree in the year 1921. It further appears that the last order in that execution case against the judgment-debtors, i.e., the plaintiffs in this suit was on 25th December 1921 and the execution in which the sale in question was held was started within one year from that date. It is therefore clear that the sale cannot be challenged as void on the ground of want of notice under O. 21, R. 22, Civil P. C. The position therefere is that the sale is not void but voidable. The plaintiffs are therefore bound to get the sale set aside before they can have their title to the lands sold declared and their possession therein confirmed. The next point for decision therefore is whether plaintiffs are entitled to bring a separate suit for setting aside the sale. It has been already pointed out that the sale is not bad for want of notice under O. 21, R. 22, Civil P. C. The finding of the learned Judge is that the sale processes were fraudulently suppressed. In other words the sale is liable to be set aside as there was fraud in publishing the sale. The grounds for setting aside the sale in the present suit therefore are within the scope of O. 21, R. 90, Civil P. C. R. 92 of the said order lays down:

"(1) Where no application is made under R. 89, R. 90 or R. 91, or where such application is made and disallowed, the Court shall make an order confirming the sale and thereupon the sale shall become absolute (2) Where such application is made and allowed, and where, in the case of an application under R. 89, the deposit required by that rule is made within thirty days from the date of sale, the Court shall make an order setting aside the sale. Provided that no order shall be made unless notice of the application has been given to all persons affected thereby. (3) No suit to set aside an order made under this rule shall be brought by any person against whom such order is made."

Under Cl. (3) of R. 92 no suit will lie to set aside an order confirming the sale under Cl. (1) even if no application under R. 90 is made. My conclusion therefore is that in view of the grounds taken by the plaintiffs in the present suit for attacking the sale, their proper remedy was by an application under O. 21, R. 90, Civil P. C., and not by a separate suit. The following observations of Sulaiman, J., in this connexion in the case of 1930 All 556 (1) are pertinent:

"It is quite clear that it is not open to the plaintiffs to get the auction sales set aside by this suit on the ground of any fraud in the conduct and proclamatiou of the sale. For that the remedy was under O. 21, only and no separate suit lies."

The learned advocate for the appellants however contended that this suit might be treated as an application under O. 21, R. 90. Assuming that such a course is permissible the real difficulty in the way of the appellants is that in that case there would be no second appeal and further the application would be barred by limitation as the appellants came to know of the sale at least on 28th March 1928 and the present suit was filed on 18th June 1928. In the above view of the matter it is not necessary to decide the question whether a suit for setting aside a sale on the ground of fraud is governed by Art. 12, or Art. 95, Lim. Act. In the result the appeal fails and is dismissed. But in the circumstances of the case I make no order as to costs.

K.S. *Appeal dismissed.*

1. Mt. Inder Koer v, Sah Dharam Narayan, 1930 All 556=128 I C 231.

A. I. R. 1935 Calcutta 357

GUHA AND BARTLEY, JJ.

Jogesh Chandra Roy—Appellant.

v.

Niranjan De and *others* — Respondents.

Appeal No. 948 of 1932, Decided on 6th December 1934.

(a) **Easements Act (1882), S. 4—Prescriptive rights as an easement to use land as burial ground cannot be acquired — Such right is not easement — Right to cremate dead bodies is also similar—Prescription.**

A prescriptive right to use land as burial ground by user of the same as such for even 100 years, oponly, continuosly, without interruption as of right, as an easement by prescription, cannot be acquired or created, and by no stretch of language could the right to bury the dead on a plot of land be called an easement, implying that such user was for the beneficial enjoyment of land. The right to cremate dead bodies may very well be treated as a right of similar nature as the right to bury the dead, and such a right cannot be acquired as an easement by prescription. Land for use as a cremation ground could however be acquired by dedication or by prescription, as a mode of acquisition or extintion of substantive or primary rights by a certain lapse of time : 1921 *Cal* 569, *Ref.*

[P 358 C 2]

(b) **Prescription — Evidence of long and continuous user — Court need not consider specific number of years to which it has lasted.**

Where there is evidence showing long and continuous user, it is sufficient for the Court to find whether it has or has not lasted long enough to confer a right by prescription without particular reference to any specific number of years.

[P 359 C 1]

Nripendra Chandra Das—for Appellant.

Narendra Kumar Das, Durga Pr. Das and *Bireswar Chatterji* for *Deputy Registrar*—for Respondents.

Judgment.—The plaintiff in the suit in which this appeal has arisen wanted to have khas possession of certain lands described in the plaint in total denial of the defendants' right of way and of a right asserted by them to use a portion of the said lands as a cremation ground. The contesting defendants it would appear, asserted user of the lands in question as a pathway and cremation ground for the period of 50 years before suit. The right of way asserted by the defendants in the suit is not in question in this appeal preferred by the plaintiff; the subject-matter of the appeal to this Court is confined to the defendants' right to use a portion of the lands in suit as a cremation ground.

The Courts below agreed in holding that the plaintiff in the suit was not entitled to get khas possession of the portion of the lands in suit in regard to which the defendants asserted that it was a cremation ground. The question raised in the Court below on this part of the case, was, whether the defendants had any right of easement by custom or immemorial user in any portion of the lands used as cramation ground. It was held that an easement, could not be acquired in regard to the cremation ground, under the Limitation Act. This position is not challenged by the defendants respondents in this Court. The Court below then proceeded to hold that the acquisition of such a right must be ascribed either to custom or to immemorial user giving rise to a presumption of lost grant. Custom was not pleaded by the defendants in the suit, and no customary right was asserted by them in regard to the cremation ground. The Court below upon the evidence on the record, came to the conclusion that it was

"quite sufficient for conceding to the defendants a presumption in their favour about a lost grant."

As indicated already, the plaintiff has appealed to this Court for the purpose of questioning the propriety of the decision of the Court below, the effect of which was that the defendants in the the suit could acquire right of the description claimed in the suit of using the plaintiff's land as cremation ground, by prescription.

It may be taken to be well established that a prescriptive right to use land as burial ground by user of the same as such for even 100 years, openly, continuously, without interruption as of right, as an easement by prescription, cannot be acquired or created, and by no stretch of language could the right to bury the dead on a plot of land be called an easement, implying that such user was for the beneficial enjoyment of land : See in this connexion 1921 Cal. 569 (1). The right to cremate dead bodies may very well be treated as a right of similar nature as the right to bury the dead, and such a right could not be acquired as an easement by prescription. Land for use as a cremation ground could however be acquired by dedication or by prescription, as a mode of acquisition or extinction of substantive or primary rights by a certain lapse of time, which mode has sometimes been described by English lawyers as acquisitive prescription, inasmuch as it not only negatives the right of the late owner, but positively affirms that the adverse party has acquired that right.

1. Gopal Krishna Sil v. Abdul Samad Chaudhuri, 1921 Cal 569=36 I C 640.

In the case before us, what was claimed by the defendants was that by immemorial user they had acquired a prescriptive right to cremate dead bodies on the plaintiff's land. They gave evidence, which has been accepted by the Courts below that the user by the defendants was sufficient, extending for over 40 or 45 years, for giving rise to a presumption of lost grant in favour of the defendant. This conclusion on evidence come to, by the Court of appeal below, in our judgment, fully justified the decision that the defendants had acquired a right by prescription on a portion of the lands in suit, which debarred the plaintiff from getting khas possession of the same as claimed in the suit. Where there is evidence showing long and continuous user, it is sufficient for the Court to find whether it has not lasted long enough to confer a right, without particular reference to any specific number of years. The defendants had on the evidence before the Court, succeeded in establishing that long user by them has given rise to a presumption that right of a limited description had accrued in their favour of burning dead bodies on land owned by the plaintiff. The presumption was that of lost grant: that there was such a grant in favour of the defendants or their predecessors in interest in derogation of the full rights of ownership in the land concerned.

In the above view of the case before us, the decrees passed by the Courts below, the effect of which is that the plaintiff-appellant in this Court was not entitled to get khas possession of portion of the lands in suit, for the reason that the defendants-respondents had acquired a limited right of cremating dead bodies on the same, by acquisitive prescription, must be affirmed, and this appeal dismissed; and we direct accordingly. The respondents are entitled to their costs in this appeal.

K.S. *Appeal dismissed.*

A. I. R. 1935 Calcutta 359

COSTELLO, J.

Akshoy Kumar Nandi—Plaintiff.

v.

S. C. Dass and *Co.*—Defendant.

Suit No. 421 of 1932, Decided on 8th June 1933.

(a) Civil P. C. (1908), Sch. 2, Para 15—It is enough if award is made in time—It is not necessary that it should be submitted, delivered or filed in time.

The words of Para 15 itself show that that paragraph is only intended to mean that an award might be set aside if it was not made in time. There is nothing in the paragraph to indicate, that there is any necessity for the award being submitted or delivered or filed in time in order to maintain its validity: 1921 *Cal.* 576, 8 *C. W. N.* 916, *Rel. on.* [P 363 C 2]

(b) Civil P. C. (1908), Sch. 2, Para 15—For setting aside award, substantive provision of C. P. C. should be applied and not a rule of High Court—Arbitration.

In order to ascertain whether an award can be set aside or not, it is necessary to refer not to a rule of the High Court but to the substantive provisions of the Civil P. C. [P 363 C 2]

(c) Civil P. C. (1908), Sch. 2, Para 15—Arbitrator taking money for charges or as fee from one party may be sufficient to set aside award — But where one party has paid it by mutual arrangement between parties, award is not vitiated.

Where arbitrators take money from one of the parties singly whether for charges or anything else before making their award, that is sufficient cause to set aside the award.

Where the arbitrators took money as fees from one of the parties and it was done by way of mutual arrangement between the contending parties, the award is not vitiated by reason of any misconduct on the part of the arbitrators. It is imperative that arbitrators should always scrupulously avoid any course of action which even remotely bears the complexion of their having put themselves into a position where it might be said against them that they had received a pecuniary inducement which might have had some effect on their determination of the matters submitted to their adjudication: *Shephard* v. *Brand*, 2 *Barnard* 463, *Ref.* [P 365 C 1,2]

B. C. Ghose and *H. N. Sanyal*—for Plaintiff.

Isaacs—for Defendant.

Order.—This is an application to set aside an award which was filed on 12th May 1933. The application is made by a firm named S. C. Dass & Co., who were the defendants in the suit (being Suit No. 421 of 1932) out of which the matter arises. That suit was instituted by the plaintiff Akshoy Kumar Nandi on 27th February 1932 to recover from the defendant firm the sum of Rs. 9969-9-0 being monies alleged to have been lent to the defendant firm on 27th February 1929 and 10th June 1929.

The present applicants as the defendants in that suit by their defence denied that that sum was due to the plaintiff, and to their written statement they annexed statements of account which purported to show that after giving credit for the sums of Rs. 2951-7-0 and Rs. 5000 which were sums alleged

to have been advanced by way of principal, a sum of Rs. 21,016-4-0 was still due by the plaintiff to the defendant firm in respect of certain dealings and transactions between them and the plaintiff. The defendant firm in their written statement claimed that an account should be taken of those dealings and transactions including the amounts paid by the plaintiff to the defendant firm and that a decree should be made awarding to the defendant firm such sums as might be found due to them on the taking of the account.

In answer to the defendant's written statement which in effect was a counter-claim the plaintiff filed a written statement denying that any sum of money had been advanced to him by the defendant firm, but at the same time admitting that he had paid to the defendant the sum of Rs. 14,426-15-0 which sum however with the exception of Rs. 345 which had been paid to the defendant firm for the price of a Remington Typewriter supplied by them to the plaintiff was stated to represent the sums of money advanced by the plaintiff to the defendant firm from time to time. The plaintiff further said that some of these loans had been repaid by the defendant with interest leaving outstanding the sums of Rs. 2,951-7-0 and Rs. 5,000. The plaintiff further stated in his written statement that the statements of account put forward by the defendant, and the particulars set out therein were not correct. That the alleged payments on the debit side of the statement between the 10th May and 14th July 1932 represented monies paid by the defendant firm for the purchase of various goods from Messrs. Birkmyre Bros., in the benami of the plaintiff for facilitating transactions between the partners and that those sums had been paid into the plaintiff's account in the Allahabad Bank by the defendant firm and again drawn out by payments to Messrs. Birkmyre Bros. The plaintiff further stated that the sum of Rs. 3,391-8-0 under date 2nd April 1928 represented the sale proceeds less commission of 200 shares in the Calcutta Industrial Bank belonging to the plaintiff and made over to the defendant firm for collection of dividend on the same.

It is to be observed, that at this stage the position was, there was a suit by Akshoy Kumar Nandi against S. C. Dass & Co., and to all intents and purposes a regular counter-claim by S. C. Dass & Co., against Akshoy Kumar Nandi. Incidentally, this matter in my opinion emphasises once more the desirability of having proper rules framed by this Court for dealing with the question of counter-claims. I make that observation because the defendants in the original suit were not content with having set up what was in effect a counter-claim in their written statement; they proceeded on or about 7th June 1932 to institute a cross suit against the plaintiff Akshoy Kumar Nandi. That suit was No. 1291 of 1932. The plaint in that suit is practically a replica of or, at any rate, is based upon the writen statement in the first suit, that is to say, Suit No. 421 of 1932. To the plaint was annexed the same statement of account that had been annexed to the written statement in the first suit. For some reason or other which is not apparent the two suits were not formally consolidated which I should have thought would have been an obvious and reasonable course to have been pursued. However, that was not done and on 1st December 1932, by an order made in Suit No. 421 of 1932 by Buckland J. to whose Court the suit had been assigned by consent of the parties all matters in dispute in the suit between the parties thereto including the question of costs of the suit and of the arbitration proceedings were referred to the decision of Mr. Aroon Kumer Roy and Mr. Satyenda Kumar Basu, members of the Bar who were to make their award in writing and submit the same to the Court, together with all proceedings had before them, by the month of February 1933. The order provided that in case of difference of opinion between those arbitrators the matters in dispute between the parties should be refered to the final decision of Mr. H. D. Bose as umpire.

Subsequently by another order made in the same suit on 28th February 1933, which was also made by the consent of the said parties the time limited by the order of 1st December 1932, that is to say, the time granted to the arbitrators to make and submit their award was extended until 6th May 1933. Further, on 1st December 1932 an order was made by Buckland J. in Suit No. 1291

of 1932. That order also was made with the consent of both parties, and by the terms of it all matters in dispute in Suit No. 1291 of 1932 including the question of costs in the suit and the arbitration proceedings were referred to the decision of the same two members of the Bar who were to make their award in writing and submit their award to the Court together with all proceedings had before them by the month of February 1933. And again, in case of difference of opinion between the arbitrators the matter was to be referred to the final decision of Mr. H. D. Bose as umpire. Just as in the case of Suit No. 421 of 1932, so in the case of Suit No. 1291 of 1932 another order was made on 28th February also with the consent of both parties and the time granted by the order of 1st December 1932, made in Suit No. 1291 of 1932, was extended until 29th April 1933.

Pursuant to the order of 1st December 1932 made in Suit No. 421 of 1932 the arbitrators entered upon the arbitration. Certain issues were settled by the arbitrators and accepted by the parties.

Those issues were as follows:

1. Did the plaintiff lend and advance to the defendants the sums of Rupees 2951 and the sum of Rs. 5000 which the defendant promised to pay the plaintiff on demand with interest @ 9 per cent per annum, or the said sums of money were paid by the plaintiff to the defendant towards payment of the defendant's dues from the plaintiff in respect of various dealings and transactions between the parties mentioned in the statement of account annexed to the defendant's written statement?

2. If latter what sum is due by the plaintiff to the defendant?

It is to be observed therefore that so far as the arbitration in connexion with Suit No. 421 of 1932 is concerned the matter was simple and precise, namely, whether the defendant was indebted in the two sums I have mentioned to the plaintiff or not. Subsequently however the arbitrators decided to proceed with the arbitration of the matters in dispute in Suit No. 1291 of 1932, and in that connexion a series of issues were settled by the arbitrators and accepted by the parties. I do not think it necessary to enumerate those issues in detail; they are set out in para. 8 of the petition on which the present proceedings are founded. There were altogether fourteen issues so settled and accepted by the parties.

It appears that those arbitration proceedings like so many other similar proceedings unfortunately—be it said—were protracted and occupied altogether something like thirty sittings. This seems to be another instance illustrative of the fact that an arbitration so far from being an expeditious and economical method of settling business disputes is only too often exactly the reverse. However the arbitration held in connexion with Suit No. 1291 of 1932 was finally concluded on 28th April 1933 and thereupon the parties on both sides agreed that the evidence adduced on their behalf on each side respectively in the arbitration proceedings in Suit No. 1291 of 1932 should be treated as evidence for the purposes of arbitration in connexion with Suit No. 421 of 1932.

On 29th April 1933 the arbitrators signed their award in the proceedings in connexion with Suit No. 1291 of 1932. By that award they found that nothing was due to the plaintiff from the defendant firm in that suit but on the other hand a sum of Rs. 9750 was due from the plaintiff to the defendant firm in that suit, that is to say, the arbitrators held that the firm of S. C. Dass & Co. were indebted to Akshoy Kumar Nandi to the extent of Rs. 9750. But in that award the arbitrators said that as the amount found by them to be due to the defendant by the plaintiff in that suit was by an award made that same day in Suit No. 421 of 1932 being directed to be paid by the plaintiff to the defendants in that suit they did not make any award for the said sum in favour of the defendant in Suit No. 1291 of 1932. The award which they actually made in connexion with Suit No. 1291 of 1932 was in these terms:

1. That the suit be dismissed.

2. That the plaintiff do pay to the defendant his costs of this suit and of the arbitration proceedings with interest at 6 per cent per annum from the date of taxation including Rs. 5900 being the fees of the arbitrators and of their clerks.

On the same day, that is to say, 29th April 1933, the arbitrators had signed an award in Suit No. 421 of 1932 whereby they awarded as follows:

1. That the defendants pay to the plaintiff the sum of Rs. 9750.

2. That the defendant do pay to the plaintiff the costs of the suit and the costs of the arbitration proceedings with interest at 6 per cent per annum from the date of taxation including Rs. 202 being the fees of the arbitrators and their clerks.

3. That the said sum to carry interest at the rate of 6 per cent per annum from the date of the decree to be made herein.

Then on 16th May 1933 the attorney for S. C. Dass & Co., received a notice from the Registrar of this Court to the effect that the award of the arbitrators appointed in Suit No. 421 of 1932 under the order dated 1st December 1932 had been filed on 12th May 1932 and that the Court would proceed to pass judgment on that award on 22nd May 1933.

It is as an outcome of those arbitration proceedings that the present proceedings were instituted and S. C. Dass & Co. now seek to have the award made against them in Suit No. 421 of 1932 set aside on certain grounds which are set out in paras. 13 and 14 of their petition. The first ground is of a somewhat technical character and the other grounds relate to the conduct of the arbitrators themselves in connexion with the arbitration. The first ground is stated in this way:

"That the said award as filed as aforesaid is invalid as the same was filed after 6th May 1933 being the time extended to file the same under the said order of 28th January 1933."

In other words, so far as the first ground is concerned the present applicants say, that the award made in Suit No. 421 of 1932 is an invalid award in that it was not filed in time. They say it ought to have been filed by 6th May 1933, but in fact it was not filed until 12th May 1933. What actually happened was that the award was, as I have stated, signed on 29th April 1933 and on that same day or a day or so later the two arbitrators sent the award to the Registrar, Original Side, of this Court with a covering letter in these terms:

Suit No. 421 of 1932.

Akshoy Kumar Nandi
v.
Sris Chandra Dass

"Dear Sir

By an order dated 1st December 1932 we were appointed arbitrators in the above suit and by a subsequent order directed to file this award on or before 6th May 1933. We are sending an award herewith the following papers and request that it may be filed.

Yours faithfully
Sd. S. K. Basu.
Sd. A. K. Roy.
Arbitrators."

Enclosures:
Minutes:

It is not entirely clear on what date that letter was actually sent because the date at the head of it is given in type as 29th April and in manuscript "1st May", which seems to suggest that they intended to send it on the 29th April but in fact put upon it the date "1st May" when they signed the letter and added in manuscript the concluding words of the letter containing the request that the award should be filed. The question of date however is of no importance because there is an endorsement of the Registrar of this Court, "execution department, Inform the attorneys concerned" and that endorsement is dated 1st May 1933.

Mr. Isaacs who appeared for the applicants in these proceedings contended that as that award was not actually filed until the 12th May it was invalid by reason of the provisions of para. 15, Sch. 2, Civil P. C.

The material part of that paragraph (para. 15) says: "No award shall be set aside except on one of the following grounds, namely:

"(c) The award having been made after the issue of an order by the Court superseding the arbitration and proceeding with the suit or after the expiration of the period allowed by the Court or being otherwise invalid."

So, we get this proposition:

"No award shall be set aside except on the ground of the award having been made after the expiration of the period allowed by the Court."

Mr. Isaacs argued that the effect of that provision in the Code was to require that the award would not only be made but also filed before the expiration of the period allowed by the Court. It is true that by consent of parties it was ordered:

"The arbitrators are to make their award and submit the same before this Court together with all the proceedings had and depositions recorded and exhibits filed before them on or before the 28th day of February 1933."

As I have already said that date was extended until 6th May 1933. The important point is, as regards that part of the order, that they were to make and submit their award before the stipulated date.

Mr. Isaacs then referred to the Rules of this Court, Ch. 23, R. 1. It says:

"Where an award in a suit has been made and the persons who made have signed it, they shall cause it to be filed in Court together with any depositions and documents which have been taken and proved before them in accordance with R. 10, Sch. 2 of the Code by forwarding the same (together with the necessary court-fees for filing) in a sealed cover addressed to the Registrar with a letter requesting that the award be filed.

Where the provisions of R. 10, Sch. 2 to the Code and of R 1 have been duly complied with the Registrar shall forthwith file the award and give notice thereof to the parties which notice shall be in form No.(1) informing the parties that the Court will proceed to pass judgment on such award on a date to be fixed in the notice which notice shall not be less than 10 days from the date of the filing of the said award.

No award shall be submitted to the Court otherwise than by being filed in accordance with these Rules."

In the present case, the arbitrators did not fully comply with the terms of that Rule as they failed to send with their application to the Registrar the necessary court-fees No doubt they are responsible for this omission but the award was actually filed on 1st May 1933. Mr. Isaacs, in support of his contention, relied upon a case decided in the Allahabad High Court in 8 All 543 (1). There it was held :

"Under S. 521, Civil P. C., the rule that no award shall be valid unless 'made' within the period fixed by the Court, is equivalent to a rule that the award must be 'delivered' within that period."

Mr. Isaacs has apparently overlooked the fact that that case was subsequently expressly dissented from in another case in the same High Court, namely, 27 All 459 (2). In that case it was held, that where an arbitration takes place the order of a Court is sufficient if the award be made, that is, completed and signed by the

"arbitrators, within the period limited under S. 508, Civil P. C., it is not necessary to the validity of such award that it should actually reach the hands of the Court within such period."

In the judgment in that case the learned Judges said :

"Obviously the word 'made' is used in the untechnical sense, because the award cannot be considered as made unless it is authenticated by the signature of the person who made it. 'Made' means that the mind of the arbitrator has been declared, and such declaration requires an authentication by signature. S. 521 seems to us to be the same section which governs the case before us. It provides that no award shall be set aside except on one of the grounds mentioned in the section, one being that the award was 'made' after the issue by the Court of an order superseding the arbitration. It is manifest that the word 'made' used here does not mean delivery because 'making' and 'delivery' indicate different stages."

Apart from any authorities, at the very outset of the argument before me in the present case, I was disposed to hold that the words of para. 15 itself show that that paragraph, reproducing as it does S. 521 of the old Code, was only intended to mean that an award might be set aside if it was not made in time. There is nothing in the paragraph to indicate, in my opinion that there is any necessity for the award being submitted or delivered or filed in time in order to maintain its validity. There is moreover a decision of this Court on this matter which is directly to the point. I refer to the case of 8 C W N 916 (3) where it was held that an award made and signed but not submitted to the Court within "the time allowed for delivering the same in Court is valid in law." The facts of the case were that an award was made on 21st November which was within the period allowed but was not "delivered" till 26th November. The Court held that it could not be impeached upon that ground. There is another case of this Court which supports that view of the matter in 1921 Cal 576 (4) Mr. Isaacs relied strongly upon the provisions of R. 1, High Court Rules. He pointed out to me in the course of the argument that that Rule does not provide any sanction for its enforcement or rather does not impose any disability on the parties to the arbitration, if it is not fully complied with by the arbitrators. In my judgment however in order to ascertain whether an award can be set aside or not, it is necessary to refer not to a Rule of that kind but to the substantive provisions of the Civil Procedure Code.

I am, accordingly, clearly of opinion that the award made in connexion with Suit No. 421 of 1932 is not rendered invalid by reason of the fact that it was filed on 24th May inspite of 6th May. That disposes of the first point put forward in support of the present application.

Now, the other objections to the award raised by the present applicants relate,

1. Behari Das v. Kalian Das, (1886) 8 All 543= 1886 A W N 179.
2. Asadullah v. Muhammad Nur, (1905) 27 All 459=2 A L J 201.
3. Debendra Nath Chatterjee v. Sarbamongola Debi, (1904) 8 C W N 916.
4. Sewdatrai Narsaria v. Tata Sons, Ltd., 1921 Cal 576=77 I C 769.

as already mentioned, to matters in connexion with the conduct of the arbitration itself. The first of them is stated in these terms :

"That the findings of the arbitrators in the said award is based on the findings of the arbitrators in their award in the said Suit No. 1291 of 1932 and the arbitrators arrived at the said findings without deciding the abovementioned issues settled in this suit (that is to say, Suit No. 421 of 1932) or in the said Suit No. 1291 of 1932."

Regarding that objection Mr. Isaacs has stated that although all the matters of account in dispute between the parties had been settled in the arbitration held in connexion with Suit No. 1291 of 1932, nevertheless the arbitrators before proceeding to make an award in the arbitration in Suit No. 421 of 1932 ought to have set out in their award the issues settled by them in the other arbitration with categorical answers to each of those issues. We are not concerned, upon this, application with anything in Suit No. 1291 of 1932 or the award made in that connexion. That is not a matter which I have before me in any shape or form. All that need be said upon this point is that admittedly the parties themselves agreed that the proceedings in the Suit No. 1291 of 1932 should be used to determine the questions which had to be determined in Suit No. 421 of 1932. Therefore, it cannot be said that the arbitrators acted improperly or misconducted themselves because they acted upon the basis that the one arbitration determined the other. It is obvious that in Suit No. 1291 of 1932 the arbitrators found that S. C. Das & Co., owed the plaintiff the sum of Rs. 9,750/- (nine thousand seven hundred and fifty rupees). If their award in that arbitration did not, in fact, direct that that sum should be paid by S. C. Das & Co. to Akhoy Kumar Nandy, then it necessarily followed that in the other award they should make an order directing that that sum should be paid by S. C. Das & Co. to Akhoy Kumar Nandy. By the time the arbitration with which we are now concerned came to be determined, there was nothing left to be done excepting the making of an order that the sum of Rs. 9,750/- should be paid. It cannot therefore be contended that the arbitrators, in connexion with the award now under discussion, acted improperly in not setting out the issues which they may or may not have decided one by one in the previous arbitration.

The next objection taken by Mr. Isaacs on behalf of the present applicant is of a rather more serious nature. It is in these terms :

"That the arbitrators on 28th April 1933 before making the award improperly obtained an undertaking from the plaintiffs' attorney Mr. R. C. Deb that the plaintiff would pay the fees due to the arbitrators and their clerks even if the plaintiff did not get a decree in his favour in this suit, (that is to say, Suit No. 421 of 1932)."

The petition then proceeds :

"That your petitioner believes that the arbitrators were biased in favour of the plaintiff on account of the said undertaking."

What took place appears to be accurately stated in an affidavit made on behalf of the respondent to the present application, that is to say, the plaintiff, which affidavit was made by one Sham Chand Nandy, who was described as the grandson of the plaintiff and he was apparently looking after the suit on his behalf. In para. 9, the deponent says :

"I deny that the arbitrators before making the award obtained any undertaking from Mr. R. C. Deb improperly or otherwise as alleged or at all. The true facts will appear from extract of the minutes of the meeting held in Suit No. 1219 of 1932 on 28th April 1933 which is as follows:

"The defendant has paid the sum of Rs. 1000 on account of the fees of arbitrators and their clerks.

The plaintiff also gave two cheques for Rs. 500 each on the same account, but Mr. Das states that till now he has not been able to arrange for their encashment.

There have been altogether thirty sittings, and a sum ofRs. 4,950 is payable for the balance of such fees. The award must be filed by tomorrow if it is to be in time. The award should in the first instance, pay the fees of the arbitration, but Mr. Banerjee states that his client is not in a position to pay anything or for encashment of those two cheques.

Mr. Deb on behalf of his client offers to pay the balance of the said fees and asked for direction that when paid his client will be entitled to add the same as well as the amount previously paid to his claim which may be allowed by the arbitrators. If however the arbitrators do not allow my client's claim suitable directions might be given to set off these payments against his liabilities. If the arbitrators are of opinion that a seprate award should be given in the other suit suitable directions might be given accordingly.

Mr. Banerjee states that these directions are unnceessary.

Mr. Deb states that suitable directions providing protecting interest of his client should be given.

The arbitrators: —'The matter will be considered in our award."

Mr. Banerji did not take any exception to the offer made by Mr. Deb."

Now, the first thing that strikes one in connexion with this point is that as I have previously stated, the method of deciding the dispute between the parties was inordinately expensive. Some idea of the total cost of this arbitration is to be gathered from the amount of the fees claimed by the arbitrators. However, it would appear that the arbitrators were entitled to the fees they were asking for and I am bound to say that the arbitrators were entitled to payment of their fees in connexion with the award they made. The matter would of course have been beyond any criticizm if, in fact, each party had paid half the costs of the arbitration.

When it was found that Mr. Das was not in a position to pay his share it would have been wiser on the part of the arbitrators if they had proceeded to complete their award and then retain it until such time as their fees were paid by the party in whose favour it was in fact made.

Mr. Isaacs sought to bring the present case within the four corners of an old case decided in England in the year 1734 the case of 2 Barnard 463 (5). In that case, arbitrators to whom disputes between A and B had been referred, before making their award, demanded three guineas from each of the parties in respect of their charges and expenses. A paid the money but B did not. On a motion to set aside the award it was held that where arbitrators take money from one of the parties singly, whether for charges or anything else, before making their award, that is sufficient cause to set aside the award. No doubt the principle there enunciated is sound and correct and it is therefore generally speaking undesirable not to say improper for arbitrators to take money from one side only before the award is actually made. The decision in the case just referred to was made upon the footing that the arbitrators were or, at any rate, might have been biased in favour of the party who in fact, had paid their charges. In a much later case, 9 T L R 181 (6), however the Court refused to set aside an award on the ground that an undertaking had been given by one side to take up the award in any event. In that case, disputes arising out of a policy of insurance were referred to two arbitrators and an umpire under an arbitration clause in the policy at the end of the hearing met before the making of the award. The arbitrator for the company asked the solicitor for the company whether the company would undertake to take up the award in any event. The company gave this undertaking. On a motion to set aside the award on the ground that the undertaking to take up the award amounted practically to a payment of money by the company to the arbitrator, it was held, distinguishing 2 Barnard 463 (5) (supra) that the arbitrators had not been guilty of such misconduct as would require that the award should be set aside.

All the same however, in my judgment, the principles underlying the decision in 2 Barnard 463 (5) still hold good and it is imperative that arbitrators should always scrupulously avoid any course of action which even remotely bears the complexion of their having put themselves into a position where it might be said against them that they had received a pecuniary inducement which might have had some effect on their determination of the matters submitted to their adjudication. In the present instance I do not think it can be rightly contended that the circumstances attending the payment of the fees of the arbitrators brings the case between the ambit of the decision in 2 Barnard 463 (5) (supra). I should be very reluctant to hold that the arbitrators in the present case were influenced in their decision by the manner in which their fees came into their hands. It is true that the whole of the sum of Rs. 2,000 was paid in the first instance by Akshoy Kumar Nandy but half that sum was provided by him by way of accommodating Mr. Das of the plaintiff firm S. C. Das & Co., when Mr. Das found himself in the position of not been able to arrange for the two cheques for Rs. 500 each to be met on presentation, and what was done by Mr. Deb, the solicitor acting on behalf of the defendant was not objected to by Mr. Banerjee, the solicitor for the plaintiff firm. The whole matter of the payment of the arbitrators' fees was one of mutual arrangement between the contending parties as appears from the minutes the correctness

5. Shephard v. Brand, 2 Barnard 463.
6. In re Kenworthy and the Queen Insurance Co., (1893) 9 T L R 181.

of which has not been disputed. Moreover from the very outset of his argument Mr. Isaacs partly stated he was not in a position to substantiate nor did he intend even to put forward the allegation contained in para. 14 (3) of the petition of S. C. Das & Co., on which the present proceedings were founded. That attitude on the part of the learned Counsel appearing for S. C. Das & Co., puts the present case outside the mischief aimed at in 2 Barnard 463 (5). Having said that however I feel bound to emphasise that the arbitrators would have been wiser had they avoided altogether a method of collecting their fees which laid them open to imputations of corruption—or at any rate prejudice—however unfounded such imputations might prove to be upon close examination.

The last point taken by Mr. Isaacs on behalf of the applicant is that set forth in para. 14 (4) of the petition. It is stated in these terms :

"That the plaintiff fraudulently withheld the inspection to the defendant of the Khatian or ledger books for the years 1923 and 1924 although the same were disclosed by the plaintiff in letter dated 24th June 1932 written by the plaintiff's solicitors to the defendant's solicitors and tendered and marked Ex. 10 in the arbitration proceedings in Suit No. 1291 of 1932. If the said ledger books were produced by the plaintiff the same would have disclosed the real state of affairs regarding the items on the debit side of the statement of account filed with the written statement between 28th April 1923 and 14th June 1923 and also between 8th March 1924 and 20th October 1924 involving large sums of money advanced by the defendant to the plaintiff and the arbitrators could have come to the true findings in their award. (5) The arbitrators should have directed the plaintiff to produce the said ledger books but they did not do so."

Once more I would point out that what we are here concerned with is the award made in the arbitration in Suit No. 421 of 1932. It is therefore not open to the present applicants to hark back, as it were, to anything that might have occurred in the course of the arbitration proceedings in Suit No. 1291 of 1932. In any event however Mr. Isaacs was not able to say that in fact any application was made to the arbitrators for the production of the books the absence of which if they were absent is not complained of. If in fact Counsel or whoever was appearing on behalf of S. C. Das & Co. had made an application for an order that the other side should be directed to produce these books and that order had been refused then perhaps there might have been something to be said of that position. As far as I can see however there is no evidence whatever to show that any attempt was made to compel the other side to disclose these books. On this point Shamchand Nandi in the affidavit made by him on behalf of Akshoy Kumar Nandi deposes as follows :

Para. 11 :

"I deny that the plaintiff withheld inspection of ledger books of the years 1923 or 1924 fraudulently or otherwise. The said ledgers were not disclosed in the affidavits of document of the plaintiff. The said books were lost and could not be found. The plaintiff disclosed and gave inspection of the Jabda books (cash books) for the years 1923 and 1924. The entries in the ledger are made up from the Jabda. I deny that the said ledger books if produced would have disclosed anything which could not be found in the Jabda books or that would have disclosed that any sum of money were ever advanced by the defendant to the plaintiff or they would have disclosed the real state of the items on the debit side of the statement of account between 28th April 1923 and 14th June 1923 and between 8th March 1924 and 20th October 1924. The plaintiff disclosed all books and documents in his possession and power relating to the matters in dispute in the two suits. The said ledgers for 1923--1924 were referred to by mistake in the letter dated 24th June 1924. The said letter was written before any search for the books was made by me under my instructions. A search for other books was made by me before the list of documents disclosed in the affidavit and I found that they were missing having been destroyed by white ants long ago or lost."

In para. 12 he said :

"Before the evidence began Mr. Banerji wanted inspection of the ledger books of 1923 and 1924. He was then told that those books were lost and could not be found. Thereupon Mr. Banerji proceeded with the reference. No complaint was made to the arbitrators that the said books had been fraudulently or at all suppressed or any direction was asked for on proper materials for the production of the said books. The arbitrators could not have given any direction for the production of the said ledgers in view of the statements that they were lost and could not be found."

That account of what transpired before the arbitrators has not been seriously challenged. All that Mr. Das in his affidavit in reply says about it so far as is really material is this :

"With reference to para. 12 of the said affidavit (i. e. the affidavit of Sham Chand Nandi) I state that the arbitrators did not direct the plaintiff to produce the ledger book for the years 1923 and 1924 but allowed Mr. P. N. Banerji to cross-examine the plaintiff regarding the said letter as will appear from the following extract from the deposition of the plaintiff before the arbitrators."

And the questions are set out.

Nowhere does he say that a formal application was made to the arbitrators and that such application was refused. There is therefore nothing in this last point made by Mr. Isaacs on behalf of the applicants which would justify me in interfering with the award of the arbitrators. As previously stated, the second, third and fourth points set up by the applicants were in effect charge of misconduct against the arbitrators, misconduct of course in the technical sense. Those charges have not been made out, and subject to the observations I have thought fit to make with regard to the method in which the fees were paid it would seem so far as one can Judge upon the materials now before me that the arbitrators conducted the arbitration in a satisfactory manner. This application must accordingly be dismissed with costs.

K.S. *Application dismissed.*

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MITTER, J.

Rasik Lal Mukhuti and *others*—Plaintiffs—Appellants.

v.

Prasanna Kumar Saha and *others* — Respondents.

Appeal No. 842 of 1932, Decided on 12th December 1934, against decree of Sub-Judge, Second Court, Faridpur, D/- 30th November 1931.

Evidence Act (1872), S. 13—Suit for khas possession of land on establishment of title —Defendant claiming it as belonging to his homestead—Documents of purchase of homestead by defendant and his predecessors in title are admissible — Absence of proof of possession affects only weight and not admissibility—Deed.

In a suit for khas possession of land established on title, where the defendant claims that this forms part of his homestead documents by which defendant, and his predecessor in title purchased the homestead are admissible; the absence of proof of possession does not affect the admissibility of such documents but it only affects the weight to be attached to them: 1925 *Cal* 1189; 1914 *P C* 74, *Rel on.* [P 368 C 1]

U. N. Sen Gupta and *Manmatha Nath Roy (Jr.)*—for Appellants.

Bhuban Mohan Saha — for Respondents.

Judgment.—This appeal is on behalf of the plaintiffs and arises out of a suit for recovery of khas possession on establishment of their title. The land in suit is a very small strip of land and a very narrow ditch on the border of the plaintiffs' land recorded in dag No. 362 of the settlement map and the defendants' homestead recorded in dags Nos. 364 and 368 of the settlement map of Mouza Palong, the plaintiffs and the defendants respectively claiming this part of the land and ditch and parts of their respective homesteads. A Commissioner was appointed to relay the Thak map and the settlement map in the locality. He could not relay the Thak map accurately and both the Courts below have held that the Commissioner's relaying in reference to the Thak map cannot be accepted.

The Court of first instance held that the Commissioner's relaying of the settlement line was reliable and in accordance with the Commissioner's report in this respect made a decree in part in favour of the plaintiffs. The plaintiffs preferred an appeal to the learned Subordinate Judge and the defendants a cross-objection. The learned Subordinate Judge gave very cogent reasons for not accepting the Commissioner's relaying of the settlement line and pointed out that a pathway on the east of the defendants' land shown as beyond the homestead in the settlement map but the Commissioner's relaying would include it within their land. He pointed out further that the dispute related to a vary narrow plot only 44 links wide and having regard to the errors which he pointed out in the Commissioner's relaying with regard to the eastern boundary it was not safe to act upon the report of the Commissioner which on the face of it was wrong. He accordingly held that the plaintiffs were not entitled to the decree as passed by the trial Court. The learned Subordinate Judge then observed that there is a hedge on the north of the ditch in question near about the southern extremity of the defendant's land and he observed that this is a fact which is strongly in favour of the plaintiffs and would lead to the inference that the hedge was the southern boundary of the defendants' land. If that were so, the whole of the disputed land would fall to the plaintiffs' dag No. 362, but the learned Subordinate Judge observed that it would be unsafe to proceed upon the existence of the said hedge because there are two documents one of the year 1288 and the other of the year 1313 which would show

that the ditch is included not in the plaintiffs' land but in the defendants' homestead. The document of the year 1307 is a conveyance by which the defendants purchased their homestead and the document of the year 1288 is a purchase-deed of the defendants' predecessors in title by which the homestead was purchased by them. The learned Subordinate Judge, as I have stated, said that these documents show that the Kacha (ditch) is included in the defendants' homestead.

Mr. Sen Gupta appearing on behalf of the plaintiffs appellants has urged that the above-mentioned two documents are inadmissible in evidence; secondly, that the learned Subordinate Judge has placed a wrong construction upon them. I do not see how these documents are inadmissible. They are the defendants' title-deeds and in them a claim is made, at least a right is asserted by the defendants and their predecessors to the Kacha or ditch in suit. These documents, in my judgment, will be admissible in evidence under the provisions of S. 13, Evidence Act. Mr. Sen Gupta argues that if there is no evidence of possession in accordance with the recitals in these documents, these documents would be no evidence at all. I cannot give effect to this contention. In the case of 1914 P. C. 74 (1), such documents have been treated as evidence and as they are old documents some weight ought to be attached to them. In dealing with this question, Mookerjee, J., in the case of 1925 Cal. 1189 (2) pointed out that the absence of proof of possession does not affect the admissibility of such documents but it only affects the weight to be attached to them. In my judgment therefore the two documents are admissible in evidence. Whether they were entitled to have the same weight which has been given to them by the learned Subordinate Judge is really a question of fact and cannot be gone into in second appeal. I do not also agree with the contention of Mr. Sen Gupta that these two documents have been mis-construed. The document of the year 1288 after giving the northern, eastern and western boundaries of the land proposed to be sold by that document proceeds in this way. "To the north the house of Madan Mohan Saha including its southern ditch." That clearly indicates that the house of Madan Mohan Shaha to which appertained the ditch is also the subject-matter of the case and the southern boundary of the conveyed lands was the southern side of the ditch in question.

The southern boundary of the lands conveyed by the document of the year 1307 is put in these words: Halot or pathway in the northern extremity of the agricultural land of Raj Kumar Mukherjee (plaintiff). After these words the words "Gar Kacha Saha" are added. These words, in my judgment, convey the idea that the boundary is to be the the Halot or pathway of Raj Kumar's land but to make it clear that the Gar or the ditch is being included in the conveyance, the words that I have stated, namely, "Gar Kacha Saha," are added there. In my judgment, the decree made by the learned Subordinate Judge is unassailable and must be affirmed. The result is that this appeal is dismissed with costs.

K.S. *Appeal dismissed.*

1. John King & Co. v. Chairman of the Municipal Commissioners of Howrah, 1914 P C 74= 26 I C 949.
2. Swarnamoyi v. Sourindra Nath Mitra, 1925 Cal 1189=89 I C 747.

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MITTER AND PATTERSON, JJ.

Kumar Raj Krishna Prosad Lal Singh Deo—Plaintiff—Appellant.

v.

Barabani Coal Concern Ltd. and *others*—Defendants Respondents.

Appeal No. 54 of 1930, Decided on 20th July 1934, against original decree of Addl. Sub-Judge, Asansole, D/- 23rd December 1929.

(a) Permanent settlement—Person claiming certain land as appertaining to permanently settled estate — Onus is on him to prove that such land is included in mal assets of estate at date of permanent settlement.

Where a person claims certain land as appertaining to the permanently settled estate, the onus is on him to prove that the land is included in the mal assets of the estate at the date of the permanent settlement, in other words that it fell within his regularly assessed mahal. This is not discharged by merely showing that the mouza is within the ambit of geographical limits of his estate, he must go further and show that this mouza was assessed to revenue: 14 *M I A* 152 (*P C*), *Rel on.*, and 1922 *P C* 272, *Ref.*

[P 369 C 1]

(b) Admission—Person admitting certain thing to be true shifts burden.

What a man admits to be true must reasonably be presumed to be so and this admission shifts the burden on to the respondent: 29 *All* 184 (*P C*) *Ref.* [P 372 C 1]

(c) Deed—Construction—Some words used in heading and body of document must have same meaning.

Where a word is used in the heading and also in body of a document it must have the same meaning. [P 372 C 2]

(d) Bengal Regulation (19 of 1793)—Effect of invalid lakheraj grant is to make land subject to payment of revenue.

The effect of the Regulation in the case of invalid lakheraj grants is not to dispossess the Ex-lakherajdars but to make the lands subject to the payment of revenue. [P 374 C 1]

(e) Land Tenure—Lakheraj lands — Right of Government to assess to Government revenue is barred by lapse of 60 years.

The right of the Government to assess lakheraj lands to revenue becomes barred by the lapse of 60 years: 4 *M I A* 466, (*P C*) *Ref.* [P 374 C 1]

(f) Bengal Regulation (8 of 1793), S. 36—Assessment is to be fixed exclusive and independent of all existing lakheraj lands.

By virtue of S. 36 of Regulation (8 of 1793) the assessment is to be fixed exclusive and independent of all existing lakheraj lands, that is lands exempt from the public revenue. Such lands are therefore in effect withdrawn from the settlement and the zamindar, though these lands might be locally situate within his district, could claim no title therein by virtue of the settlement: 1917 (*P C*) 8, *Ref.* [P 375 C 2]

(g) Evidence—Thak maps are evidence as to state of things at date of Permanent Settlement.

Thak maps are good evidence of the state of things at the date of the Permanent Settlement in the absence of evidence to the contrary: 30 *Cal* 291, (*P C*) *Rel on.* [P 376 C 1]

(h) Record-of-Rights—It is no evidence of title.

The Record-of-Rights is no evidence on the question of title as the records are mainly based on possession. [P 378 C 1]

(i) Bengal Regulation (19 of 1793), S. 4 — Mineral rights—Lakherajdar holding under invalid grant not resumed by Government—Though property is situated in limits of zamindar's estate title of mineral rights is in lakherajadar.

The title to the underground rights is in the lakherajdar who holds under an invalid grant which has not been resumed by the Government although the property is situate within the geographical limits of the estate of the zamindar: *Case law referred.* [P 381 C 2]

(j) Landlord and Tenant—Mineral rights are in owner—Mines.

Minerals rights are in the proprietor of the soil. [P 381 C 2]

(k) Landlord and Tenant—Rent free grant—Minerals will not pass to grantee in absence of express reservation.

If the grant is a rent free grant there can be no question that the minerals would not pass to the grantee in the absence of reservation: 1919 *P C* 17, *Rel on.* [P 381 C 1]

(l) Evidence Act (1872), S. 116 — Suit for rent or ejectment—Relationship of landlord and tenant alleged—Plaintiff need not set out his own title—Landlord and Tenant.

In a suit for rent as in a suit for ejectment against a tenant where the relationship of landlord and tenant is alleged to exist it is not necessary that the plaintiff should set out his own title, and this is on the principle that the tenant is estopped from denying that his landlord who put him in possession of the land then had title so to do or that his landlord from whom he accepted a lease then had title to grant the lease or that the landlord to whom he paid rent then had title to receive the rents. [P 382 C 1]

(m) Evidence Act (1872), S. 116 — Estoppel under, is estoppel by contract.

Section 116 deals with instance of estoppel by agreement based on permissive enjoyment. The estoppel of a tenant is founded upon a contract between him and his landlord. [P 382 C 2]

(n) Deed—Recital in deed to which person is not party is not evidence against him — Evidence.

A recital in a document to which a person is no party is not evidence against such person: 1916 *P C* 110, *Rel on.* [P 383 C 1]

(o) Landlord and Tenant—Plea of eviction by title paramount — Conditions necessary stated—Forcible expulsion is not necessary.

In order that the plea of eviction by title paramount might constitute a good defence, three conditions must be fulfilled. The eviction must have been from something actually forming part of the premises demised, (2) the party evicting must have a good title, (3) the party must have quitted against his will. Forcible expulsion is however not necessary, for it is sufficient if the tenant gives up possession and the person claiming by title paramount, i. e. by a title superior to those both of the lessor and lessee against a tenant who is unable to to make a defence. [P 384 C 2]

(p) Deed — Kabuliayat — Consideration need not appear on face of deed itself—Oral evidence to show that real consideration is settlement of doubtful rights is admissible — Evidence Act (1872), S. 72.

It is not necessary that the consideration for a deed by kabuliyat must appear on the face of document itself; it is permissible to rely on external evidence showing that the real consideration for the kabuliyat is a settlement of doubtful rights. Oral evidence can be given to show what the real consideration was for the kabuliyat: *Crears* v. *Hunter* 19 *Q. B. D.* 341, *Rel on; English cases referred.* [P 384 C 2]

(q) Evidence Act (1872), S. 116 — Lessee cannot dispute lessor's title without first surrendering possession.

Section 116 of the Act precludes the lessees from disputing the lessor who has put the lessee in possession without first restoring possession: 1933 *P C* 29 *Ref,* [P 384 C 1]

(r) Landlord and Tenant—Rent issued out of land or covenant concerning rent is covenant which touches land or runs with it —It can be enforced against transferee of lease.

Rent issued out of land and any covenant concerning rent of the demised premises is a coven-

ant which touches the land or runs with the land. If the covenant to pay rent whether there is title in the lessor or not is binding on the original lessee the covenant being one which runs with the land can similarly be enforced against the transferee of the lease. [P 388 C 1]

S. N. Banerjee, *Sarat Chandra Bose* and *Karunamoy Ghose*—for Appellant.

P. R. Das, *S. C. Roy*, *Provash Chandra Chatterjee*, *Jitendra Nath Roy*, *Probhas Chandra Bose* and *Krishna Chaitanya Ghose*—for Respondents.

Mitter, J.—This is an appeal by the plaintiff from the decree of the Additional Subordinate Judge of Asansole dated 23rd December 1929 dismissing his suit for recovery of arrears of royalty and for a declaration that the royalty payable to the plaintiff is the first charge on the colliery described in the schedule to the plaint including machinery boiler, implements and office rooms.

The case stated in the plaint is that Mouza Manohar Bahal appertains to the permanently settled estate, Chakla Panchakote belonging to the Raja of Panchete who is a pro forma defendant to the suit; that while possessing the undergrounds of the said mouza the Raja settled the said underground rights with Radha Ballav Mukherjee on 25th January 1912 and registered pottahs and kabuliyats were exchanged between the parties, that according to the terms of the kabuliyat Radha Ballav was to pay annually a minimum royalty of Rs. 3,200 and royalty at varying rates for different kinds of coal and that the royalty and minimum royalty were to be the first charge on the mouza and the colliery in suit; that Radha Ballav sold his interest in Mouza Manohar Bahal to Baraboni Coal Co. (defendant 1) by a deed of sale dated 14th February 1914, that the Baraboni Coal Co. after getting their name registered in the Sherista of the Raja of Pachete executed an agreement on 1st November 1918, that Gour Gunanand Thakur and others who will be described as Thakurs throughout who are the surface holders of the said mouza had never any title or possession in the under-ground rights of the said mouza, that at the time of the agreement of 1st November 1918, the defendants gave out that the Thakurs had underground rights and the royalty was reduced from 3 annas to 2 annas per ton of steam coal to 2 annas per ton and certain other stipulations were made; that by a registered deed dated 29th September 1926 the Raja of Panchete (proforma defendant 3) made a gift to the plaintiff of the Manohar Bahal Colliery and other properties for the khorposh of the plaintiff including the arrears of royalty due up to the date of the kobala; that in pursuance of the pottah and kabuliyat dated 25th January 1912 and of the agreement dated 1st November 1918 defendant 1 company paid to the plaintiff the Raja up to December 1926 minimum royalty and royalty (a very large sum of money to the tune of about Rs. 90,000) that the Manohar Bahal Colliery was sold by auction for arrears of road cess due to Government and was purchased by defendant 2, that demands were made for the arrears of royalty due to the plaintiff since 16th Poush 1333 B. S., but there was no response. Hence the present suit.

The suit was contested by defendants 1 and 2 who filed separate written defences. Defendant 1 contended (1) that mouza Manoharbahal though situate within Pargana Panchakote does not appertain to plaintiff's father's zamindary, but is a separate Touz held directly under Government; (2) that the title of the plaintiff's father was challenged in two suits and a decree was passed on 12th July 1927 declaring that plaintiff's father (D-3) never had nor has any title to the property. They denied the allegation that the underground rights were ever in khas possession of the plaintiff's father and alleged that the lease to Radha Ballav was a fraudulent one. The defendant company asserted that mouza Manohar Bahal has been at all material times and is the Lakheraj debuttar property of the Sri Gopinath Jeu Thakur and was in the possession of the shebaits of the said Thakur who owned both the surface and underground rights of the said mouza. They allege that on 10th Jaistha 1308 one Coverji Bhoja obtained a grant of the underground rights in respect of 8 annas share of the mouza from the shebaits Gourgunand Thakur and others who after taking possession subsequently transferred his interest to Messrs. Laek Banerjee and Co, that Laek Banerjee was adjudicated insolvents in respect and at a sale held

by the Official Assignee; the defendant company purchased the undergrounds rights of the whole moza in 1917 and entered into possession of the said underground property.

In paras. 4, 5 and 6 of the written statement of defendant 1 company they allege that Radha Ballav was induced to accept the lease in 1912 on false representation by the Raja that he had title to the underground rights, that defendant company was induced to take the assignment on 14th February 1914 under mistake and in ignorance of actual facts and although the Subordinate Judge has based his decision partly on these grounds of defence nothing more need be said about them since Mr P. R. Das, the learned counsel appearing for the defendant company, has abandoned the defence of fraud or mutual mistake in respect of lease of Radha Ballav, the assignment of Radha Ballav in favour of defendant company in 1914 or the agreement of 1st November 1918.

The defendant company further asserted that they had been paying the royalties to the Raja in the bona fide belief that he was entitled to the same; they refer to the Record of Rights as having recorded mouza Manohar Bahal as Lakheraj Debuttar property of the defendants directly under the Government. The defendants refer in para. 9 to a suit for the cancellation of the Pottah pending in the original side and for the refund of Rs. 90,994-9-2, and their learned Counsel Mr. P. R. Das has rightly described this paragraph of the written statement as wholly irrelevant. Defendant 2 was impleaded in their personal capacity and the plaint has been amended and they are now arrayed as defendants (2a) as a firm. Their defence (see p. 33) is substantially the same as that of Baraboni Coal Co. Defendant 3, the Raja of Pachete supports the case of gift of the mouza Manoharbahal to the plaintiff and says he is an unnecesaary party. On these pleadings four issues were raised. It is only necessary to refer to issues 2 and 3 as controversy has centred round these issues in the present appeal. They run as follows :

Issue 2. Has the plaintiff got any right to the property in suit?

Issue 3. Is the plaintiff entitled to the royalty claimed; if so, how much and from whom?

Both these issues have been decided against the plaintiff and hence the present appeal. Four questions have been argued before us and fall for determination in this appeal. In the first place it is said that the Subordinate Judge is clearly in error in holding that plaintiff has failed to establish title to the underground rights of mouza Monoharbahal as the evidence both oral and documentary clearly establishes such right. And secondly it is argued that even if the plaintiff fails to establish title the contesting defendants are estopped from raising the plea of want of title in the plaintiff having regard to the rule of law embodied in S. 116, Evidence Act, as on evidence the defendant company was put into possession by the plaintiff's predecessor in title, the Raja of Pachete. With regard to the question of estoppel the Subordinate Judge has come to the conclusion that defendant 1 company was not let into possession of the disputed colliery by the Raja of Pachete and S. 116 does not apply. The finding of fact as to whether defendant 1 was put in possession by the plaintiff has been attacked by the appellant. It is argued next that the finding of the Subordinate Judge that there should be suspension of rent as there has been eviction by title paramount is erroneous. It is argued lastly that even if the mouza is Lakheraj of the defendant the title to the underground right remained in the Raja of Pachete, the zemindar of Chakle Pachakot, through whom the plaintiff claims.

The question of title was argued first and we proceed to deal with it first. The plaintiff claims mouza Monoharbahal as appertaining to the permanently settled estate of the Raja of Pachate through whom he claims. The defendants on the other hand asserts that it is the Lakheraj debuttar of an idol whose earthly representatives are the Thakurs. In such circumstances the burden would lie on the plaintiff of showing that mouza Monoharbahal was included in the mal assets of the estate at the date of the Permanent Settlement; in other words that it fell within his regularly assessed Mahal. If any authority is needed for this proposition reference might be made to the decision of the Judicial Committee of the Privy Council in very early cases

of 14 M I A 152 (1). At p. 172 of the Report their Lordships say this :

"Their Lordships think that no just exception can be taken to the ruling of the High Court touching the burthen of proof which in such cases the plaintiff has to support. If this class of cases is taken out of the special and exceptional legislation concerning resumption suits, it follows that it lies upon the plaintiff to prove a prima facie case. His case is, that his mal land has, since 1790, been converted into lakhiraj. He is surely bound to give some evidence that his land was once mal. The High Court in the judgment already considered has not laid down that he must do this in any particular way. He may do it by proving payment of rent at some time since 1790 or by documentary or other proof that the land in question formed part of the mal assets of the estate at the Decennial Settlement. His prima facie case once proved, the burthen of proof is shifted on the defendant who must make out that his tenure existed before December, 1790."

There is nothing in the later and very recent decision of their Lordships in the case of 1922 P C 272 (2), which is inconsistent with the case in 14 Moo I A 152 (1) The burden which lies on the zemindar is not discharged by merely showing that the mouza is within the ambit of geographical limits of his estate; he must go further and show that this mouza was assessed to revenue. It is contended for the appellant that the burden is shifted in the present case as there are some admissions of the defendant company to the effect that the mouza is within the revenue paying estate of the Raja of Pachete. Reference is made to a kabuliyat dated 24th May 1901 of Coverji Bhoja Ex. 1, p. 54, p. 2 where at p. 57 Monoharbahal in the Schedule of boundaries is described as "appertaining to Touzi No. 1 of District Manbhum and Touzi No. 1 is the permanently settled estate of Raja of Panchete."

The interest of Bhoja has descended to the defendant company and the admission binds the company. Admission to the same effect in 1926 is made in Ex. 9, p. 206, (p. 2). Reference is made to similar admissions made after suit by the Thakurs : Ex. J, 28th March 1929, (p. 251, p. 2), Ex K, 29th Jannary 1929, (p. 245, p. 2). It is true what a man admits to be true must reasonably be presumed to be so and this admission shifts the burden on to the respondent : see 29 All 184 (3). In this view we have to determine whether the defendants have effectually discharged the burden of showing that the mouza is not part of the revenue paying estate of the Raja but that it is revenue free grant of the Thakurs. The defendants seek to discharge the burden by three documents of very ancient date. They first rely on the list of Bazezamin lands (Ex. P-1) which they say is equivalent to Lakheraj lands. The document is at p. 5, p. 2 of the printed paper book. It is a certified copy of Terij of Baje Zamin (lands) for the year 1178 B. S., i. e. 1771 A. D. The respondent defendant contend, that Bazezamin means lakheraj land and that this is a return of lakheraj lands which is filed in the Collectorate under the provisions of Regulation 1769 and in this return at p. 16 mouza Monoharbahal is shown as a mouza in Pargana Shergura carrying an annual jama of Rs. 200 ; on the other hand it is contended for the appellant that the word Bazezamin means miscellaneous lands and the words Bajey Asamir Khuchran Debuttar (these words are in the original) against 70 3/16 villages (in p. 5) shows that these are the petty debuttar of miscellaneous kind belonging to Assamis or tenants of the Raj who as tenants of the Raj would have no underground rights in the absence of express reservation of these rights in the grant. In other words the list is the list of rent free grants from Zemindar of Panchakote according to the contention of the appellant.

It is necessary to decide between these conflicting contentions as to the meaning of the words Bazezamin as used in the heading of the list or as used in the body of the document Baje Jami Khuchran Debuttar (L 20, p. 5, part. 2), Ex. F-1. The meaning of the word Baje Jami must be taken to be the same when used in the same document (Ex. F-1). This is a certified copy of a copy kept in the Collectorate, it being suggested on behalf of the appellant that the original was lost at the time of the Sepoy Mutiny of 1857 (see p. 53, p. 1). The copy of which Ex. F-1 is a certified copy was produced from the Collectorate by an Amla of the Collectorate and is a part of the official records. It must have

1. Harihar Mukhopadhyay v. Madhab Chand Baboo, (1870-72) 14 M I A 152=20 W R 459=2 Suther 484=2 Sar 713 (PC).
2. Jagdeo v. Baldeo, 1922 P C 272=71 I C 984=49 I A 399=2 Pat 38 (PC).
3. Chandra Kunwar v. Narpat Singh, (1907) 29 All 184=4 A L J 102 (PC).

been filed in pursuance of an official request made apparently under the provisions of Revenue Regulations dated 17th August 1769, (see p. 174 of Colebrook's Supplement to the Regulations, Vol. 3 of his Digest). One trouble with which the East India Company was confronted after their accession to the Dewany in 1765 was how to tackle the problem of revenue free grants. In 1769 the company appointed supervisors to make a critical and detailed inquiry into the various matters one of which was Baze-zamin. At p. 175 in the Extract of Proceedings of the President and Select Committee on 17th August 1769 the following occur :

"Charitable and religious donations which successive princes have made, many through zeal but most through vanity, form no considerable part of some districts, and as it may be reasonably supposed that in a course of years the produce of such benefactions has been misapplied and perverted or that the particular persons and societies in whose support they were granted have fallen or decayed, it is expected that you diligently search into and report their true state;"

and again at p. 182 there occurs a passage from which it appears supervisors are asked

"to call for particular accounts of all lands which are held as taluks, jagheers and charitable or religious donations."

There are the following special instructions with reference to charitable or religious donations (see p. 183):

" As to charitable or religious donations the lands so sequestered are to be estimated with regard to their extent, production and value."

Apparently Ex. F-1 was filed in pursuance of the regulation on behalf of the zamindar of Panchakote. The zamindars have enjoyed considerable tracts rent fee on various pretences and for various purposes (see p. 175 of Colebrookes supplements) and the Supervisors were to investigate into the value of these lands. Reference was made to Philip's Land Tenures—Tagore Lectures p. 212—where the learned author states that Baze zamin lands mean "land paying no revenue to exchequer." In a revenue regulation enacted on 31st May 1782 it is recognized that for sometime past the attention of Government has been drawn to Baze zamin or lands exempt from the payment of revenue (see p. 224 Colebrooke's supplement to his Digest). It is pointed out that "such lands exist to a very considerable degree is well known" and further that partial attempts have been made at different periods to ascertain the amount and annual value of the Baze zamin lands but no general register had been formed of them, and complaint. It is argued for the appellant that the word "Baze zamin" might have acquired the technical meaning of revenue free lands in 1782 several years after the Terij which was filed in 1771 and the same technical meaning cannot be attributed to the document which was filed eleven years before. But this comment loses force when we find the regulation stating " that such lands exist to a considerable degree is well known and has drawn the attention of Governnent for a considerable number of years."

The wore Baze zamin has been used in the sense of revenue free grants in S. 48, Regulation 19 of 1793. It is also to be noticed that this Terij was filed in the Pachete case which went up before their Lordships of the Judicial Committee of the Privy Council and is reported in 1926 P C 41 (4). At p. 112 (of 53 I A) their Lordships speaking of this return say this:

" But the Raja has made a previous return of the Baze zamin or Lakheraj lands within the zamindari in 1771."

It would thus appear that the respondents have discharged their onus of showing that these lands were revenue free lands. It is argued for the appellant that if these lands were lakheraj they were invalid lakheraj lands and should surely have been resumed by the Government and further they could not be regarded as lakheraj not having been registered in accordance with the provisions of Regulation 19 of 1793. It appears that non-badshahi grants which formed the subject of Regulation 19 of 1793 fall under three heads. (1) Those that were created before 12th August 1765, the date of company's accession to the Dewani (2) those that were created after 12th August 1765 but anterior to the date of the Decennial Settlement viz., 1st December 1790, and (3) those that were made revenue free after the date of the Decennial Settlement.

The lakheraj lands in the present case fall within the second class and being in excess of 100 Bighas (area of Monoharbahal being 566 acres) were invalid lakheraj and liable to resumption by

4. Secy. of State v. Jyoti Prosad Singh Deo, 1926 P C 41=94 I C 974=53 I A 100=53 Cal 533 (P C).

Government and could be assessed to revenue. This was never done and it is argued for the appellant that this is consistent with the lands being rent free grant of the Raja of Paehete and not revenue free lands. The answer to this is that Government might have resumed the lakheraj but it did not do so and Government's right to resume is barred by the Statute of Limitations, sixty years having expired from the year 1178 B. S. i. e., 1771. The effect of the Regulation in the case of invalid lakheraj grants is not to dispossess the ex-lakherajdars but to make the lands subject to the payment of revenue, and this has not been done and this is a matter between the Government and grantee. If these lands were the rent free lands and were within the regularly assessed mehal of the Pachete estate of the Raja one would have expected that these lands would be shewn to be so included within the Decennial Settlement papers. But as shall be seen presently they are not so included.

It becomes necessary to examine therefore the Decennial Settlement kabuliyat dated 24th of some month in 1197 B. S. corresponding to 1790 (Ex. G p. 33, para 2) on which the respondent very strongly relies. With respect to the first class, all grants, by whatever authority made, and whether in writing or not, were admitted and allowed to be valid, if the grantees had got possession and the land had not subsequently been made subject to the payment of revenue by competent officers of Government. Whether any particular officer of Government had been competent in this respect, it was left to the Governor-General-in-Council to decide in case of doubt (S. 2, Regulation 19 of 1793). With respect to the second class, all grants made by any other authority than that of Government and not subsequently confirmed by Government or by any officer empowered to confirm them were declared invalid. Whether any officer had been competent to confirm it rested with the Governor-General-in-Council to decide in cases of doubt. Grants made by the Chiefs of the Provincial Councils were valid, and so were grants of less than 10 bighas, the produce of which was bona fide appropriated for the endowment of the temples or for the maintenance of Brahmins of other religious or charitable purposes, provided that these latter grants were of dates antecedent to the Bengal year 1178, or the Fussily or Willaity year 1179. Grants of the second class so declared invalid were subdivided into grants exceeding 100 bighas and grants not exceeding 100 bighas. The revenue assessable on the former was declared to be the property of Government, and these grants when assessed were to become independent taluks, that is, their revenue was to be paid direct to Government and not through any zamindar. The revenue assessable on grants of less than 100 bighas was made over by Government to the proprietors of estates within which these grants were situate, who were authorised to assess them and realize the revenue from them, without being at the same time liable to pay any additional revenue for the estates in which the lands so resumed were included. These grants were to become dependent taluks.

With respect to the third class, i. e., grants made since 1st December 1790; and these whether exceeding or not exceeding one hundred bighas, were declared null and void, and S. 10, Regulation 19 of 1793 enacted that no length of possession was thereafter to give validity to any such grant either with regard to the property in the soil or the rents of it. The kabuliyat excludes all lakheraj lands whether covered or not covered by Sanads. Then occurs the following important statement

"with regard to the jama which has been assessed in respect of the Tahut I shall allot the same in mofussil (according to each village) and shall within the current year file a list thereof in the District Record under my own signature together with Taidads of Talabi and Be Talabi lands as per boundaries determined."

Exhibit F (p. 36 para 2) is the Ferist of the Talabi lands of Perganah Shergarh in which mouza Monoharbahal is situate and we do not find in the list any mention of Monoharbahal as a Talabi or Be Talabi Brahmottar or Debuttar. This is very significant for it shows that no mention was made of Monoharbahal as a rent free or Be Talabi grant within the estate on which revenue was assessed. It is common ground that Monoharbahal is situate within the ambit i. e., the geographical limits of Chakla Panchkote; but before it could be regarded as within the mal lands of the estate it must be shown to be assessed

no revenue. This kabuliyat rather reinforces the conclusion that Manoharbahal lands being lakheraj lands were withdrawn from the Permanent Settlement in view of the provisions of S. 36 of Regulation 8 of 1793. If Monoharbahalf had been assessed to Government revenue it would undoubtedly be in the list Ex. F The fact that it was not so included in the list and no revenue was allotted to it leads to the irresistible inference that it was lakheraj or revenue free land. An argument was advanced for the first time before us by Mr, Bose who opened the case for the appellant that the list was not a complete list at all. To this contention the respondent replied by saying that the question whether the list is a complete list or not is essentially a question of fact and it is impossible for them to go give further evidence. The evidence of the recordkeeper at p 47, part 1 is that the original list of Pergana Shergarh was found in the record of the collectorate and was proved. The original, it may be mentioned here was itself a copy. There is no cross-examination of the recordkeeper on this point. The learned Subordinate Judge has arrived at a finding that the list purports to be a complete list of mouza Shergarh and this finding has not been challenged in grounds of appeal. It is idle for the appellant to contend now that the list was not a complete list.

It has already been stated that the appellant laid stress on the circumstance that if Monoharbahal was a lakheraj village it would not have escaped the attention of Government seeing that it was an invalid lakheraj consisting of an area far in excess of 100 bighas. It is impossible, it was argued, that the existence of a village of the extent of over 500 acres paying no revenue to Government could have been unknown to the revenue authorities. This is no doubt a matter which requires consideration. It appears it is true from Colebrookes (supplement to) at pp. 224 and 485 that under the regulation of 31st May 1782 and of 26th August 1783 respectively that such invalid lakheraj lands were directed to be resumed, and a register was directed to be made of such lands. This was however a pious wish and the register was never prepared. The East India Company was doing its best to get rid of this evil of large alienations of public revenue but the task was a hopeless one, and many invalid lakheraj lands were not resumed : see Philip's Tagore Lectures—pp. 255 to 258. It is possible that the village was not resumed because it was rent free Debuttar but all these speculations are of no avail seeing that the list of 1771 shows that they are Baze Zamin of Lakheraj (revenue free lands). The right of the Government to assess them to Government revenue has become barred by the lapse of 60 years : see 4 M. I. A. 466 (5) (502 et seq). It was because Monohar Bahal village was revenue free village that it was withdrawn for settlement for under S. 36, Regn. 8 of 1793. By virtue of the said section the assessment is to be fixed exclusive and independent of all existing lakheraj lands, that is lands exempt from the public revenue. Such lands are therefore in effect withdrawn from the settlement and the zamindar though these lands might be locally situate within his district, could claim no title therein by virtue of the settlement : see the observations of their Lordships of the Judicial Committee in 1917 P. C. 8 (6).

We have next to consider a few document on which the plaintiffs very strongly rely in support of their case that the grant was not a revenue free grant but merely a rent free grant. (1) They rely on the Thak statement of mouza Monoharbahal dated 20th July 1862 (Para. 2, p. 46) which was signed by the Karpardaz for the debuttar lakherajdars, the Thakurs. In answer to the question

"What is your connexion with this village, zamindar or Mokarraridar a Ticcadar ?"

The Karpardazs said this:

"We are Karpardazs for the lakheraj debuttar holders, Jnananda Mohonto Thakur ; the Lakheraj Brahmottar of the said Thakur is from the Taraf of Maharaja Nilmoni Singh Deo Bahadoor Raja of Panchakote and annual gross collection is Rs. 311-8-0."

The appellant argues that the document shows that the grant has emanated from Raja Nilmoni Singh Deo and is really a rent free grant. The word Lakheraj is sometimes used to denote

5. Maharajadhiraj Mahatab Chand Bahadur v. Bengal Government, (1846-50) 4 M I A 466=1 Sar 385 (PC).
6. Ranjit Singh v. Kali Dasi Debi, 1917 P C S= 40 I C 981=44 I A 117=44 Cal 841 (PC).

rent free grants. If this document had stood alone it might have been possible to argue having regard to the equivocal meaning of the word 'Lakheraj' that the grant was the rent free grant of the Raja of Pachete in favour of the Thakurs, but the Baze Zamin list, the kabuliyat of the Decennial settlement and the list of Talabi lands already referred to make this an impossible contention. If on the other hand the word Lakheraj meant revenue free grants then the Thak return would support the respondents' case. Although the right to make revenue free grants belonged to the Crown the zamindars made many alienations which are revenue free grant : see Tagore Lectures, Phillip's, pp. 215 to 257. There was some discussion at the bar as to the evidentiary value of the Thak statements. It was contended by learned counsel for respondents that Thak maps and statements have nothing to do with the question of title and that they are concerned with the demarcation of villages and have no evidentiary value on the question of title and reference was made to Major Hirst's book on the revenue surveys of India pp. 7 or 8 in support of this position. It is too late now to contend this. The evidentiary value of Thak maps has been considered in several decisions of their Lordships of the Judicial Committee of the Privy Council : see 30 Cal. 291 (7) where it was said that thak maps have been held to be good evidence of the state of things at the date of the permanent settlement in the absence of evidence to the contrary. Referring to certain remarks regarding thak statements in the case of 1922 P. C. 272 (2) their Lordships observed as follows in the recent case of 1929 P. C. 50 (8).

"In their Lordships' opinion it was not intended in that case to lay down that these statements could never have any evidentiary value still less that they were inadmissible in evidence, but only that they were of no evidentiary value when, as in that case they dealt with matters altogether outside the scope of the survey."

Thak surveys were made for revenue purposes and the statements used to be signed by the agents of the parties concerned and are valuable evidence. The words "from the Taraf of Raja Nilmony Singh Deo" in the statement shows that it started originally as a revenue free grant from the Pachete Raj, for although the word Lakheraj might mean a rent free grant as well, having regard to the earlier documents Exs. E, F and G, the word must be understood in the sense of revenue free grants. In this connexion the appellant has relied very strongly on the circumstance that the defendants have not produced the Char Sanad which the Thakurs had from the Raja of Pachete as appears from a statement in a kabuliyat executed by Coverji Bhoja in favour of the Thakoors on 24th May 1901: see p. 55, Part 2. At p. 58 occurs the following statement of Coverji Bhoja whose rights have devolved on the defendants:

"Have gone though the record of suit No. 37 of 1884 of the Munsif's Court and Case No. 123 of 1884 of District Judge's Court. You will give the decree and judgments of these Courts as well as the char sanad whenever I shall demand them and this document also contains towards the end the statement mouza Moncharbahal appeat ins to touzi No. 1 of District Manbhum : see p. 58;"

and we have been asked to infer that if the Char Sanad had been produced it would have shown that the mahal in question appertained to Raja of Pachete's estate originally and a rent free grant was made to the Thakoors. The char sanad must be in the possession of the Thakoors and not of the defendants and the Thakoors are no parties to the present suit. It is true that the defendants might have cited the Thakoors to produce the char sanad but as the defendants are not in possession of the char you cannot necessarily draw the inference that if produced it would not support the defendant's case. It is surely a matter of comment.

The next document on which the plaintiff very strongly relies is the General Register Part 2 of revenue paying estates, p. 258, Part 2, and is prepared under the Land Registration Act 8 of 1876 B. C, which shows Monoharbahal as within the Touzi No. 1 Chakla Panchakote, District Manbhum and the name of the proprietor is given as Raja Nilmoni Singh Deo Bahadur. And it has been conceded by counsel for respondents that this documents does support plaintiff's title to the Mouza as proprietor. The area is shown to be

7. Jagadindra Roy v. Secy. of State, (1903) 30 Cal 291=30 I A 44 (PC).
8. Krishna Pramada v. Dhirendra Nath, 1929 P C 50=113 I C 465=56 I A 74 = 56 Cal 813 (PC).

536 acres odd. Provision is made under S. 58 of the Act for a register of revenue paying lands, and for registers of revenve paying lands Ss. 9 10 and 11 are the provisions applicable. The register must have been prepared shortly after the promulgation of the Act in 1876. From this register it is clear that mouza Monoharbahal bearing an area of 533 bighas was borne on the roll of revenue paying estates and would lead to the inference that the grant by the Raja of Monoharbahal was a rent free grant and Raja Nilmoni Singh was the proprietor of the same. If the entry could be supported by the earlier documents there can be no question on the authorities that the right to the minerals would be in the proprietor the Raja.

As against this document the respondent relyt on Ex. P (Part 2, p. 261) the general register of revenue free lands which show that excepting 1/3rd of Mouza Dubra the whole of Mouza Monoharbahal is revenue free land and in Col. (e) reference is made to the copy of the list of Lakheraj grants of the year 1178 B. S. This register does not bear any date of its preparation but it must have been prepared after, 1901 for from Ex. 1 (Part 1, p. 54) it would appear that the document was executed when Radhananda Thakur, father of Debananda, was alive. The register bears the name of Debananda, son of Radhananda, so that the register must have been prepared after Radhananda's death sometime after 24th May 1901. That Radhananda is the father of Debananda appears from Ex. O, p.202, Part 2. This document of which two certified copies Exs. P and P (1) were filed on behalf of the defendants show the area of Monobarbahal to be only 39 acres. The discrepancy aetween the actual area of Monoharbahal which is 566 acres and the area as shown in Ex. P (1) is indeed very great, and very strong exception has been taken to the reception of this document in evidence on behalf of the plaintiff-appellant. We have however no reasons to suppose that the document is not the genuine one as it has been produced from the records of the Collectorate.

The plaintiff has next relied on a decree in a suit for cess against the defendant for the Bengali year 1295 up to 1298 : see Ex. 15, p. 50, Part 2. In the claim which is set out in the decree the Maharaja Nilmoni Singh of Pachete states that the Thakurs were in possession of mouza Monoharbahal under the plaintiff. This decree was of the year 1892. The defendant has produced a decree of the Subordinate Judge dated 29th March 1898 (Ex. Q, part 2, p. 52) between the Pachet Raj and the Thakurs in respect of cess for the years 1300-1303 B. S. At that time Pachet was an encumbered estate and the suit was brought by the Manager Mr. Rickett on the allegation that Mouza Monoharbahal was in the Zamindary of Pachet encumbered estate. The defence of the Thakur defendant was that the mahal was rent free. The learned Subordinate Judge held that the Mahal should be held to be rent free. The Subordinate Judge further observed that :

" the plaintiff cannot recover the cess from the defendant, the holder of lakheraj mahal unless he shows that he has paid the cess of the period in suit to the Collectorate and he dismissed the suit on the ground that plaintiff had failed to establish that he has actually paid the cess for the period in suit."

It would appear at any rate from these two decrees that the Thakurs were setting up a rent free tenure under the Pachet Estate up till 1898 as distinguished from a revenue free mahal. We will have to return to these documents, in consideration another issue hereafter for it seems to us that so far as the question of title is concerned they are not conclusive on the question as to whether mouza Monoharbahal appertain to revenue paying estate of the plaintiff. They are good evidence in favour of the plaintiff's title and are liable to be displaced by better evidence. The last series of documents are the Record of Rights which are finally published on 22nd July 1921, which are Exs. R series but which are not printed. The copy of proceedings under S. 103-A, Ben. Ten. Act, Ex. O, is to be found at p. 202, part 2 and on this document the defendant places a very great reliance. The Raja of Pachet was the objector and his contention was that mouza Monoharbahal appertain to his touzi No. 19 and that the defendants the Thakurs had got their names recorded in Khatian No. 73 directly under the King-Emperor of India and it was prayed that Khatian No. 73 might be

recorded as subordinate to plaintiff's khatian. This objection was rejected and the entry in the Record of Rights creates a presumption in favour of the defendants case that mouza Monoharbahal was the Lakheraj Debottar of the Thakurs. This presumption is not only not rebutted but the earlier document of the year 1178 B. S. and the decennial settlement Kabuliyat support the entry in the Record of Rights. I am not unmindful of the circumstance that the Record of Rights is no evidence on the question of title as the records are mainly based on possession. In our view it has been established beyond reasonable doubts that mouza Monoharbahal is the lakheraj debottar of the Thakurs and although situate within the geographical limits of plaintiff's estate was not assessed to revenue and did not form part of the Mal assets of the estate of the plaintiff at the date of the permanent settlement.

The next question to consider is one of considerable importance and is not covered by authority. That question is in whom do the underground rights or the rights to the minerals vest. Do they vest in the lakherajdar who holds under an invalid lakheraj grant which has not been resumed by the Government—the right to such resumption having been extinguished by the lapse of 60 years from the date of grant, or do they vest in the zemindar within the ambit of whose revenue paying estate the lakheraj lands lie. The respondent contends that the lakherajdars the Thakurs must be considered to be the proprietors of the soil and the underground rights vest in them and in support of this contention the respondents rely on S. 4, Regn. 19 of 1793. It is necessary to reproduce this section in extenso as the appellants also found their arguments on the provisions of this section. S. 4 is in the following terms :

"This regulation, as far as regards lands alienated previous to the 1st December 1790, respects only the question whether they are liable to the payment of revenue or otherwise. Every dispute or claim regarding the proprietary right in lands alienated previous to that date, and which in conformity to this regulation, may become subject to the payment of revenue, is to be considered as a matter of a private nature to be determined by the Courts of Diwani Adalat in the event of any dispute or claim arising respecting it between the grantee and the grantor or their respective heirs and successors. The grantee or the present possessors, until dispossessed by a decree of the Diwani Adalat are to be considered as the proprietors of the lands with the same right of property therein as is declared to be vested in proprietors of estates or dependent taluks, (according as the land may exceed or be less than one hundred bighas as specified in S. 6, 7 and 21) subject to the payment of revenue, and they are to execute engagements for the revenue, with which their lands may be declared chargeable either to Government or to the proprietor or farmer of the estate in which the lands may be situated or to the officer of Government (according as the revenue of the estate in which the land may be situated may be payable by the proprietor or a farmer, or collected khas) under the rules for the decennial settlement. If by the decisiyn of the Diwaui Adalat the proprietary right in the land shall be transferred the person succeeding thereto is in like manner to be responsible for the payment of the revenue assessed or chargeable thereon."

The appellant argues that even if the village is considered to be lakheraj the underground rights are still in the Raja of Pachet thrcugh whom the plaintiff claims. The respondent on the other hand contends that Manoharbahal having been withdrawn by virtue of S. 36, Regn. 8 of 1793, from Settlement concluded with the Raja it is an astonishing proposition that he should be considered as the owner of the minerals. It is necessary to decide between these conflicting contentions. A long line of authorities has established that mineral rights are in the proprietor of the soil. In the case of 37 Cal. 723 (9) their Lordships of the Judicial Committee of the Privy Council quote with approval the following passage from Mr. Field's admirable introduction to the Bengal Regulations, p. 30 where he says:

"The Zemindar can grant leases either for a term or in perpetuity. He is entitled to rent for all land lying within the limits of his zemindari, and the rights of mining, fishing and other incorporeal rights are included in his proprietorship."

Under S. 4 of Regn. 19 the possessors of invalid lakheraj lands until dispossessed by the decree of the civil Court were to be considered as the proprietors of lands with the same rights of the property therein as is declared to be vested in the proprietors of the estate when the lands exceed 100 bighas subject to the payment of revenue. It has been argued for the appellant that S. 4, Regn. 19 deals with the realization of revenue and not with proprietary rights

9. Hari Narayan Singh v. Sriram Chakravarty, (1910) 37 Cal 723=6 I C 285=37 I A 136 (P C).

and thnt every dispute or claim regarding the proprietary rights in lands alienated previous to 1st December 1790 and which in conformity to this Regulation may become subject to the payment of the revenue is to be considered as a matter of private nature to be determined by civil Courts in the event of any dispute arising between the grantee and the grantor. It has been very strenuously argued by Mr. S. N, Banerjee, the learned counsel who gave the final reply for the appellants, that prior to the permanent settlement the zemindar was the owner of all lands and that the property in the soil never belonged to any body else except the proprietors and that it has never been the policy of the Government to take away the rights which previously existed and that it is for the lakherajholder to prove that the zemindar had prior to to the date of the permanent settlement alienated not only the surface rights but also the under ground rights. In other words it was contended that at the date of the permanent settlement the Government recognised pre-existing right in the zemindars and others and did not confer rights by the Settlement. It is sufficient in answer to this contention to say as has been said by Lord Phillimore when delivering the judgment of the Judicial Committee in 1926 P C. 41 (4), with reference to a similar contention

"that the arguments receive no support from decided cases and appear at first sight to be contrary to the teaching of text books."

It is true that their Lordships were relieved from considering the force of this contention because it was not raised in the Courts in India. Mr. Field in his introduction to the Regulations points out at p. 30 that

"The Provinces of Bengal, Bihar and Orissa were the first territories in which the solution of the problem was attempted."

In these provinces there were at the commencement of our rule a class of persons called "zemindars", as to whose position and rights there was then, and has ever since been, the greatest doubt and discussion. No attempt to define their position and rights could now possibly succeed, and this for two reasons. In the first place, the new status which we gave them by the Permanent Settlement in 1793 has effaced many of the traces of the previous state of things. The old foundations are buried beneath the new structure. In the second place it may be doubted if their position and rights were ever capable of exact definition. Under an arbitrary system of Government, where so much depended upon the will of the Ruler, rights were not

"demarcated by metes and bounds as they are under a systematic oonstitution like that of Great Britain."

Mr. Field continues at p. 35:

"Never, wrote Lord Hastings in his minute of 31st December 1819 "was there any measure conceived in a purer spirit of generous humanity and disinterested justice, than the plan for the Permanent Settlement in the Lower Provinces. It was worthy the soul of a Cornwallis; yet this truly benevolent purpose, fashioned with great care and deliberation, has to our painful knowledge subjected almost the whole of the lower classes throughout these provinces to most grievous oppression—an oppression, too, so guaranteed by our pledge that we are unable to relieve the sufferers. One of the effects of making the zemindars proprietors and fixing for ever the Government demand of revenue was that all other rights in land were so completely effaced that at this present hour it is difficult to find a single vestige of them or to ascertain what they were."

That the Permanent Settlement created a title in the zemindars and did not merely recognise a previous title to the ownership of the soil seems to be the result of the research of the learned author Mr. Phillips who delivered the admirable Tagore Lectures on Land Tenures in 1875; see pp. 225—244, 259, 281, 311. Another learned author Mr. Sarada Charan Mitra, a former Judge of this Court, in his Tagore Lectures on Land Laws of Bengal (1895) after reviewing the position of the zemindars prior to 1790 was inclined to the opinion that by the Decennial Settlement which was made permanent in 1793 the estate assumed to itself and made over to the zemindars its own supposed proprietary rights to the soil. See pp 100—104. If one looks to the preamble to Regn. 2 of 1793 it would appear that Lord Cornwallis consciously or unconsciously introduced an imitation of English system of landed property and vested the property in the soil in the zemindars, for the preamble states:

"The property in the soil was formally declared to be vested in the land holders.

It is not necessary however to determine finally as to whether the effect of the Regulations at the time of the Permanent Settlement was that the

zemindars were recognised and declared to be proprietors irrespective of whether they entered into a settlement as to particular land or not for this question is inconsistent with the case made in the plaint which was to the effect that mouza Monoharbahal appertained to the permanently settled estate Chakle Panchakate. It was not the case made in the plaint that the said Mouza was within the geographical limits of the zemindari and that the prima facie title was in the zamindar even if the said mauza is not named in the decennial settlement documents in the absence of anything to show that the zamindar has parted with his interest in it. For all these reasons this ground of the appellant must fail. It remains to notice a few cases on which reliance has been placed on behalf of the appellant to show that the title to the minerals in dispute still vests in the Raja. The appellant relies very strongly on the recent decision of their Lordships of the Judicial Committee of the Privy Council in 1931 P. C. 30 (10) and contends that having regard to the observations in the last two paragraphs of their Lordships' judgment even if Monoharbahal is treated as lakheraj that circumstance chould in no way affect the right of the Raja of Pachet to the minerala in the said village or mauza. An examination of the case however will show that that the plaintiff in that case was zamindar of an eatate settled at the Decennial Settlement in 1790 which was made permanent in 1793. The defendants and their predecessors, who were of the senior branch of the zemindar's family, held villages included in the settled estate subject to an annual payment to the zamindar. The holding was recorded in the record of rights under the Chota Nagpur Tenancy Act, 1908, as a jagir held from the zamindar. The defendants claimed that the villages with the subjacent minerals were their property; they contended that the payments were in respect of revenue paid through the zamindar instead of direct to Government. In 1791 the agent for the East India Company had granted a sanad to the defendants' predecessors remitting the revenue in respect of two of the villages. In these state of facts their Lordships held

"that apart from the presumption under S. 84, sub-S. 3 of the above Act, the entry in the Record of Rights was correct, there was a presumption that the villages, being part of the settled estate, were the property of the zamindar, and that the presumption was not rebutted by the evidence. Although the defendants were of the senior branch the inference was that they held under a khorposh, or maintenance jagir; and it was well settled that as between a zamindar and a jagirdar holding from him the zamindar was entitled to the minerals. The remission of revenue, whether with or without the authority of Government, did not affect the zamindar's proprietary rights."

It will thus appear that the important point of distinction between that case and the present is that the High Court held contrary to the finding of the Subordinate Judge that the two villages Dharguli and Chalkhusa were entirely in the name of Maninath Sing who was the Raja of Ramgarh in 1790 as proprietor in the settlement register of perganna Ramgarh from 1760 to 1790. It further appeared that the two villages had been assessed to revenue in the time of Bishan Sing, the Raja who died in 1763, but that in the time of Raja Maninath Sing they were entered in the accounts without any jama being shown against them, and their Lordships point out that the Ramgarh Raja had the same proprietary rights in them as in the rest of his zamindary and that a subsequent remission of land revenue in 1791 whether authorized by Government or not would affect the proprietary rights of the zamindar in the said villages. Great stress is laid on the following passage at p. 16 (bottom) of their Lordships' judgment:

"It appears to them much more likely that, as contended before the appellate Court, these villages were treated as lakhiraj and left unassessed at the decennial settlement."

It is contended that their Lordships of the Judicial Committee proceeded on the footing that the two villages were lakheraj and nevertheless held that the Ramgarh Rajas' proprietary rights in these villages could not be affected or his right as against tenure holders under him to claim the ownership of the minerals in them could in any way be affected The crucial point of distinction is that the two villages were settled with the Raja of Ramgarh at the date of decennial settlement although there was

10. Bageswari Charan Singh v. Kamakshya Narayan Singh, 1931 P C 30=131 I C 325=58 I A 9=10 Pat 296 (P C).

subsequent remission of revenue by the Government. In the present case it is not shown that ths lakheraj village Manoharbal was settled with the Raja of Pachet as it could not be by virtue of the terms of the kabuliyat of the decennial settlement. This case therefore does not assist the appellant.

The next case which is very strongly relied on by the appellant is 1929 Cal. 791 (11). This case was with reference to a village called Itapara which is shown in the lakheraj list of 1771 at p. 16, Vol. 2 (Ex. F-1) and it was held that the underground rights were in the Raja of Pachet who was the proprietor of the estate within whose limits the mauza Itapara lay. It appears in that case the list Ex. F-1 was not produced but the sanad was produced from a previous Raja of Pachet but it is pointed out that the sanad does not distinctly make a grant of the soil to the defendant's ancestor assuming it included the land of the said mauza. The learned Judges proceeded on the footing that the documents filed by the plaintiff the Raja of Pachet in that case disclosed that this mauza had all along been treated as within the revenue paying estate of the plaintiff. The learned Judge remarked however

"whether this mauza was assessed with revenue or not at the time of the permanent settlement does not appear to me to be a guiding factor in this case."

and they held on a reading of the sanad that it was a rent free grant by way of a lease by the grantor for the purpose of Debsheba. If according to the learned Judges the grant was a .rent free grant there can be no question that the minerals would not pass to the grantee in the absence of express reservation: see 1919 P. C. 17 (12). In the very recent case of 1931 P. C. 89 (13) their Lordships of the Judicial Committee of the Privy Council have held that the subsoil rights forming part of a permanent settled zamindary are to be presumed at all events when they are not claimed by the Crown, to belong to the zamindar and their Lordships point out that

"a long series of recent decisions by the Board has established that if a claimant to subsoil rights holds under the zamindar, or by a grant emanating from him, even though his powers may be permanent, heritable and transferable, he must still prove the express inclusion of the subsoil rights. This is laid down in a passage from the judgment of Lord Buckmaster in 1916 P. C. 191 (14), which has been so often quoted in subsequent judgments of the Board that it is unnecessary to repeat it here. In 1919 P. C. 17 (12), this principle was applied to a rent free brahmottar grant from a zamindar, and finally in 1928 P. C. 234 (15) it was held to be applicable to a patni grant."

The case of a lakheraj grant within the ambit of a zamindary has not been considered with reference to the question of underground rights. On the best consideration that we have been able to give to this case we are of opinion that the title to the underground rights is in the lakherajdar who holds under an invalid grant which has not been resumed by the Government although the property is situate within the geographical limits of the estate of the zamindar, that is the Raja of Pachet in this case.

The next matter for consideration is whether the defendants are estopped from disputing the title of their lessor the Raja of Pachet. The derivative title of the plaintiff from the Raja is not denied and the estoppel, if any, is available to the plaintiff. The Subordinate Judge below has gone into the question and has decided against the plaintiff. He has held that defendants were not let into possession of the demised premises by the plaintiff or the Raja and therefore S. 116, Evidence Act, does not apply. The appellant argues that the Subordinate Judge has gone wrong on the question of estoppel for two reasons: (1) that he should have held on the evidence both oral and documentary that defendants Barabon Coal Co. were let into possession of the Manoharbahal colliery under lhe lease by the Raja, (2) and even if plaintiffs fail to prove that the Raja put the defendant into possession there being no case of fraud, coercion, mis-representation or mistake the rule of estoppel applies and the defendants are estopped

11. Sachidananda v. Jyotiprosad Sing, 1929 Cal 791=123 I C 641.
12. Raghunath Roy v. Durga Prosad, 1919 P C 17=50 I C 849=46 I A 158=47 Cal 95 (P C).
13. Gobinda Narain Sing v. Shamlal Sing, 1931 P C 89=131 I C 753=58 I A 125=58 Cal 1187 (P C).
14. Sashi Bhusan v. Jyoti Prosad Singh, 1916 P C 191=40 I C 139=44 I A 46=44 Cal 585 (P C).
15. Bijoy Sing Dudhoria v. Surendra Narain Singh, 1928 P C 234=111 I C 345=55 I A 320 =56 Cal 1 (P C).

from denying the Raja of Pachete's title to the under-ground minerals. On this question the respondents argue that the plea of estoppel should never have been allowed to be raised in the Court below and should not be allowed to be raised now as it was never expressly pleaded, and reliance has been placed on a number of authorities. We propose to deal with this contention of the respondents first: In a suit for rent as in a suit for ejectment against a tenant where the relationship of landland and tenant is alleged to exist it is not necessary that the plaintiff should set out his own title, and this is on the principle that the tenant is estopped from denying that his landlord who put him in possession of the land then had title so to do or that his landlord from whom he accepted a lease then had title to grant the lease or that the landlord to whom he paid rent then had title to receive the rents: See Bullen and Leake's Precedents of Leadings, Edn. 8 p 63.

It is argued for the respondent that where the plaintiff in a suit for rent relies on estoppel as a part of his title he should plead it in his statement of a claim or in his plaint and reliance is placed on Halsburya Laws of England, Vol. 13, 350 where it is stated that under the modern practice facts relied on to establish an estoppel of any kind should be pleaded in any case in which it is intended to rely on it except in an answer to a claim in ejectment and it has been held in the case of (1902) 2 I. R. 232 (16) that if a plaintiff in ejectment relies on estoppel as a part of his title it seems that he should plead in his statement of claim. The question may arise whether in a suit for rent the ordinary rule should be relaxed that a plaintiff is not bound to anticipate a defence that his title would be denied. The fact that in ejectment a defendant can raise all legal defences under a plea of possession has been regarded as taking the case out of the general rule that a plaintiff is not bound to anticipate a defence. It is not necessary to finally decide on this as in our opinion the defendants had full notice of the plea taken at the trial and they gave evidence to show that plaintiff did not let the defendants into possession under the lease in order to defeat the plea of estoppel. The defendants have not been taken by surprise. The Subordinate Judge below has stated that the estoppel under S. 115, Evidence Act, has not been pleaded in this case and that it was absolutely necessary to plead such an estoppel. We are not concerned in the present case with the estoppel under S. 115, but we are concerned with the estoppel of a tenant under S 116 which is based on a very different principle. S. 116 deals with instances of estoppel by agreement based on permissive enjoyment. The estoppel of a tenant is founded upon a contract between him and his landlord. As has been pointed out in 6 Ch. D. 9 (17) the tenant took possession under the contract to pay the rent as long as he held possession under the landlord, and to give it up at the end of the term to the landlord, and having taken it in that way he is not allowed to say that the man whose title he admits, and under whose title he took possession, has not a title. That is a well established doctrine. That is estoppel by contract. In the recent case of 1915 P. C 96 (18) at 207 (of 42 I. A.) their Lordships of the Judicial Committee observed that:

"Section 116, Evidence Act, is perfectly clear on the point, and rests on the principle well established by many English cases that a tenant who has been let into possession cannot deny his landlord's title however defective it may be, so long as he has not openly restored possession by surrender to his landlord."

The case of the plaintiff with regard to the estoppel which prevents the defendants from disputing the title of the plaintiff or the Raja of Pachet is dependent on the following circumstances. (After dealing with some of the circumstances the judgment proceeded.) The next document on which plaintiff relies is the letter written by Buraboni Coal Co. to the manager of the Pachet Raj on 7th January 1919, p 145, line 35, part 2. The letter states,

"we got possession of Manoharbahal in the beginning of 1914 that is 1st of April of that year and although we do not know when we started extracting Manoharbahal coal from Choto Nuni it is unlikely that we started doing so immediately we got possession.'.

The plaintiff relies on this letter for the purpose of showing that there is an

16. Coppinger v. Norton, (1902) 2 I R 232.

17. Re Stringer's Estate v. Jones Ford, 6 Ch D 9.
18. Bilas v. Desraj 1915 P C 96=30 I C 299=42 I A 202 - 37 All 557 (P C).

admission by Burabani Coal Co. that possession was obtained from the Raja of Pachet for there is no point in writing to the Raja unless possession was given by the Raja. With regard to the actual date of possession the plaintiff relied on Ex. 2, the kabuliyat executed by Buraboni Coal Co. on 1st November 1918, in favour of the Raja of Pachet, see part 2 p. 198. In that kabuliyat Buraboni Coal Co. admits we are in possession thereof after purchasing the said puttah holder's interest on 14th February 1914. This is a kabuliyat with reference to Manoharbahal. These documents in our opinion support the case of plaintiff that possession of the colliery was given hy the Raja to Buraboni Coal Co. in February 1914. The only document against this case is the conveyance by the Official Assignee dated 22nd June 1917 in which there is a recital that possession was delivered on 1st April 1914 by the Official Assignee. But it is to be noticed that this is a recital in a document to which the 'Raja was no party and such recitals are not evidence against the plaintiff: See 1916 P. C. 110 (19). Dealing with oral evidence of the defendant it appears that one Gobordhon Pal was called and he said that in 1913 the defendant company worked in the colliery, see p. 44 Part 1. He states that it was by a letter that the Official Assignee put defendant 1 in possession of Manoharbahal but he has not produced the letter. This witness is contradicted by his previous deposition where he stated that Baraboni Coal Co., did not do any work in the underground and they had not any boring done in the property by Turner Morrison or any one else. See p. 46, part 1. It does not seem to us likely that the Official Assignee would put the defendants into possession before the conveyance was actually completed in 1917. Another witness has been called named Bibhuti Bhusan Mahato who says that he had some pit done in the Monoharbahal Colliery for Laik Banerjee from 1316 to 1318. After that the Official Assignee worked in the Colliery from 1319 to 1320. It appears to us that trial pits were dug at the instance of the Official Assignee at Monoharbahal in order to find out whether there was coal inside the mouza. This would appear to be so from letter Ex. H, part 2, p. 127 where a letter is written to the Chief Inspector of Mines bringing to his notice the fact that three trial pits were being sunk at Manoharbahal Colliery to test coal.

The respondent has placed very strong reliance on Ex. 4 submitted to the Chief Inspector of Mines on 21st July 1914 see p. 135, part 2. It shows that date of commencement of mine to be 1st May 1914, and it is argued that from the entry in the said letter that the number of inclines were two in number and the depth of the shaft will approximate 300 feet shows that the mine must have been worked long before 31st May 1914. The appellant argues that the words "will approximate it" do not show that the shaft exists. It is further pointed out that if the mine was worked then the statutory return would have to be furnished under S. 20, Mines Act. This letter seems to us to be equivocal but it is important to remember that the books of account of the company have been withheld. If any working was done during Laik and Banerjee's time the papers would be given to Barabani Coal Co. The absence of these papers suggest that Manoharbahal was not being worked independently but was being worked through Nuni. The last paragraph of the letter 7-G shows that the only raising of the coal was through Chota Nuni. If Manoharbahal was being worked separately one would expect despatch reports but they have not been produced and the inference is irresistible that it was being worked through Choto Nuni. This letter Ex. 7-G which is at p. 133, part 2 makes it clear that the Buraboni Coal concern have for sometime been extracting Manoharbahal coal through Choto Nuni and that the quantity extracted amounts to 21,000 tons, and the last paragraph of the letter shows that if the royalty on 21,000 tons exceeds the minimum the company will pay the excess royalty.

This letter destroys entirely the theory set up on behalf of the respondents that additional coal was being worked through Choto Nuni and that there were separate raisings of coal through Manoharbahal pits. The respondent also relies on Ex. 7-L, p. 148, part 2, to show that additional Manoharbahal coal was

19. Bangachandra v. Jagat Kishore, 1916 P C 110=36 I C 420=43 I A 219=44 Cal 186 (PC)

being raised through Chotonuni but if one looks at Ex. 70, p. 153, part 2 letter written by the company to the Manager of Pachet Raj it would appear that there was one raising for Manoharbahal and Chotonuni coal for which an account of royalty was given, for at that time the Chotonuni coal had admittedly been exhausted, for from the end of the account at p. 154 it would appear that only minimum royalty for Chotonuni colliery Rs. 200 was being asked for. It would also appear from p. 98 of the record that the appellant took out a subpoena asking the Burabani Coal Co., to produce the half yearly statements of the Manoharbahal Colliery for 1917 and 1918 and yet they were not produced. From this an inference unfavourable to the defendants case is drawn. On the oral and documentary evidence which we have reviewed we have no doubt that the Buraboni Coal Co. after their purchase from Radhabullav Mukherji were put into possession of Manoharbahal Colliery by the Raja of Pachet who allowed the defendant company to take Manoharbahal coal through Chotonuni Colliery which admittedly belong to Pachet. The Subordinate Judge has dealt with the question of possession very summarily and after a consideration of the evidence we are unable to agree with him. The Buraboni Coal Co. having been let into possession of Colliery by the Raja of Pachet under the lease of 1912 in favour of Radhamadhav which was assigned to Buraboni Coal Co. in February 1914, S. 116, Evidence Act, is attracted to the present case and defendant 1 company is precluded from disputing plaintiff's title to the same.

The appellants have also argued that even if the Raja had not put the defendant company into possession the case of fraud, misrepresentation for mutual mistake on which the Subordinate Judge proceeded having been abandoned in this Court the defendant would be estopped from disputing plaintiff's title. In the view which we have taken it is unnecessary to deal with this question which has been canvassed during the argument or to express any opinion on the same. The respondent contends that even if the rule of estoppel under S. 116 applies the suit should be dismissed as there has been eviction by title paramount, for the estoppel lasts only so long as the tenant has not been evicted from the lands. The next question therefore for consideration is whether, as has been contended by the respondent there has been eviction by title paramount so as to entitle the respondent to contend successfully that there should be suspension of rent and to get a dismissal of the suit. The respondents in their written statement in para. 2, (page 25) refers to two suits which had been brought by the Thakurs against the Baraboni Coal Co. claiming royalty in respect of Manoharbahal Colliery from them and states now that the suits had succeeded and that they had attorned to the Thakurs and consequently there has been eviction by the paramount title of the Thakoors.

The suit for rent by some of the shebaits succeeded up to the High Court and was pending appeal to His Majesty in Council. But we have taken as additional evidence the judgment in appeal of their Lordships of the Judicial Committee in 1934 P C 58 (20) (marked as Ex. 20 in the High Court) by which the suit of the Thakoors for royalty for a different period was dismissed. To that suit the present plaintiff or Raja of Panchakote was not a party and it is contended that although the findings in that judgment cannot be regarded as any evidence against the appellants, the judgment is admissible in evidence, to show under S. 13, Evidence Act, the fact of eviction by title paramount. The circumstances that the findings in the judgment of the High Court in the case which went to the Privy Council are not binding on the appellant is of no consequence seeing that our own finding is that the Raja of Pachete has no title to the underground rights and consequently of the plaintiff claiming through him and that the title is in the idol Gopinath Jiu, the lakheajdar 'represented by by Thakoors who are its earthly representatives. In order that the plea of eviction by title paramount might constitute a good defence three conditions must be fulfilled. The eviction must have been from something actually forming part of the premises demised, (2) the party evicting must have a good title (3) and the party must have quit-

20. Baraboni Coal Co. v Gopinath Jiw Thakur, 1934 P C 58=147 I C 884=61 I A 35=61 Cal 313 (PC).

ted against his will. Forcible expulsion is however not necessary for it is sufficient if the tenant gives up possession and the person claiming by title paramount, i.e., by a title superior to those both of the lessor and lessee against tenant who is enabled to make a defence : See Lord Denman C.J's observations in 1 M & W 759 (21). It is pointed out in Foa's book on Landlord and Tenant that the authorities show that it is not necessary for the tenant actually to go out of possession and that if upon a claim being made by a person with title paramount he consents by an attornment to such person to change the title under which he is holding : see 4 B & C 529 (22), 11 A & E 315 (23), and the other cases cited at p. 194 foot note (q) in Foa's sixth edn., p. 194. We have to examine whether these conditions exist in the present case.

The question of eviction by title paramount is also complicated by the agreement of 1st November 1918 (p. 198, part 2) which states that title or no title the defendant will go on paying royalty at a rate less than the rate under the original lease and this question will depend on the further question as to whether the agreement of 1st November 1918 has consideration to support it. We proceed therefore to consider the validity of the agreement of 1st November 1918 (Part 2, p. 198 Ex. 2). After the Baraboni Coal Co. had purchased the underground leasehold rights in Monoharbahal Colliery in 1914 and after the Company had been put into possession of the said Colliery the Company took a conveyance from the Official Assignee of whatever right, title and interest the insolvents Laik and Banerjee had in mouza Manoharbahal in 1917. At that time it is common ground that coal was "booming" to use an unforensic expression used by the learned counsel on both sides on account of the Great European War and the Company in order to make its title perfect about the underground rights in Manoharbahal took the Conveyance from the Official Assignee with the result that they had to pay at that time royalty both to the Raja as also to the Thakurs. By this action of the company in taking the conveyance of the underground rights a cloud was thrown on the title of the Raja of Pachete to the underground rights in Manoharbahal Colliery. The Raja denied the title of the Thakur. The Raja had a claim to evict, and he was putting forward that claim and in order that the Raja might forbear from not enforcing the claim to evict the agreement (Exte. 2) dated 1st November 1918 was executed the Raja reducing the commission from 3 annas per ton coal to 2 annas and a further term was introduced in this agreement the effect of which is that if the Raja could establish that the Thakurs and the Searsole estate have not title to underground rights of Manoharbahal then from the year in which it would be so held by the highest Court the royalty would be increased from 2 annas to 7 annas. It was further a part of this agreement that if no such suit is instituted by the Raja the company shall be bound to pay commission at the rate of 2 annas per ton, and shall not be competent to raise any objection to the payment of commission at the rate of 2 annas on the score of Rajas not having title to the underground rights of the said mouzah. The circumstances under which this agreement was executed are detailed in para. 8 of the written statement of the company in another suit. It contains an admission of the company to the following effect :

"The defendant company also states that the title of the said Sri Sri Iswar Gopinath Jiu Thakur and the shebaits thereof was denied by the said Raja of Pachete and that to avoid eviction by title paramount the defendant company also took settlement of such coal mines ane coal mining rights from the said Raja. Thd defendant company states and submits that it has been in open, continuous and uninterrupted possession and enjoyment of such coal mines and coal mining rights under such purchase and settlement as aforesaid since 1914 and that neither the grantee of the said alleged settlement of 21st Baisakh 1316 B. S. nor any subsequent transferee thereof ever held possession of any share or interest in such mines or mining or mining rights."

Part 2, p. 206. It has been pointed out on behalf of plaintiff by Mr. Banerjee that this written statement is signed by Mr. Bepin Chandra Mullick, a well known advocate of this Court, whose probity cannot be questioned, and it is argued that from the passage of the written statement just quoted it is manifest that the kabuliyat of 1st No-

21. Neale v. Mackenzie, 1 M & W 759.
22. Hill v. Saunders, 4 B & C 529=7 D & R 17.
23. Doe v. Barton, 11 A & E 315.

vember 1918 was executed by the company with a view to induce the Raja of Pachete to desist from bringing a suit for eviction against the company. It is clear from this passage of the written statement which in our view must be taken to represent the true state of things that the company executed the kabuliyat as a consideration for the abandonment of the claim of Raja of Pachete to evict. It is argued for respondent by Mr. Das that the passage in the written statement just referred to above (Part 2, p. 206, para. 8) is not open to the construction that there was an actual threat by the Raja to evict but that the company might have believed that the Raja was threatening to evict We are unable to accept this construction.

In our view what Mr. Mullick meant was that the Raja denied the title of Thakur and the Shebaits in the underground rights and threatened to evict and thereupon the defendant company took settlement of coal mines and coal mining right from the Raja. The learned counsel for the appellant has drawn our attention to the recital of the written statement in a judgment in suit No. 1 of 1927 and 45 of 1926 in which it is stated that the Raja of Pachete within whose zamindary the mouza Manoharbahal is situate denied the title of the Thakurs to the sub soil of the mouza and threatened to evict the company whereupon the company was compelled to execute the kabuliyat of 1st November 1918: see p. 226, Part 2 lines 20 to 30. As the said written statement has not been put in it is doubtful if the recital of the written statement in the judgment in a suit not inter partes can be admisiible in evidence. Our conclusion is based on the construction of the written statement filed in Ghati's suit (Ex. 9). At the time of execution of this kabuliyat there was a doubt as to the title of the Thakurs in the underground rights seeing that the view that prevailed was that the title to the underground rights was in the proprietor of the soil, and the Raja as well as the company honestly believed that title to the same was in the Raja. There was the thak statement which was equivocal ; there was the earlier register under Act 7 of 1876 of revenue paying lands in which mouza Manoharbahal was shown as appertaining to the Raja's zamindary. There was on the other hand the register of revenue free lands which referred to the list of Baze zamin lands of 1178 B. S., and this kabuliyat was executed with a view to the settlement of doubtful rights. The kabuliyat was a carefully considered document and was executed after advice had been taken by the company from Messrs. Orr. Dignam & Co., a well known firm of solicitors in Calcutta : see p. 45, line 16, part 1.

It has been argued for the respondent that the consideration for the deed must appear on the face of document itself, and that it is not permissible to rely on external evidence snowing that the real consideration for the kabuliyat, of 1st November 1918, was a settlement of doubtful rights. We are unable to accept this contention of the respondent. We think oral evidence can be given to show what the real consideration was for the kabuliyat : see 19 Q. B. D. 341 (24) at p. 344. In our opinion the settlement of doubtful claims and the forbearance of the Raja to sue to evict the company was sufficient consideration for the kabuliyat of 1st November 1918. The facts and circumstances of the present case fall within the rule of law laid down by Bowen, L.J., as he then was in the case of 32 Ch D. 266 (25) at p. 291 in the following passage. He says this:

"It seems to me that if an intending litigant bona fine forbears a right to litigate a question of law or fact which it is not vexatious or frivolous to litigate he does give up something of value. It is a mistake to suppose it is not an advantage, which a suitor is capable of appreciating, to be able to litigate his claim, even if he turns out to be wrong. It seems to me it is equally a mistake to suppose that it is not sometimes a disadvantage to a man to have to defend an action even if in the end he succeeds in his defence : and I think therefore that the reality of the claim which is given up must be measured, not by the state of the law as it is ultimately discovered to be, but by the state of the knowledge of the person who at the time has to judge and made the concession. Otherwise you would have to try the whole cause to know if the man had a right to compromise it, and with regard to questions of law it is obvious you could never safely compromise a question of law at all."

24. Crears v. Hunter, (1887) 19 Q B D 341 = 56 L J Q B 518=35 W R 821=57 L T 554.
25. Mills v. New Zealand Alford State Co., (1886) 32 Ch D 266=55 L J Ch 801=34 W R 669=54 L T 582.

These observations of Bowen, L. J., have been approved by the Judicial Committee in the more recent case of 1918 A. C. 869 (26) at p. 875. Lord Aktinson in delivering the judgment of the Judicial Committee remarked in the same case:

"The legal validity or invalidity of the claim the female plaintiff threatened to enforce by action is entirely beside the point if she however mistakenly bona fide believed in its validity. Blackburn, J., in 5 Q. B. 449 (27) pointed out that in 1 B. & S. 559 (28) it was decided that even if the defendant actually knew that the plaintiff's claim which was compromised was invalid, yet the compromise of it was enforceable ; and it was in the former case decided that the compromise of a disputed claim made bona fide is a good consideratian for a promise, even though it ultimately appears the claim was wholly unfounded."

This kabuliyat is a binding agreement and its terms must govern the rights of the parties. This kabuliyat was really a modification of the lease of 25th January 1912 in favour of Radhabullav. It is argued for the appellant that if this kabuliyat is binding no question of the estoppel of the tenancy ceasing by reason of eviction by title paramount really arises. It is said that by the kabuliyat of 1918 the company contracted themselves out of their rights to cease to pay rent on eviction by title paramount. Title or no title the company made themselves liable to pay at the reduced rate of Rs. 2 per ton. This the company did deliberately with their eyes open. It has been contended for the respondent that as there was no agreement to continue to pay royalty whether the company was in possession or not the kabuliyat is of no assistance to the plaintiff on this part of the case. We cannot accept this contention. The company bargained with 2 sets of persons both claiming underground rights irrespective of title. The company had already attorned to the Thakurs when the kabuliyat of 1918 was executed. They were also liable to pay rent to the Thakurs, and on defaulting to pay that rent the Thakurs had to bring the suit for rent which has been dismissed by the Privy Council. When the kabuliyat of 1918 was executed the company knew perfectly well that they would have to pay rent to both sets of persons and they did not mind doing so so long as coal was "booming". We are therefore of opinion that in the circumstances of the present case the plea of eviction by title paramount is not available to the respondent company. The learned counsel for the respondent has relied very strongly on the case of 1922 Cal. 237 (29) in support of the proposition that even if there is an agreement to pay rent whether the lessor has title or has no title there will be suspension of rent if there is eviction by title paramount. The distinguishing features between that case and the present is that in that case the lessor was a party to the suit by the person claiming title paramount and in such a suit it was held that the lessor had no title. In such state of facts it was held that it is open to the tenant to prove a subsequent cessor of the landlord's title, and that one way in which the tenant can show that the title has determined is by proving an eviction by title paramount or the equivalent to such an eviction. Besides in that case there was no agreement between the lessor and the lessee that the lessee would go on paying rent whether the lessor's title is established or not.

Mr. Bose who opened the case for the appellant has relied on the recent decision of the Judicial Committee in the case of 1933 P C 29 (30) and he argued that this case supports the position that the lessee is liable to pay rent even if the lessor ceases to have title if the lessee with eyes open deliberately enters into an agreement to the effect that rent would be paid irrespective of the question of title to the rent land. Reference in particular is made to a passage at the bottom of p. 304 and the top of p. 305 (of 60 I A). It was held in 1933 P C 29 (30) that in a suit for ejectment defendants in possession as assignees from defendants who the plaintiff has put into possession under an agreement for a lease cannot rely in defence upon a lease which they obtained from cosharers with the plaintiff after the assignment, first because their

26. Jayawickreme v. Amarasuriya, (1918) A C 869=87 L J P C 165=119 L T 499.
27. Callisher v. Bischofieheim, (1870) 5 Q B 449=39 L J Q B 181=18 W R 1127.
28. Cook v. Wright, (1861) 1 B & S 559=30 L J Q B 321=7 Jur N S 121=4 L T 704.
29. Ram Chandra v. Promothanath, 1922 Cal 237=68 I C 754.
30. Currimbhoy v. Critts, 1933 P C 29=141 I C 209=60 I A 297=60 Cal 980 (P C).

possession is referable to that given to the assignors, and secondly because S. 116, Evidence Act, precludes them from disputing the plaintiff's title without first restoring possession. In 1933 P C 29 (30) as in the present leases were taken from persons who had title as also from those who had no title, it was held that S. 116, Evidence Act, precluded the lessees from disputing the lessor who has put the lessee in possession without first restoring possession.

The objection of defendant 2 is that there should be no decree against him as he is not bound by the covenant in the kabuliyat of 1918 as that is not a covenant running with the land and does not bind the assignee. There is no substance in this contention as rent issued out of land and any covenant concerning rent of the demised premises is a covenant which touches the land or runs with the land. If the covenant to pay rent whether there is title in the lessor or not is binding on the original lessee the covenant being one which runs with the land can similarly be enforced against the transferee of the lease. Summarising our conclusions we hold that the title in the underground rights is not in the plaintiff, (2) but that the defendants are estopped from denying the plaintiff's title, (3) that estoppel still continues having regard to the terms of the kabuliyat of 1st November 1918.

The result is that this appeal is allowed and plaintiff's suit is decreed in full. With regard to costs as plaintiff has failed on the principal issue of the title he will get half his costs throughout.

Patterson, J.—I agree.

K.S. *Appeal allowed.*

A. I. R. 1935 Calcutta 388

GUHA AND BARTLEY, JJ.

Satyanarayan Banerjee and *another* Creditors—Appellants.

v.

Dinesh Chandra Roy Choudhury and *another*—Respondents.

Appeal No. 555 of 1933, Decided on 23rd November 1934, against order of Dist Judge, 24-Parganas, D/- 27th and 29th November 1933.

Deed—Construction—Moveable—Unregistered mortgage-deed — Movables and immovables hypothecated — Held 'movable' was not confined to machinery but to all movable property mentioned in mortgage-deed—Mortgage.

The word 'movable' is not confirmed to machineries only. In an unregistered mortgage, both movable and immovable properties were mentioned as being hypothecated.

Held: that the transaction could not operate as a valid mortgage of immovable property and that the word moveable was confined not merely to machineries but to all the moveable property mentioned in the deed and that the mortgage in respect of it was valid. [P 388 C 2; P 388 C 1]

Bijon K. Mukerji and *Khitindra K. Mitter*—for Appellant.

Abinash Chandra Ghose—for Respondents.

Judgment.—This is an appeal arising out of an insolvency proceeding started at the instance of a creditor. The question raised before the learned District Judge of the 24-Parganas, which has given rise to this appeal was whether the Judge was right in interpreting or confining the word "moveable" to machineries, as was done by him in his order dated 27th November 1933, when the learned Judge was apparently asked to determine what his predecessor in office meant by "moveables" in his order of 8th May 1933, passed in Insolvency Case No. 14 of 1931, in the Court of the District Judge of the 24-Parganas. The creditors applying for adjudication, the appellants in this Court, placed before the Court a document purporting to be a mortgage-deed, in which both moveable and immovable properties were hypothecated. The document however was not a registered one, and the transaction evidenced by the same could not therefore operate as valid mortgage of immovable property under the law. It could not affect immovable property specified therein: so far as the immovable property was concerned there was no valid mortgage by the insolvent, against whom the application for adjudication was directed. The learned Judge overruling the objection of the Official Receiver that the document was invalid as a whole, stated in one part of the order that there was "a valid mortgage of the movables i. e. machineries;" and in the concluding part of the order passed by him definitely stated, and which statement was strictly in accordance with law, that "so far as the moveables" were concerned, the mortgage was valid, and was not liable to be held void as against the Receiver under S. 54, Provincial

Insolvency Act. On the order of the learned Judge passed on 8th May 1933, as it stands taken as a whole, we are not able to hold that the moveables specified in the unregistered mortgage-deed were confined to machineries only. The moveables mentioned in the order, regard being had to the concluding part of the same, must refer to all the moveables specified in the unregistered mortgage-deed.

It remains to notice that we were not impressed with the argument advanced on the side of the respondent, that the order of Judge passed on 8th May 1933, could be held to be limited to machineries only, on the assumption that the other moveables mentioned in the unregistered mortgage-deed, vested in the Receiver in insolvency, on the footing that they remained in the possession of the insolvent; and we cannot possibly accept the position indicated in the above argument before us, as sound, regard being had to the provisions of the law applicable to the facts and circumstances of the case before us. In the above view of the question raised in this appeal, the order of the learned District Judge, passed on 27th November 1933, is set aside. The Official Receiver is to pay to the appellants the whole of the sale proceeds of the moveables mentioned in the unregistered mortgage-bond, less administration charges. The appeal is allowed; there there is no order as to costs in this appeal.

K.S. *Appeal allowed.*

A. I. R. 1935 Calcutta 389

GUHA AND BARTLEY, JJ.

Girish Chandra Ghose—Petitioner.

v.

Jadavpur Estate, Ltd. and *another*—Opposite Parties.

Civil Rule No. 700 of 1934, Decided on 14th November 1934, from order of Munsif, First Court, Alipore, D/- 16th February 1934.

Bengal Tenancy Act (1885), S. 26-F (2)—Application for pre-emption—Deposit not made—Application dismissed—S. 26-F is imperative.

Where an application for pre-emption is made, but no deposit has been made at that time, there is no alternative left for the Court other than to dismiss the application: 1934 *Cal* 661, *Dist.*

[P 389 C 2]

Kshemendra Nath Tagore—for Petitioner.

Charu Chandra Chaudhury—for Opposite Parties.

Order.—This Rule is directed against an order passed by the Munsif, First Court, at Alipur, under S. 26-F, Ben. Ten. Act. The opposite party in the Rule, as the landlord, applied to the Court for exercising his right of pre-emption as contemplated by law, in the case of a sale of a part of a holding to the petitioner. It appears from the materials before us that the landlord applicant did not, at the time of making the application for pre-emption, deposit in Court the amount of the consideration money together with the statutory compensation as required by the mandatory provisions of S. '26-F, Ben. Ten. Act. On examination of the record, it is apparent that the chalan for the amount required to be deposited on 28th August 1933, the date on which the application for pre-emption was filed in Court, was filed on the next date, 29th August.

In the circumstances therefore there was no alterative left for the Court other than to dismiss the application made by the landlord. The law is imperative on the point, and expressly provides for the dismissal of the application for pre-emption unless at the time of making the application, the deposit as required by S. 26-F (2), Ben. Ten. Act, is made by the applicant. The Munsif instead of complying with the provision of the law as contained in the section referred to above, held that "the deposit though late by one day" was within two months from the service of notice on the landlord of the transfer, in respect of which the right of pre-emption was sought to be exercised. We are wholly unable to accept the view taken by the Court below in the case before us; and in our judgment the decision of this Court in the case of 1934 Cal. 661 (1) cited before us in support of the order of the lower Court has no application in the present case. In the case mentioned above, the landlord on the date of filing his application for pre-emption under S. 26-F, Ben. Ten. Act, also filed along with it chalan for the deposit of the money required to be

1. Jatindra Kumar Chakrabarty v. Chandra Kumar, 1934 Cal 661=153 I C 509.

deposited under the law. On the facts of the case before us, the only course open to the Court below was the dismissal of the application, as enjoined by which the application for pre-emption "shall be dismissed" unless the landlord at the time of making the application deposits in Court the amount of the consideration money for the transfer in regard to which the right of pre-emption is sought to be exercised together with compensation at the rate of 10 per cent of such amount.

As our decision on the question referred to above disposed of the case before us, it is not necessary to discuss the other points raised in support of the Rule. The decision and the order passed by the Court below on 16th February 1934, cannot be upheld and it is set aside, with the result that this Rule is made absolute, and the application for pre-emption on which Misc. Case No. 240 of 1933 in the Court of Munsif at Alipore, was started, is dismissed. The petitioner in this Court is entitled to his costs in the Rule; the hearing-fee in the Rule is fixed at two gold mohurs.

K.S. *Rule made absolute.*

A. I. R. 1935 Calcutta 390

GUHA AND BARTLEY, JJ.

S. M. Bose and *others*—Defendants—Petitioners.

v.

Hafiz Md. Fateh Nasib and *another*—Opposite Parties.

Civil Rule No. 1139 of 1934, Decided on 11th December 1934, from decision of Sub-Judge, 1st Court, 24 Parganas, in Miscellaneous Case No 160 of 1933.

Civil P. C. (1908), O. 33, R. 2—Title suit—Application to continue in forma pauperis amended as one for permission to sue in forma pauperis—Suit dismissed—Held application should be dismissed.

A suit brought by opposite party 1 as plaintiff was ultimately dismissed by an order dated 22nd January 1934. In November 1932, however the plaintiff had filed another application to continue the suit in forma pauperis, which was numbered as pauper case 7 of 1932. This application, which had been dismissed for default on 11th November 1933, came up for final disposal on 19th June 1934. At the hearing, the plaintiff altered the form of the application and urged it as one for permission to sue in forma pauperis. The lower Court held that the second application was registered independently and treated it as an application to sue in forma pauperis, and not to continue the suit in forma pauperis, and that the Court had ample jurisdiction to treat it as an independent application.

Held: that there was only throughout the whole of the proceedings one simple plaint, the plaint in title suit comprising one cause of action. The suit had been dismissed before the application now in question came up for disposal and with the dismissal of the suit, the sole cause of action disappeared. It was not therefore within the jurisdiction of the Court to entertain further proceedings in the matter. Nor was it entirely correct to say that the application was one to sue in forma pauperis, and not to continue the suit in forma pauperis.

[P 391 C 1]

S. N. Banerjee and *Pramathanath Mitter*—for Petitioners.

Suhrawardy and *Abdul Hossain*—for Opposite Parties.

Bartley, J.—This Rule was issued on the opposite party, calling on them to show cause why two orders made by the learned Subordinate Judge, one allowing the application of the opposite party 1 to continue the prosecution of a title suit in forma pauperis, which application was amended, at the hearing itself, into a prayer for permission to sue in forma pauperis, and a second order restoring to file the said application which had been dismissed for default, should not be set aside. The facts underlying the matter now in question are not in dispute. A title suit No. 144 of 1931 brought by the opposite party 1 as plaintiff was ultimately dismissed by an order of this Court, dated 22nd January 1934. In November 1932, however the plaintiff had filed another application to continue title suit No. 144 of 1931 in forma pauperis, which was numbered as pauper case No. 7 of 1932. This application, which had been dismissed for default on 11th November 1933, came up for final disposal on 19th June 1934. At the hearing, the plaintiff altered the form of the application, and urged it as one for permission to sue in forma pauperis. The learned Subordinate Judge held that suit No. 144 had been dismissed long ago, so that the petitioner plaintiff could not continue it even if it was found that he was a pauper. He went on however to hold that the second application was registered independently, and treated by the Court as an application to sue in forma pauperis, and not to continue the suit No. 144 of 1931 in forma pauperis, and that the Court had ample jurisdiction to treat it as an independent application. On the finding therefore that the applicant was a pauper and entitled to sue as a pauper,

he allowed the application. We find ourselves entirely unable to assent to the conclusion arrived at by the learned Judge in the Court below.

There was before him, throughout the whole of these proceedings, one single plaint, the plaint in title suit No. 144 of 1931, comprising one cause of action. That suit had been dismissed before the application now in question came up for disposal, and with the dismissal of the suit, the sole cause of action disappeared. It was not therefore within the jurisdiction of the Court to entertain further proceedings in the matter. Nor is it entirely correct to say, as the learned Judge does, that the application was one to sue in forma pauperis, and not to continue the suit in forma pauperis. Apart altogether from any value which can be attached to the distinction thus sought to be made, it is clear from the opening paragraph of the Judge's own order that what he had before him at the actual trial was an application for permission to continue title suit No. 144 as a pauper, and not an application for leave to sue as a pauper. We are accordingly of opinion that the orders made in this case cannot be supported and that they must be set aside. This Rule is therefore made absolute; the orders complained of are set aside and the application dismissed. Petitioner is entitled to his costs in the Rule. We assoss the hearing-fee at two gold mohurs.

Guha, J.—I agree.

K.S. *Rule made absolute.*

A. I. R. 1935 Calcutta 391

GUHA AND BARTLEY, JJ.

Phani Bhusan Basu and *others* — Decree-holder—Appellants.

v.

Shashi Bhusan Maity — Judgment-debtor—Respondent.

Appeal No. 10 of 1934, Decided on 23rd November 1934, from appellate order of Dist. Judge, Midnapur, D-/18th September 1933.

Provincial Insolvency Act (1920), S. 28 (2) —Sale in execution of decree — Judgment-debtor adjudicated insolvent — He has no locus standi to apply under S. 28 (2) to have sale declared void.

The property of the insolvent having vested in the receiver after such a receiver has been appointed by the insolvency Court, the receiver completely represents the insolvent under the law, in respect of his properties and the insolvent has no locus standi to maintain an application under S. 28 (2) to have a sale of his properties in execution of decree a voided : *Case law Ref.* [P 391 C 2]

Amarendra Nath Bose, Saroj Kumar Maiti and *Sushil Chandra Dutt* — for Appellant.

Brojo Lal Chakravarti and *Ramaprosad Mukhopadhyay*—for Respondent.

Judgment.—This appeal has arisen out of an application made by an insolvent purported to have been made under S 28 (2) Prov. Ins. Act, for having it declared that a sale in execution of a decree was void, on the ground that the sale having taken place without the leave of the insolvency Court, could not be allowed to stand. There is no question that the order of adjudication under the Provincial Insolvency Act was passed on 22nd April 1933, and the order related back to the date of the presentation of the petition for insolvency, on 21st November 1930, and as such the order of adjudication must be taken to have been in force when the sale in question took place on 15th March 1932. The only point for consideration in the case before us therefore is whether the application before the Court with the prayer for declaration that the sale held on 15th March 1932 was void was maintainable, at the instance of the insolvent whose properties had at the time of the application vested in the receiver in insolvency.

The question of the right of the insolvent, the appellant in this Court to make the application as aforesaid, was decided against him by the Court in which the sale was held. On appeal, the decision of the primary Court was reversed by the learned District Judge of Midnapur. In our judgment the decision of the Court of appeal below cannot be supported either on principle or by authority. The property of the insolvent having vested in the receiver, after such a receiver had been appointed by the insolvency Court, the receiver completely represented the insolvent under the law, in respect of his properties and the insolvent has no locus standi to maintain the application filed by him in Court. The law on the subject appears to be sufficiently clear, regard being had to the provisions contained in the Provincial Insolvency Act, bearing upon the question of vesting of proper-

tion of an insolvent after an adjudication order has been made by the insolvency Court, and there is no provision contained in the statute, which might be deemed to have conferred any locus standi on the insolvent, to bring an action of the present description. It may be noticed in this connexion that in a decision of this Court in which the English practice and procedure under the English Bankruptcy Act, 1914, was reviewed, the bankrupt was held to have no locus standi to be retained as a defendant in a suit, after his properties had vested in the trustee in bankruptcy : see 1930 Cal 388 (1).

The position that appears to be sound in law, applicable to the facts of the case before us, and the principle underlying the same were clearly indicated in the case of 1919 Cal 1006 (2), where it was held by this Court that a judgment-debtor who has been adjudicated an insolvent, had no right to maintain an appeal against a decision in execution, after his properties had vested in the Official Reciever ; and it finds support also from the decisions of other High Courts in India (see in this connexion 1928 Lah 675 (3), 1916 Sind 20 (4), 1919 All 284 (5) and 1926 Mad 556 (6). The decision of the Madras High Court in the case of 1921 Mad 402 (7) was cited before us in the course of argument, on the side of the respondent in this Court, in which it was observed by the learned Judges deciding the case, that an insolvent after an order of adjudication had been made, was not disqualified, by reason of his insolvency, from appealing from an order refusing to set aside a sale. It appears that Spencer, J., in the course of his judgment in the case, expressed the opinion that it was the property of the insolvent which became vested in a receiver. The learned Judge added :

> "There were no words in the statute which might be read as making insolvency equivalent to civil death of the individual and taking away his common law rights of action"

According to the learned Judge

> "for protecting the right of the creditors in an insolvent's property, the receiver might appropriately be joined as party, but that it did not follow from that, that the insolvent had no locus standi in civil proceedings of any kind."

In our judgment, the observations to which reference has been made above are not in consonance with the approved view of the law applicable to the subject, regard being had to the provisions contained in the Provincial Insolvency Act, relating to the vesting of properties of an insolvent in the Court or the receiver, after the order of adjudication has been made by the Court ; and the observations are not also in line with the approved view of the law, as taken by the different High Courts in this country and in England, in regard to the effect of vesting of properties of an insolvent in the receiver in insolvency. The question was not whether there was the civil death of the insolvent, after an order of adjudication had been made by the insolvency Court, but whether the insolvent could be held to have any right in himself to bring any action before the Court, after his properties had vested in the receiver. That question as has already been indicated above, must, in our judgment, be answered in the negative, against the insolvent. The result of the conclusion we have arrived at, as mentioned above, is that this appeal must be allowed, and the order passed by the Court of appeal below set aside, and we direct accordingly. The appeal is allowed; the order appealed from is discharged, and the decision and order passed by the Subordinate Judge on 19th July 1933, is restored. The appellant is entitled to get his costs in this appeal and his costs in the Courts below. The hearing fee in this Court is fixed at two gold mohurs. In view of the above order in the appeal, the application in revision is not pressed.

K.S. *Appeal allowed.*

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1. Prince Victor N. Narain v. Bhairabendra Narayan Deb, 1930 Cal 388=125 I C 851.
2. Banamali Dutt v. Lalit Mohan Ghosal, 1919 Cal 1006=47 I C 152.
3. Bhagawan Das v Amritsar National Bank 1928 Lah 675=111 I C 432.
4. Kala v. Assa Jalal, 1916 Sind 20=35 I C 530=10 S L R 53.
5. Sakhawat Ali v. Radha Mohan, 1919 All 284=49 I C 816=41 All 243.
6. Hari Rao v. Official Assignee, 1926 Mad 556=94 I C 642=49 Mad 461 (FB).
7. Tatireddi v. Ramachandra Rao, 1921 Mad 402 =62 I C 854.

A. I. R. 1935 Calcutta 393

MITTER, J.

Gani Mia and *others*—Appellants.

v.

Wajid Ali—Plaintiffs—Respondents.

Appeal No. 1745 of 1932, Decided on 6th February 1935, from appellate decree of Sub-Judge, first Court, Sylhet, D/- 27th April 1932.

(a) Landlord and Tenant—Several tenants—Denial of title by some of tenants in written statement is not sufficient to cause forfeiture of tenancy.

Where a denial of title made in a written statement was not by all the tenants.

Held: that the statements made therein were not sufficient in law to sustain a forteiture of the tenancy: 39 *Cal* 903, *Ref.* [P 394 C 1]

(b) Landlord and Tenant—Tenant denying landlord's title cannot subsequently claim to be tenant.

Where a tenant denies landlord's title he cannot subsequently claim to be bis tenant and retain possession in that character: 6 *Cal* 55 and 1920 *Cal* 272, *Ref.* [P 394 C 1]

(c) Mahomedan Law—Gift—Gift of land in possession of tenants—Lessees asked to give possession to donee—Document of title and documentary evidence placed in possession of donee to enable him to establish title and recover possession—Held there was sufficient delivery and gift was valid.

Where the donor of a leased property which formed subject-matter of gift or his heirs did not appear in the suit and did not challenge the gift and the donor had placed the documents of title and documentary evidence in the possession of the donee, put in his powers the means to establish title and recover possession from the lessees and had expressly asked the said lessees to give up possession to the donee.

Held: these acts amounted to such delivery of possession as the subject-matter of the gift was capable of and that the gift was valid: *Case law referred.* [P 396 C 2]

Priyanath Dutt—for Appellants.

Surajit Chandra Lahiri—for Deputy Registrar.

Judgment.—This appeal is directed against the judgment and decree passed by the learned Subordinate Judge, first Court, Sylhet, reversing the judgment and decree of the learned Munsif, second Court, of the same place. The plaintiff, who is the respondent before me and who is a minor, instituted the suit for ejecting the defendants, on the ground that they were the tenants of his predecessors-in-interest (defendant 13) but had forfeited their tenancy by denial of the title of the plaintiffs' predecessor-in interest. The plaintiff's case is that the lands in suit belonged to his grandfather (original defendant 13) who had inducted the defendants on the land as tenants in the year 1322=1915. In the year 1919 he, defendant 13, instituted a suit against the defendants for recovery of arrears of rent, but on the defence taken by some of them that there was no relationship of landlord and tenant, he withdrew the said suit.

The Records of Rights prepared under Chap. 10, Ben. Ten. Act, and finally published in the year 1918 having recorded the lands as the lands of defendant 13 and defendants 1 to 12 as tenants under him, the said defendants (Nos. 1 to 12) instituted a suit against defendant 13 in the year 1925 (being (No. 570 of 1925) alleging that the entry in the record of rights was wrong. In that suit they alleged that they themselves were co-owners of defendant 13 and that there was no relationship of landlord and tenant between them and defendant 13. They prayed for confirmation of possession as such owners. This suit was decreed by the first Court, but dismissed by the Subordinate Judge on appeal, whose decision was confirmed in second appeal by this Court. This Court held that defendant 1 to 12 were not co-owners, but were tenants of defendant 13, having been inducted on the land as such in the year 1322. This Court pronounced the judgment on 2nd June 1930, and that judgment establishes the fact that defendants 1 to 12 were tenants of defendant 13 at the date when the plaint in Suit No. 570 of 1925 was filed.

On 8th August 1930, defendant 13 made a gift of the property in suit to the plaintiff, his son's son, who with his father was then living with defendant 13. Defendant 13 delivered over to the plaintiff's father the 'papers,' which I take it, meant the documents of title and documentary evidence to prove the title of defendant 13, and defendant 13 also asked defendants 1 to 12 to make over possession to the plaintiff. On 19th May 1931 the suit in which the appeal arises was filed, defendant 13 who was then alive was served with summons but did not appear. On his death his three sons were substituted. They did not challenge the gift to the plaintiff and one of them, namely the plaintiff's father, has supported the gift by his evidence. Of the defendants 1 to 12 only defendants 1, 5, 6 and 7 contest the plaintiff's claim. In paras. 9, 15 and 16 of the written statement the position is

still maintained by them that defendants 1 to 12 are owners and not tenants. The written statement proceeds on the footing not that the tenancy is still subsisting and has not been forfeited but that there was never any tenancy under defendant 13. The plaintiff's title is also challenged.

Against the decree made defendants 1, 5, 6 and 7 have appealed to this Court and two points have been urged before me by them, namely: (i) that the plaintiff has not acquired any titls as the gift is invalid, no possession being delivered to him or could be delivered, as the property was at the date of the gift in the possession of persons claiming a title adverse to the donor; (ii) the alleged denials of relationship of landlord and tenant are not sufficient in law to determine the tenancy.

In support of the second contention it is said that the denial in the written statement filed in the rent suit of 1919 cannot in law sustain a forfeiture. There I agree with the contention of the appellant's Advocate, The said denial was not by all the tenants, and even if the denial had been by all the recorded tenants, as all the defendants whom the plaintiff admits to be tenants had not filed the said written ssatement, the statements made therein are not sufficient in law to sustain a forfeiture of the tenancy: 39 Cal. 903 (1). With regard to the statements made in the plaint of suit No. 570 of 1925 it is stated that the effect thereof has been neutralised by the judgment and decree passed therein which held the defendants to be tenants. I have already pointed out that the effect of the decision of the High Court was that defendants 1 to 12 were tenants at the date of that suit. The defendants who were plaintiffs in that suit persisted in the course of that suit and even in this suit in denying the relationship of landlord and tenant and in repudiating the title of defendant 13 I do not think that it is now open to them in Second Appeal to take a somersault, repudiate the written statement which they have filed in this suit, and claim that they are still tenants and mean to retain possession in that character. Such a position was taken before Garth, C J. and Mitter, J. in 6 Cal. 55 (2) and was repelled. I do not think that it is now open to the defendants to urge the second point: see also 1920 Cal. 272 (3). With regard to the first contention which relates to the validity of the gift to the plaintiff by defendant 13, Mr. Lahiry for the respondent has contended that no delivery of possession is necessary and that mere declaration of intention on the part of defendant 13 to give is sufficient. He bases his argument on the ground that defendant 13 was in the position of loco parentis. According to the Mahomedan law of gifts:

"Its pillar (i. e., of a donation) is the declaration of the donor (Wahib), for that constitutes the gift, and it is completed by the act of the owner alone, acceptance being required only for the purpose of establishing the property in the donee (Mowhoob Lechoo): (Baillie's Digest, Book 8, Ch. I, p. 507)."

Possession must be taken to establish the right of the donee, for the Prophet said that "a gift is not valid unless possessed: (Inayah Vol. 4, p. 24)." This being the express saying of the Prophet the requisite of delivery of possession can only be dispensed with in the cases expressly recognised by Mahomedan jurists. The scope of the exceptions cannot be extended in analogous cases. So far as I am aware the Mahomedan jurists make an exception only in the case where the donor is the father or guardian of the donee: 2 I. A. 87 (4) and 1932 Cal. 497 (5), and then only when the subject-matter of the gift was in the possession of the donor (Hamilton's Hedaya, p. 484, Edn. 2). Speaking of the gift of a father to his minor son Bailie states:

"The gift of a father to his infant child is completed by the contract; it makes no difference whether the subject of the gift be in his own hands, or in deposit with another. But if it be in the hands of a usurper, or of a pledgee, or of a tenant who has hired it, the gift is not lawful for want of possession: (Bailie's Digest Book 8, Ch. 5, p. 529)."

Mr. Ameer Ali in his Tagore Law Lectures points out that this passage which is taken from the Fatwa Alamgiri does not mean that such properties, e. g.

1. Birendra Kishore Manikya v. Bhubaneswari, (1912) 39 Cal 903=15 I C 620.
2. Suthyabhama Dassee v. Krishna Chandra Chatterjee, (1881) 6 Cal 55=6 C L R 375.
3. Sarbeswar Bez v. Surendrabala, 1920 Cal 272 =55 I C 631.
4. Ameerunnessa Khatoon v. Abedanoosa Khatoon, (1875) 2 I A 87=15 Beng L R 67=23 W R 208=3 Sar 423 (PC).
5. Sultan Miya v. Ajibakhatoon, 1932 Cal 497= 138 I C 733=59 Cal 557.

properties in the possession of a usurper, tenant or pledgee cannot be the subject-matter of a gift, but that possession must in such cases be delivered, (Vol. I, p. 66 and 67, Edn. 4). The delivery need not be of khas possession but accerding to the nature of the gift. In fact it has been held that the property in the possession of tenants can form the subject matter of a gift, as also there can be a gift under the Mahomedan law of the equity of redemption in respect of lands in the possession of the usufructuary mortgagee: 10 Cal. 1112 (6) and 1922 Cal. 422 (7). In such cases the mere declaration of intention on the part of the father ("I give") would not pass title to his infant child, but a further act must be done which, having regard to the nature of the right sought to be given away, could be construed to be delivery of possession. For this reason and for the reason that the gift by defendant 13 to the plaintiff when the latter, father, and not he defendant 13, was the guardian it would not confer title on the plaintiff unless possession was delivered. Defendant 13 may have been maintaining both the plaintiff and his father and living with them, but that would not be sufficient to dispense with the delivery of possession. Whatever may have been the view before of the matter, this last point is now settled by the Judicial Committee of the Privy Council in the case of 1928 P. C. 108 (8). In the case of 132 I. C. 95 (9), cited by Mr. Lahiry one of the gifts in question was by a grandfather to his predeceased son's minor son. The donor therefore was the legal guardian under the Mahomedan law of the donees, and when Jack and Remfry, JJ. held that no delivery of possession was necessary under the Mahomedan law they were not extending the well recognised exception. The words loco parentis used in the judgment must be taken with the facts of that case. I accordingly overrule the broad contention of Mr. Lahiry noticed above.

I have pointed out above that property in the possession of a tenant, mortgagee or wrongdoer can be the subject-matter of a valid gift under the gift under the Mahomedan law. In such cases delivery of Khas possession is not neeessary. In the case of property in the possession of tenants, asking the tenants to attorn to the donee or allowing the donee's name to be registered in the revenue registers or the landlord's papers, as the case may be. would be regarded as delivery of possession by the donor. In the case of 49 I A 195 (10) at 209 Sir John Edge observed thus:

"In considering what is the Mahomedan law on the subject of gifts inter vivos their Lordships have to bear in mind that when the old and admittedly authoritative texts of Mahomedan law were promulgated there were not in the contemplation of any one any Transfer of Property Acts, any Registration Act, any Revenne Courts to record transfer of possession of lands, or any zemindari estates, large or small, and that it could not have been intended to lay down for all time what should alone be the evidence that titles to lands had passed."

Dealing with the text of the Durr-ul-Muktear (Book on Gifts, p. 635) which lays down that no gift can be valid unless the subject of it is in the possession of the donor at the time where the gift is made and that land in the possession of a usurper or of a lessee or mortgagee cannot be made the subject of donation as it cannot be given away. Garth, C. J. in the case of 10 Cal 1112 (6) at 1124 observed:

"But we think that this rule, which is undoubtedly laid down in several works of more or less authority must. so far as it relates to land, havs relation to cases where the donor professes to give away the possessory interest in the land itself, and not merely a reversionary interest in it. Of course, an actual seisin or possession cannot be transferred, except by him who has it for the time being."

The Mahomedan theory of seisin is not so archaic as it is considered to be, and when it is established that property in the possession of a tenant. wrong deer or mortgagee can be the subject matter of a valid gift, the Mahomedan theory of seisin at once furnishes an answer of what can be regarded as delivery of possession in respect of such property. The author of Majm' aa ul-Anhar says thus:

"And the meaning of Kabz-ul-kamai (complete seisin) with reference to moveables depend upon their natnre, and with reference to immovable property as is suitable to its nature."

6. Mullik Abdool Guffoor v. Muleka, (1884) 10 Cal 1112.
7. Taraprossona Sen v. Shandi Bibi, 1922 Cal 422 = 62 I C 481=49 Cal 68.
8. Musa Miya v. Kadar Bux, 1928 P C 108=109 I C 31=55 I A 171=52 Bom 316 (PC).
9. Sm. Abia Khatoon v. Omar Ali, (1930) 132 I C 95.
10. Mohammad Abdul Gani v. Fakhar Jahan Begum, 1922 P C 281=68 I C 254=49 I A 195 44 All 301 (P C).

According to Dur-ul-Muktiar "to be in a position to take possession is tantamount to taking possession." Mr. Ameer Ali in his Tagor Law Lectures (Vol. 1 pp. 113-114) after noticing some of the texts of the Mohamedan jurists notices in particular Kazi Khan and states that according to that jurist,

"ability of the donee, if adult, or of his guardian if a minor, to take possession of the gift, is sufficient to validate the act of donation. Power to take possession is equivalent in certain cases to actual delivery of possession;"

and at p. 67 of the same volume ventures the opinion that in the case of property in the possession of a trespasser authority given to the donee by the donor to sue for possession is tantamount to delivery of possession. The same principles can be deduced from the judgment of the Judicial Committee in the case of 11 Cal 121 (11). There the question arose whether the gift of a property, in the possession of a person who was claiming adversely to the donor and donee, made before the Transfer of Property Act, was valid under the Hindu law. The Hindu law required delivery of possession in the case of gift or sale. It was no doubt a case relating to Hindu law, but the principle formulated in the said decision has been applied by the Judicial Committee to the Muhamadan law of gift 5 Cal 684 (12). In 11 Cal 121 (11) Sir Richard Couch pointed out that the dispute as to the validity of the gift in question was not between the donor and the donee, but between the donee and a third person in actual possession of the subject at the date of gift and at the date of the suit, who was claiming adversely to both the donor and the donee. Then at p. 232 after examining the cases he observed thus:

"In this case the appellant (donee) is under the terms of the gift and according to the construction which their Lordships have put upon the Ikrarnama (deed of gift) entitled to possession, and their Lordships see no reason why a gift or contract of sale of property, whether moveable or immovable, if it is not of a nature which makes the giving effect to it contrary to public policy, should not operate to give to the donee a right to obtain possession. On the principle contended for by the respondent, so long as he prevents the true owner from taking possession, however violently or wrongfully, that owner cannot make any title to a grantee. In this case the donor has, in fact, done all she could und as she still desires to support her gift there is no question of compelling her to do more."

The gift was upheld and a decree for possession In favour of the donee was made. In the case before me the donor or his heirs did not appear in the suit and did not challenge the gift, the donor had placed the documents of title and documentary evidence in the possession of the donee, put in his powers the means to establish title and recover possession from defendants 1 to 12, and had expressly asked the said defendants to give up possession to the donee. These acts in my judgment amount to such delivery of possession as the subject matter of the gift was capable of. The plaintiff has accordingly acquired a title under the donation and must succeed on its strength. I accordingly uphold the decree made by the learned Subordinate Judge and dismiss the appeal. As the costs of the minor respondent have already been paid there would be no further order for costs of this Court.

K.S. *Appeal dismissed.*

11. Kalidas Mullick v. Kanhyalal Pandit, (1885) 11 Cal 121=11 I A 218=4 Sar 578 (P C).
12. Mahomed Buksh Khan v. Hosseini Bibi, (1888) 15 Cal 684=15 I A 81 (P C).

A. I. R. 1935 Calcutta 396

GUHA AND BARTLEY, JJ.

Gour Chandra Pramanik—Plaintiff—Appellant.

v.

Ranaghat Peoples Bank, Ltd. and *another*—Defendants—Respondents.

Appeal No. 1954 of 1931, Decided on 22nd November 1934, against appellate decree of Dist. Judge, Nadia, D/- 6th March 1931.

Civil P. C. (1908), S. 47—Proceedings in execution for enforcement of award—Objections to award taken overruled—Separate suit challenging award on same objections does not lie.

Where in proceedings in execution for enforcement of an award, the objections challenging the decree and award are overruled, a subsequent suit challenging the award on same grounds does not lie. [P 397 C 2]

Panchanan Ghose and *Hara Krishna Pramanik*—for Appellants.

Ramaprosad Mukhopadhya and *Khitindra K. Mitter*—for Respondents.

Judgment.—This is an appeal by the plaintiff in a suit with the prayer for a declaration that an award made in favour of the Ranaghat People's Bank, Ltd., the defendant in the suit, under R. 22 of the Rules framed under S. 43,

Co-operative Societies Act (2 of 1912), against the plaintiff for recovery of Rs. 489-8-0, was without jurisdiction, and null aud void as such. It was the case of the plaintiff before the Court that the award had not the force of a decree; was not capable of execution as decree passed by a competent civil Court. The plaintiff prayed for the relief that a permanent injunction be granted to restrain the Bank for executing the award. The Bank asserted that the award was a valid award under the law, and was not liable to be called in question in any civil Court.

The Courts below have agreed in dismissing the plaintiff's suit; and in support of the appeal to this Court it was urged that inasmuch as in the reference the Bank had included a stranger as surety for the debt, the whole reference was incompetent in law, and in this connexion the point was raised that there was variation of the reference by the arbitrator who made the award; one of the sureties, the stranger not having been mentioned at all, and the rights and liabilities as between the principal debtor and the two sureties mentioned in the reference to the arbitration had not been determined by the arbitrator. It was in the next place urged in support of the appeal that the lower appellate Court had put an erroneous construction upon the Cls. (6) and (7), R. 22 in holding that these clauses covered the case of an award made by a single arbitrator; it being contended on this part of the case, that the rules contemplated that to have the force of a decree there must be an award by three arbitrators. The contention lastly urged on behalf of the appellant was that there being no evidence on the record to show that any notice or summons was served upon the appellant, the Court below should not have presumed service of such notice or summons, and that notice or summons not having been served on the appellant, the whole proceeding of arbitration and the award made by the arbitrators were without jurisdiction.

The questions thus raised are no doubt substantial questions relating to the validity of the award sought to be challenged by the plaintiff-appellant in this Court; but it has to be noticed in this connexion that all these questions were the subject-matter of consideration before the civil Court at a previous stage. The question raised in the case before the Courts below, and those submitted for our consideration were raised in the form of objections in a proceeding in execution started by the Ranaghat Peoples Bank Limited for enforcement of the award passed by the arbitrator, by realization of the amount covered by the award, from the plaintiff, the appellant before us. The questions were decided by the executing Court, in favour of the decree-holder Bank, the objections raised by the appellant having been negatived. It would appear from the decisions given in the execution proceedings under S 47, Civil P. C., that the question of service of notice or summons when the reference to the arbitrator was dealt with, was decided against the appellant by the executing Court, and in appeal the question of non-service of notice or summons was not even pressed. The other questions raised in this appeal were dealt with by the executing Court and the Court of appeal at that stage.

The judgments of the Courts disposing of the objections raised by the appellant before us under S. 47 of the Code, are before us, and they were documents used at the hearing of the case by the Courts below. On a careful consideration of these documents Exs. F, G and K, we have no hesitation in coming to the conclusion, that the questions that were specifically raised by the appellant and decided against him in the proceeding in execution, could not be allowed to be reagitated again in a separate suit, as the plaintiff appellant before us wanted to do, by instituting a suit for a declaration that the award made by the arbitrator was void and without jurisdiction, with a prayer for permanent injunction to restrain the Ranaghat People's Bank Ltd., from executing the award having the force of a decree against him.

The point was distinctly raised before the Court of appeal below that all the questions arising for consideration in the suit were raised in the form of objections in execution proceedings, and were decided against the plaintiff in the present suit. The lower appellate Court appreciated that position, and expressed the opinion that where the decree was alleged to have been made without juris-

diction objection to that effect could be taken in execution proceedings; but observed that the issues raised in the proceedings in execution, could not be taken to have been directly and substantially raised in the former suit between the parties, the proceeding in execution not being a suit. It is difficult for us to follow the real import and significance of the observation contained in the judgment of the learned District Judge in the Court of appeal below and we entirely disagree with the view taken by the Judge if he meant to hold that the questions raised in the suit out of which this appeal has arisen could not be taken to have arisen directly and substantially in a proceeding started on objections raised to the execution of an award having the force of a decree, under S. 47, Civil P. C.

In our judgment, the selfsame questions going to the root of the award challenging the award on the ground that it was on the face of it an invalid award, and could not be allowed to be executed as a valid and binding decree, were raised and decided against the plaintiff in the suit in which the appeal before us has arisen. In view of the decision of the Courts come to in the proceedings in execution, as evidenced by the judgments passed in the same by the primary and the appellate Court, the questions raised in the suit and in the appeal before us, could not be allowed to be reagitated. The decision of those questions was binding on the appellant, and we are unable to hold that the appellant could be allowed to reagitate them, in a separate suit, after his objection under S. 47, Civil P. C., was overruled in proceedings in execution.

The decision we have come to, as mentioned above, concludes this appeal entirely. It may be mentioned that after having heard arguments bearing upon the questions raised in the suit out of which this appeal has arisen, upon the three main points raised in support of this appeal, specifically referred to at the commencement of this judgment, we see no reason whatsoever for disagreeing with the conclusion arrived at by the Courts below on these points. In our opinion, the Courts below have rightly held on the merits of the case, that there was no substance in any of the grounds raised by the plaintiff-appellant in this Court, for the purpose of assailing the award made by an arbitrator appointed under the provisions contained in the Rules framed under S 43, Co-operative Societies Act (2 of 1912). In the result the appeal fails, and it is dismissed with costs.

K.S. *Appeal dismissed.*

A. I. R. 1935 Calcutta 398

HENDERSON, J.

Srt. Shushila Bala Basu— Decree-holder—Petitioner.

v.

Anjuman Trading and Banking Co., Ltd. and *another*—Opposite Parties.

Civil Rule No 1589 of 1934, Decided on 12th March 1935, from decision of Sub-Judge, Dinajpur, in Small Cause Court Ex. Case No. 12 of 1934.

Companies Act (1913), S. 153 (1) (2) — Only class of depositors framing scheme are bound by it — Decree obtained by one of depositors against bank — Subsequent scheme framed by depositors and approved by Court — Such scheme is not binding on judgment-creditor.

Only the class of creditors who framed the scheme are bound by it. Where one of the depositors obtains a decree against a bank and subsequently a scheme framed by the depositors under S. 153 is approved by the Court, the scheme is not binding on the judgment-creditor. He is no longer a depositor and it would be most unreasonable to hold that the arrangement made by the depositors in their own exclusive interest should be binding upon other persons who have conflicting interest : 1935 *Cal* 117, *Rel on.* [P 399 C 1]

Nirmal Chandra Chakravarty — for Petitioner.

Rabindra Narain Roy — for Opposite Parties.

Order.—This is a Rule calling upon the opposite party to show cause why an order of the Subordinate Judge of Dinajpur allowing an objection under S. 47, Civil P. C., filed by the opposite party who was the judgment-debtor should not be set aside. The facts are these. The petitioner was a depositor of the bank in question. She instituted a suit to recover the money due to her and obtained an instalment decree on 27th September 1932. An attempt on the part of the bank to get that decree set aside by this Court was unsuccessful. On 13th April 1933 a meeting was held by the depositors of the bank in accordance with S. 153, sub-S. (1), Companies Act, and then a scheme was approved by this Court on 12th June 1933 and became effective from 13th April

1933. The bank attempted to establish an adjustment in accordance with this scheme and applied without success to have the adjustment recorded under the provisions of O. 21, R. 2. On 11th January 1934 the present execution case was filed. The bank filed a petition under the provisions of S. 47 on the ground that the petitioner was bound by the scheme approved at the meeting of the depositors on 13th April 1933.

The Subordinate Judge held that the petitioner was bound in view of the provisions of S. 153, sub-S. 2. With great respect to his decision he appears to have misunderstood the meaning of that sub-section. It is clear that only the class of creditors who framed the scheme are bound by it. The present scheme was framed by the depositors with the object of saving the bank. The petitioner was no longer a depositor. She had obtained a decree and was a judgment creditor. Her interest was not in any way the same as that of the depositors. It would be most unreasonable to hold that the arrangement made by the depositors in their own exclusive interest should be binding upon other persons who have conflicting interests. There is nothing in the sub-section to justify any such view and I need only refer to the case of 1935 Cal 117 (1) which supports the contention raised by the petitioner in this Rule.

The result is that this Rule is made absolute. The order of the learned Subordinate Judge allowing the objection under S. 47, Civil P. C., is set aside and he is directed to proceed with the execution. I make no order as to costs.

K.S. *Rule made absolute.*

1. Dewangung Bank and Industry, 1935 Cal 117.

A. I. R. 1935 Calcutta 399

MITTER, J.

Zerman Gomez—Plaintiff—Appellant.

v.

Mahima Chandra Kaibarta and *others*—Respondents.

Appeal No. 332 of 1932, Decided on 27th November 1934, against decree of Dist. Judge, Bakarganj, D/- 5th September 1931.

(a) Fishery—Right of fishing in non-navigable rivers is not in Crown but is in riparian proprietors—Government has right to fisheries in large navigable rivers only.

In India the right of fishing in non-navigable rivers is not in the Crown, but is in riparian proprietors. When such a river passes entirely through the estate of one, he has the right of fishing and when it passes in between two estates the proprietors thereof have the right to the soil according to the principle of usque ad medium filum aquae and the equal right of fishing in the portions of the river adjacent to their lands. The Government has the right to fisheries in large navigable rivers only and as the claim to a several fishery by a private person can only be founded upon a grant from the Crown, either proved or presumed, it would follow that where a several fishery is claimed by a private individual in the natural streams in a pergunah or pergunahs the right claimed can be over navigable rivers only, or those portions of a river which are navigable, on the principle that a grantee cannot have a right in what the grantor had not. In any event such a grant can confer on the person to fish only in natural watercourses and not in those made by the hand of man. [P 401 C 1]

(b) Fishery—Several fishery—Right must be founded upon grant of Government—Government's right does not depend on ownership of soil but on navigability of stream—Grantee can follow shifting channel of navigable river even though the channel passes over land of private person.

A several fishery in India as elsewhere must be founded upon a grant from the Government and the river need not flow over the land of the Government. The right of the Government to the fishery does not depend upon its ownership of the soil but upon the navigability of the stream. There is no difference whether the change in course is gradual or sudden but the change must be a change by natural causes and the grantee from the Government can follow the shifting channel of the navigable river, and his right to fish therein is not affected by the said channel passing over the lands of a private person: 1914 *P C* 48, *Foll.* [P 402 C 1]

(c) Fishery—Plaintiff having several fishery—Current from plaintiff's river introduced by District Board to non-navigable 'done'—Riparian proprietors who held done before have their rights unaffected even after blind stream becomes flowing channel.

Where the current from the plaintiff's river who had a several fishery was introduced by an artificial excavation by the District Board into a done which was a blind stream and not navigable:

Held: that the riparian proprietors from whom the defendants claim to have derived the right to fish in the done in question, who undoubtedly held the done when a 'blind stream' as their territorial fishery, have still their right unaffected when the done was converted into a flowing channel by the act of the District Board, as the flowing channel is a non-navigable one, and that the plaintiff can have also no right in the done as the current from the plaintiff's river was there introduced by an artificial excavation. [P 402 C 1]

Jatindra Nath Sanyal—for Appellant.

Judgment.—The plaintiff, who is the appellant before me, instituted the suit for a declaration that he has 11 as. 11 gds. odd share in a jalkar called the-

Sutberia done, for possession and damages; in the alternative for rent. The case made by him in the plaint is that he and his co-sharers, the pro forma defendants, have a jalkar mehal recorded as touzi No. 1427 of the Bakarganj Collectorate. The jalkar is called Bishandi and comprises the rivers and dones that fall within the boundaries stated in the plaint and that Satberia done is a part of the said jalkar. He claims an exclusive right to fish therein with his co-sharers by triangular nets. In the evidence it was stated that Satberia done is a part of the river system in which he and his co-sharers have a right of fishery, being a done that connects the Golapdi River, the Golapdi done and the Lohalia river which are shown to be big rivers in the settlement map. He does not claim the soil of the said done and his first witness admits that the done in suit was a shallow one with no current till the District Board excavated a khal 7 or 8 years before suit, called the Gajalia Bharani Khal, and the plaintiff had never attempted to fish there before the District Board made the khal. The defendants, who admit fishing in the done in suit, claim the right to fish there on the basis of settlements taken from the riparian proprietors (not made parties) through whose estates the done flows. They do not deny that the plaintiff and the pro forma defendants have a several fishery named Bishandi, but maintain that the done is not a part of the same and is moreover not navigable.

The plaintiff to support his claim relied principally upon Exs. 2, 3 and 4. Ex. 4 which is an order of the Khas Mahal Deputy Collector states that proprietors of touzi No. 1427 have the right to catch fish in all the rivers comprised in the said Mahal and directs a clause to be inserted in the kabuliat of the ijaradar of the Government Khas Mehal Jalkar forbidding him to fish in those rivers. No particulars of the rivers included in touzi No. 1427 are mentioned in this order. Exs. 2 and 3 are copies of the D Registers in respect of touzi No. 1427. In Ex. 3 fourteen rivers and dones are mentioned. Satberia is not there, but the Lohalia river and possibly Golapdi river are mentioned therein (The word in Ex. 3 seems to be Golapi done, but I take it that the word is a contraction for Golapdi). In the body of Ex. 2 which is a part of Ex. 3 there is a statement that the owners of touzi No. 1427 (Bishandi Jalkar Mehal) have a right to fish by triangular nets in 14 dones which flow through parts of certain thanas mentioned there. In the foot-note however an order of the Collector is mentioned by which the word "fourteen" was expunged.

The plaintiff in the Courts below urged only one point, namely that Sutberia done is a part of the river system of his fishery, apparently on the ground that the current of his river Golapdi passes through it and falls into river Lohalia; but before me one other point is urged, namely that he has a several fishery in all streams which fall within the places mentioned in Ex. 2, which as the first Court points out would include the whole of Patna khali Subdivision and parts of Ferozpur and Sudder Subdivisions of the District. Both Courts have found that the done is not navigable, a few years back was part of a "blind stream," and that it was only when the District Board excavated a Khal called the Gajalia Bharani about seven or eight years before suit, that regular current began to flow through it. On these findings the plaintiff's suit has been dismissed, both Courts holding that the done cannot be regarded as included in the river system in which the plaintiff has his fishery rights. The first Court remarked that the plaintiff had his fishery in the fourteen rivers mentioned in Ex. 3 (which does mention the Sutberia done), but the lower appellate Court did not place much reliance upon this fact. I have pointed out that the words "fourteen rivers" which were originally in Ex. 2 were later on struck out by the Collector's order and I would assume that the plaintiff's jalkar rights are not limited to fourteen rivers but to all rivers within the places specified in Ex. 2, in which he could in law have a several fishery. In my judgment the fact that the done is not navigable and that it has become connected with the flowing rivers not by natural causes but by the act of the District Board puts an end to the plaintiff's claim. I would first consider the plaintiff's first contention for the first time advanced here, namely, that the plaintiff has a several fishery in all the

rivers falling within the boundaries of his grant as evidenced by Ex. 2. I do not see how he can have any such right in rivers and streams or dones which are not navigable. It is well settled that in India the right of fishing in non-navigable rivers is not in the Crown, but is in riparian proprietors. When such a river passes entirely through the estate of one he has the right of fishing and when it passes in between two estates the proprietors thereof have the right to the soil according to the principle of usque ad medium filum aquae and the equal right of fishing in the portions of the river adjacent to their lands: Cal S. D. A. Rep. 160 (1), 19 I. C. 893 (2) and 17 Cal. 814 (3). The Government has the right to the fisheries in large navigable rivers only and as the claim to a several fiishery by a private person can only be founded upon a grant from the Crown, either proved or presumed, it would follow that where a several fishery is claimed by a private individual in the natural streams in a perganah or preganaho the right claimed can be over navigable rivers only, or those portions of a river which are navigable, on the principle that a grantee cannot have a right in what the grantor had not. In any event such a grant can confer on the person to fish only in natural watercourses and not in those made by the hand of man.

Now to turn to the case of the plaintiff as presented in the lower Courts. The plaintiff claims the done as part of his river system. He says that the current of his river (Golapdi) flows into and through the done and passes on to his river Lohalia. That he says makes the done a part of his river system and the fact that the done is not navigable, or that it was connected with his rivers by an artificial channel, namely the Khal ecavated by the District Board are not material facts at all which can affect his claim. His learned Advocate refers to p. 374 of the Tagore Law Lectures of 1889 (Doss on the law of Riparian Rights) and to a passage in 1914 P. C. 48 (4) at p. 516 and contends that his client has fishing rights in all "adjuncts of the navigable streams", whether such parts are navigable or not. In examining this contention it is necessary to bear in mind that the plaintiff's claim is over a new channel through which a portion of the current of a river in which he has fishing rights is now passing. It can be considered at most a channel branching from the main river Golapdi in which he has the fishing right, the running channel being formed not by reason of any natural physical change, but by reason of an act of man of a recent date. In my judgment there is a great difference between the case where a river shifts from its old bed leaving there sheets of water which have a regular connection with the new main channel and the case where a river divides itself, the volume of its waters still flowing down its old bed, and the new channel is a non-navigable channel passing over the lands of private persons or through their jalkars. 1927 Cal. 741 (5) In the former case the sheets of water in its old bed may or may not be shallow. The person having the several fishery will still have his right to fish in those sheets as long as the connection is maintained with the flowing river and that connection is not merely occasional, due to temporary causes, as for instance an exceptional flood due to very heavy rainfall. The rights of the parties in the last mentioned case however must be determined according to the principles which would govern the case when a river changes its bed and and takes a new course, for the extra channel formed is after all a new bed. The law in this respect has been elaborately discussed in 1914 P C 48 (4) by Lord Summer. That was also a case where a new channel was formed which connected two old navigable channels of the river Padma as the plan would show. Lord Sumner in the beginning of his judgment pointed out that the new channel in respect of which there was the dispute was both tidal and navigable. An exhaustive examination of the Indian case law was then made and the following propositions material to this case were laid down: (i) that a several fishery in India as elsewhere must be founded

1. Raja Neelanund v. Raja Tek Narain, (1862) Cal S D A Rep 160.
2. Sreemantu Bagdi v. Nirantar Jelia, (1913) 19 I C 893.
3. Khagendra Narain v. Matangini Debi, (1890) 17 Cal 814=17 I A 62=5 Sar 528 (P C).
4. Raja Srinath v. Dinabandhu Sen Roy, 1914 P C 48=25 IC 467=41 I A 221=42 Cal 489 (PC).
5. Indu Bhusan Bose v. Sarajubala Debi, 1927 Cal 741=104 I C 494.

upon a grant from the Government, (ii) that the river need not flow over the land of the Government, the right of the Government to the fishery does not depend upon its ownership of the soil but upon navigability of the stream, (iii) that there is no difference whether the change in the course is gradual or sudden and (iv) that the grantee from the Government can follow the shifting channel of the navigable river and his right to fish therein is not affected by the said channel passing over the lands of a private person. In the course of the judgment the case of 17 Cal 963 (6) is noticed and approved by Lord Sumner and the ratio of that decision in my judgment furnishes an answer to the case before me. There the defendants (Watson & Co.) had a several fishery in the river Howlia, a public navigable river, which had changed its course suddenly and passed in part over the plaintiff's (Tarini's) lands. Tarini claimed the right to fish on that portion of the river which flowed over his lands on the ground that he was the owner of the soil. Ameer Ali, J., overruled the plaintiff's claim and in the course of the judgment, after quoting with approval the observations of Norman, J., in 108 W R 1864 (7), which was a converse case, that

" the right of the defendant to the fishery in the water in question being merely granted out of and a part of the right of the Government to the river can no longer exist when the right of the Government is gone,"

observed :

" but the principle laid down was that so long as the river retains its navigable character, it is subject to the right of the public and the right of fishery remains in the person who held it under a grant from the Government."

If the retention of the right of fishing is dependent on navigability of the river a fortiori the extension of the right over a new channel must also depend upon the same character. In my judgment therefore the riparian proprietors from whom the defendants claim to have derived the right to fish in the done in question, who undoubtedly held the done when a "blind stream" as their territorial fishery, have still their rights unaffected when the done was converted into a flowing channel by the act of the District Board, as the flowing channel is a non-navigable one. I also hold that the plaintiff can have also no right in the done as the current from the plaintiff's river was there introduced by an artificial excavation. Certainly the plaintiff can have no right to fish in the Gajalia Bharani Khal which is an entirely artificial channel and which is the connecting link between the plaintiff's river and the natural depression which is called a "blind stream" by the Courts below. The change in the course of a river so as to attract the rule laid down in 1914 P C 48 (4) must be a change by natural causes, or as Lord Sumner puts it "a natural physical change." This is an additional reason which puts the plaintiff out of Court. The appeal accordingly is dismissed, but without costs as there is no appearance on behalf of the respondents.

K.S. *Appeal dismissed.*

6. Tarini v. Watson & Co., (1890) 17 Cal 963.
7. Grey v. Anund Mohan, (1864) 108 W R 1864.

A. I. R. 1935 Calcutta 402

EDGLEY, J.

Gosai Chandra Ray—Defendant—Appellant.

v.

Churku Singh Babu and *others*—Plaintiff—Respondents.

Appeal No. 47 of 1932, Decided on 20th July 1934, from appellate decree of Addl. Sub Judge, Asansol, D/- 22nd August 1931.

Chota Nagpur Encumbered Estates Act (6 of 1876), S. 2—Provisions of Act are strictly confined to land situated in Chota Nagpur.

The provisions of the Act are strictly confined to land which is actually situated in Chota Nagpur. Therefore it has no application to land outside Chota Nagpur : 17 *I C* 957, *Rel on*; 1924 *P C* 153, *Dist.* [P 403 C 2]

Rupendra Kumar Mitter and *Kshitindra Nath Basu*—for Appellant.

Satish Chandra Sinha for *Krishna Chaitanya Ghose*—for Respondents.

Judgment.—This is an appeal against the judgment and decree of Mr. Sarat Chandra De, Additional Subordinate Judge of Asansol, dated 22nd August 1931, in which he dismissed an appeal from the decision of Babu Khagesh Chandra Mitter, Munsif of Asansol dated 29th July 1930.

In the case with reference to which this appeal arises it appears that one Jugal Roy held certain land under defendants 2 and 3. The land in question was held under a service tenure. He also appears to have held certain other lands under the same proprietors under an-

other tenure. When Jugal died the Chakran land was resumed by defendants 2 and 3, and in 1926 defendants 2 and 3 settled this resumed land with the plaintiff Churku Singh. It is admitted that, before this land was settled with Churku Singh, the estate of defendants 2 and 3 had been declared to be an Encumbered Estated under the provisions of the Chota Nagpur Encumbered Estates Act (6 of 1876). In order to obtain possession of the land which was settled with him in 1926 and a declaration of his title thereto the plaintiff instituted the suit out of which the present appeal arises.

The case for defendant 1 Gosai Chandra Roy, in the lower Court was to the effect that he was in possession of the land in suit and that defendants 2 and 3 had no power to grant settlement of this land to Churku Singh. He also raised another defence to the effect that the land in suit appertained to certain jamai land belonging to Jugal Roy which he had bought from the latter. But with regard to the latter defence it is admitted that the findings of fact in the judgment of the lower Courts are conclusive. The Subordinate Judge in dismissing the appeal noted that, as the land in suit is not situated within Chota Nagpur, he considered that defendants 2 and 3 had ample power to grant settlement thereof to the plaintiff, and he based his finding on this point on the decision of this Court in the case of 17 I C 957 (1). The only point which has been urged by Mr. Mitter in support of the appellant is that the land which is the subject-matter of the suit out of which this appeal arises is subject to the provisions of the Chota Nagpur Encumbered Estates Act, even although it is admittedly situated in the Asansol Sub-Division and, in particular, he refers to S. 2 of the Act by which it is provided that

"the Commissioner may, with the previous consent of the Lieutenant Governor of Bengal by order published in the Calcutta Gazette, appoint an officer (hereinafter called the manager) and vest in him the management of the whole or any portion of the immovable property of or to which the said holder is then possessed or entitled in his own right."

It is contended that the language of this section of the Act implies that an order under S. 2 may be made in respect of any portion of the estate of a Chota Nagpur Zemindar, even although some portion of the property may be situated beyond the limits of Chota Nagpur. With regard to this contention it seems to be clear however from the preamble that the provisions of the Act are strictly confined to land which is actually situated in Chota Nagpur, and these provisions of the Act must therefore be read subject to the restrictions laid down in the preamble. This view was adopted by Sir Asutosh Mookerjee in the case of 16 C L J 527 (1) at p. 533 of the report where the Hon'ble Judge states "to my mind, it is a sound and reasonable interpretation of the statute to hold that it has no application to land outside Chota Nagpur." In support of his contention Mr. Mitter places some reliance upon the decision of the Privy Council in the case of 1924 P C 156 (2). In this case their Lordships held that the manager of an estate in respect of which an order has been passed under the Chota Nagpur Encumbered Estates Act of 1876, is in the eye of the law fully and completely vested in the management of the Estate, and the vesting in him continues during the tenure of his office. It is admitted however that the subject-matter of the case with reference to which this appeal arose was the Paresnath Hill which is admittedly situated in Chota Nagpur, and the decision in question can be of no avail to the appellant. Having regard to the considerations mentioned above I think the decision of the lower appellate Court was quite correct and it is therefore affirmed. The appeal must therefore be dismissed with costs.

K.S. *Appeal dismissed.*

1. Bhicha Ram Sahu v. Bishumbhur Nath Sahi, (1912) 17 I C 957=16 C L J 527.

2. Hukum Chand v. Rao Bahadur Singh, 1924 P C 156 = 80 I C 841=51 I A 208 = 3 Pat 625 (PC).

A. I. R. 1935 Calcutta 403

S. K. GHOSE AND HENDERSON, JJ.

Kachi Hazam—Accused—Petitioner.

v.

Seraj Khan—Compalinant—Opposite Party.

Criminal Revn. No. 816 of 1934, Decided on 19th December 1934.

Criminal P. C. (1898), S. 154—Telegram to Police Inspector is not first information

report — But it cannot be excluded from evidence.

A telegram is not a writing given to the police signed by the person making the statement and further that so far as authenticity goes a telegram stands in no better position than village gossip. Hence it may be said that the telegram to a Police Inspector does not comply with S. 154 of the Code inasmuch as it was not signed by the informant. But the telegram cannot be excluded from evidence where it was put in without objection and there was the statement of complaint which was always available to accused under S. 162.

Held : no prejudice was caused to accused and conviction should not be set aside. [P 404 C 2]

Hiralal Ganguli—for Petitioner.

S. K. Ghose, J.—The petitioner has been convicted under S. 436, I. P. C., and sentenced to undergo rigorous imprisonment for three years and to pay a fine of Rs. 75; in default to undergo rigorous imprisonment for a further period of six months and it has been directed that the fine, if realized, will go to the complainant as compensation. Shortly stated, the case for the prosecution is that the petitioner and others set fire to the house of one Seraj Khan who started proceedings by sending a telegram to the Sub-Inspector of Police, Bagnan, Police Station in the following terms :

" Kochi Hajam with party set fire my house burnt come. Sd. Sheraj Khan Pipulnam."

This telegram was treated at the trial as the first information report under S. 154, Criminal P. C. The investigating police officer on going to the spot recorded the statement of Seraj Khan. But this statement was treated as one recorded under S. 161, Criminal P. C. The ground on which the Rule was issued is that the telegram is not legally admissible as the first information report within the meaning of S. 154, Criminal P. C, and the trial has been vitiated by the reception and use of the same as the first information report and the petitioner has been seriously prejudiced by this procedure. It is contended on behalf of the petitioner, that, if the provisions of S. 154 of the Code were strictly followed, where the information is given in writing it shall be signed by the person giving it and, since it cannot be said that the telegram was sent to the thana with the signature of the informant Seraj Khan, the document was not in accordance with the provisions of S. 154 of the Code and therefore was not admissible as a first information report. In support of this reliance is placed on the case of 1928 Mad 791 (1) and in 1915 Mad 312 (2). It was pointed out in the first mentioned case that a telegram is not a writing given to the police signed by the person making the statement and further that so far as authenticity goes a telegram stands in no better position than village gossip.

This criticism may be accepted as correct and it may be said that, as a matter of procedure, the telegram in question does not comply with S. 154 of the Code inasmuch as it was not signed by the informant, although so far as authenticity goes it is deposed to by the informant. Mr. Ganguli for the petitioner however concedes that the telegram cannot be excluded from the evidence. All that he contends is that it is not a first information report within the meaning of S. 154 of the Code. His contention is that the statement which was recorded by the Sub-Inspector should have been put in as the first information report in the case. This argument however has no practical value in this rule. The telegram was put in without objection. In so far as the statement of Seraj Khan was concerned it was always available to the accused under S. 162 of the Code and Mr. Ganguli also concedes that, as a matter of fact, this statement was available to the defence for the valuable purpose of contradicting the witness. The grievance might have been with the prosecution in that it was not able to put it in in examination-in-chief. But in so far as the accused is concerned there is no prejudice. The ground therefore on which the Rule is based cannot be sustained. The Rule is discharged. The petitioner, if on bail, must surrender to his bail bond and serve out the remainder of the sentence imposed upon him.

Henderson, J.—I agree.

K.S. *Rule discharged.*

1. Public Prosecutor v. Chidambaram, 1928 Mad 791=110 I C 461=29 Cr L J 717.
2. In re N. Anandayya, 1915 Mad 312=25 I C 630=15 Cr L J 622.

A. I. R. 1935 Calcutta 405

LORT-WILLIAMS AND JACK, JJ.

Sarat Chandra Mukherjee—Appellant.

v.

Nerode Chandra Mukherjee and *others*—Respondents.

Appeal No. 16 of 1934, Decided on 24th January 1935.

Limitation Act (1908). S. 23—Sheds constructed by defendant on land which plaintiff has right to use—Suit for declaration of plaintiff's right and removal of sheds is governed by S. 23.

Where the plaintiff has a right to use the land on which certain sheds have been erected, as a passage and those sheds are obstructing his passage way, there is a continuing wrong and a suit for declaration of plaintiff's right to use the land and for removal of sheds is governed by S. 23: 1923 *Cal* 356; 6 *Cal* 394, *Rel on.* [P 406 C 1]

Advocate-General and *S. B. Sinha*—for Appellant.

S. N. Banerjee (*Sr.*) and *Sambhu Banerjee*—for Respondents.

Jack, J.—This appeal has arisen out of a suit for declaration of the plaintiffs' right to use the land dercribed in the plaint as a common passage way and for a decree against the defendant Sarat Chandaa Mukherjee for the removal of 2 tin sheds erected by him thereon and for damages. The land in suit was included in the premises described as 134 Jan Bazar Street in a partition between those parties along with others in 1901. The total area of these premises was found to be 5 bighas and 16 cottas. Of this 9 cottahs was deducted as common passage leaving 5 bighas 7 cottahs to be divided. The learned Judge has decided that the land in suit is included within this 9 cottahs of passage land (as shown in map No. 5) annexed to the plaint separating the four parts into which the premises were then divided being a portion of the land separating part 1 from Part 4 of that award running east and west and terminating on the west in Grant Street.

By an award in a subsequent partition suit between the plaintiffs and defendants in 1917. Part 1 of the award of 1901 was divided into 6 blocks (vide map No. 1) blocks 2 and 3 coloured red on the map being given to the plaintiffs, blocks 1 and 4 to defendant 1 and blocks 5 and 6 to defendant 2. The plaintiffs allege that in 1925 the two tin sheds in question were erected by defendant 1 on the common passage in extension to the north of his building on block 1, the eastern one measuring 14'-6" x 5'-9" and the western one 25'-1" x 6'-11½". The finding of the learned Judge that the land on which those sheds were erected was a common passage under the partition of 1901 and was also shown as such in the partition of 1917,is not now seriously disputed between the parties, and defendant 1 appellant has mainly disputed the decree which the plaintiff obtained for the declaration asked for and the removal of the sheds, on the ground of limitation.

The appellant maintains that since, admittedly, the sheds were erected as long ago as 1925, whereas this suit was not instituted until 21st August 1931, the suit is time barred inasmuch as it is a suit to which the provisions of Art. 32, Lim. Act, apply. Even if it be taken that the suit comes under Art. 120, Lim. Act, the onus was on the plaintiff to show that the period of six years under that Article was not exceeded and that onus he has failed to discharge. In support of their contention that Art. 32 applies, the appellants have cited a number of decisions of the Lahore High Court in which Art. 32, Lim. Act, was held to apply where co-owners had set apart land for a common purpose and the defendant had diverted it to an unauthorised purpose and so excluded the plaintiff from using it for the common purpose. These decisions were however overruled in the Full Bench case of 1933 Lah 705 (1), in which it was stated by Tek Chand, J. that in suits of this kind

"the real cause of action is the ouster of the plaintiff from property jointly owned by him and the defendant and reserved for their common use for g specific purpose and not the perverted user of such property by the defendant."

In such cases

"the presumption of law is that the possession of one is the possession of all and it was not the intention of the legislature to reduce the period of limitation for such suits to two years simply because the attack by the defendant on the plaintiff's title was accompanied by a perversion of the user of the property from its original specific purpose."

He held however that Art. 32 would apply where the defendant, while perverting joint property from its specific common purpose, admits the plaintiffs'

1. Mastan Singh v. Santa Singh, 1933 Lah 705=145 I C 553=14 Lah 267 (FB).

right to share the perverted user. But that is not the case here. It was held that in suits between co-owners inter se where the title of one is denied by the other, Art. 144 or Art. 120 would apply according as the relief claimed is one for possession or injunction. That was a case in which the defendants encroached upon common land by cultivating it as part of their holding so that the plaintiff co-owner was prevented from exercising a common right of way in the land. Art. 120, Limitation Act, was held to apply. In that case there was no reference to S. 23, Limitation Act which lays down that :

"In the case of a continuing breach of contract and in the case of a continuing wrong independent of contract, a fresh period of limitation begins to run at every moment of the time during which the breach or the wrong, as the case may be, continues."

Section 3, Limitation Act, makes the provisions of Sch. 1, Limitation Act, subject to the provisions contained in S. 23, so that, if it can be shown that in this case there is a continuing wrong, a fresh period of limitation begins to run at every moment during which the wrong continues.

It has been established that the plaintiff in this case has a right to use the land on which those sheds have been erected as a passage and that those sheds are obstructing his passage way. The learned Judge has held that in these circumstanees there was a continuing wrong and in this he appears to be correct. If authority is needed it is to be found in the case referred to by the learned Judge, 1923 Cal. 356 (2), a case similar to the present case in which land reserved as a common passage by long usage and agreement was obstructed by the erection of a verandah to a house. Such an obstruction was found to be a continuing nuisance relying on the principle on which the Privy Council acted in 6 Cal. 394 (3). Other cases which have been referred to are (1) the case of 1916 Cal. 733 (4) in which it was held that obstructions which interfere with a right of way are in the nature of continuing nuisance as to which cause of action is renewed de die in diem so long as the obstructions causing such interference are allowed to continue; (2) the case of 1919 Cal. 807 (5), in which it was held that S. 23, Limitation Act, had no application in case of a Rowak or platform built over municipal land inasmuch as the injury was complete in the erection of the wall and the mere fact that the effect continued could not extend the time of limitation. But the real reason of the decision appears to have been that the Rowak having been in existence for 50 years the municipality had lost their right to the land on which it stood and there was therefore no continuing wrong ; (3) another case referred to is the Full Bench case of 25 Bom. 644 (6), in which it was held that a suit for restitution of conjugal rights under Act 15 of 1865 was barred under Art. 35, Limitation Act, and Art. 23 had no application. Jenkins, C. J., held that even if the conduct of the husband be regarded as a continuing cause of action since Art. 23 is general in its terms, whereas Art. 35 provides a special remedy and where there is a repugnancy the special provision should prevail. With all due respect to the learned Chief Justice he appears to have left out of account S. 3, Limitation Act, by which all the Articles of Sch. 1, Limitation Act, are subject to the provisions of S. 23. No doubt the effect of this appears to be to nullify certain provisions of the Limitation Act, but we have to take the law as it stands and the learned Judges who concurred with the decision recognized the difficulty caused by the application of S. 23 of the Act

Inasmuch as it was held that S. 23, Limitation Act, applies in this case, there is no need to consider the question of onus arising as to the proof of the elapse of the full period of six years under Art. 120, Limitation Act. We find that the suit is not barred by limitation and this appeal must be dismissed with costs.

Lort Williams, J.—I agree.

K.S. *Appeal dismissed.*

2. Dwarka Nath Sen v. Tara Prosanno Sen, 1923 Cal 356=76 I C 328.
3. Rajrup Koer v. Abdul Hossain, (1881) 6 Cal 394=7 I A 240=4 Sar 199 (P C).
4. Nazim v. Wazidulla, 1916 Cal 733=29 I C 385.
5. Ashutosh Sadukhan v. Corporation of Calcutta, 1919 Cal 807=49 I C 93.
6. Dhanjibhoy Bomanji v. Hirabai, (1902) 25 Bom 644=3 Bom L R 371.

A. I. R. 1935 Calcutta 407

(Special Bench)

COSTELLO, PANCKRIDGE AND M. C. GHOSE, JJ.

Emperor

v.

Bent Pramanik and *others*—Accused.

Jury Ref. No 55 of 1934, Decided on 6th February 1935.

(a) Criminal P. C. (1898), S. 274 (2)—Trial by jury—11 out of 18 jurors absent though duly summoned—Held trial with 7 jurors was not illegal.

The jurors were duly chosen by lot without objection from either side, and the trial proceeded with the aid of seven jurors only as all the other eleven jurors who were duly summoned were absent on call. There was nothing on the record to show that it was practicable in the circumstances to obtain the full number of jurors.

Held : that the Court ought to proceed on the principle embodied or implied in the phrase 'omnia rite acta' that is to say, it ought to proceed upon the assumption that the trial in the Court below took place in full accordance with the requirements of S. 274, Sub-S. (2) and its proviso and that everything in connexion with the empanelling of a jury was done in due form of law. Hence the trial was not illegal : 1931 *Cal* 261, *Rel on* ; 1931 *Cal* 793, *Diss. from.* [P 411 C 1,2]

(b) Criminal Trial—Trial by jury—Charge under S. 302—Accused found guilty by unanimous verdict of jury—Judge disagreeing with it and making reference to High Court—Convicted persons should be held in custody pending final decision of High Court.

Where in a trial by jury into an offence of murder the accused are convicted by the unanimous verdict of the jury and the Judge disagreeing with the verdict refers the case to the High Court, it is desirable that the convicted persons be held in custody pending the final decision of the High Court. [P 412 C 1]

Surajit Chandra Lahiri—for Reference.

Khundkar and *Siddheswar Chakravarty*—for the Crown.

Costello, J.—This is a reference under S. 307, Criminal P. C., made by the Sessions Judge of Pabna by a letter of reference dated 23rd November 1934. Eight persons Benat Pramanik, Goyanath Sarkar, Kasi Pramanik, Baser Fakir Sukurali Sardar alias Sukra, Mallik Pramanik, Bhowani Charan Sarkar and Jagannath Chanda were put on their trial before a Jury on charges of murder and conspiracy. The jury unanimously acquitted all the eight accused persons of the charge of murder and also the last four out of the eight accused of the charge of conspiracy. But they convicted Benat Pramanik, Gayanath Sarkar, Kasi Pramanik and Baser Fakir of the charge of conspiracy to murder, and it is with regard to these four persons that this reference has been made to this Court.

The learned Judge disagreed with the verdict of the Jury and he was very emphatically of opinion that these four persons ought not to have been found guilty of an offence under S. 120-B read with S. 302, I. P. C. In the opinion of the learned Judge .the accused persons ought to have been acquitted, and in his view the evidence recorded in the case did not justify an inference either that there was a conspiracy at all, or that any one of the accused persons was a party to the conspiracy. The case put forward by the prosecution in outline amounts to this: at 11 p.m. on 17th June 1934 a man named Sonatan Goon living at a place called Madla in the police district Shahajadpur came to the police station and there stated that in the evening Suresh Chandra Biswas, Biseswar Biswas and Rahimuddin Sarkar and another man all belonging to a place called Potazia had come to his house and had informed him that they had seen a man named Hriday Sarkar of Madla who was a relation of Sanaton's leave Potazia Hat carrying a lantern, and that shortly after they had heard from a man Rumi that he had seen a man passing along with a lantern in hand, and had then heard certain cries which had caused Rumi to suspect that foul play was taking place.

In view of the fact that Hriday had not returned to his house Sonatan sent out a search party to look for him and himself started for the Thana. Before he reached the Thana he got news that Hriday's dead body had been found floating in water. Actually the dead body was taken out of a small river or khal at a spot near Potajia. On one side of the river there was a burning ghat which was referred to in the evidence as the cremation ground, and on the other side of the river there was a babla tree. On 18th June an inquest was held by the Sub-Inspecter of Police, on the dead body. No marks of injury were found, but from the circumstances the persons who were summoned to take part in the inquest, and the police officer all came to the conclusion that Hriday had been murdered. The body

was examined by Dr. Singh who was the Assistant Surgeon of Serajganj on 19th June. By that time it was in such an advanced stage of decomposition that the doctor was unable to find anything either on external examination or on dissection, to show what was the cause of death. The doctor said that in his opinion death must have taken place two days prior to the post-mortem examination. That the man Hriday was murdered, there is, in our opinion, no doubt whatever. The only real question in the case is whether the prosecution had succeeded in establishing that the accused or any of them had conspired together to bring about the death of the deceased. The learned Sessions Judge for some reason or other which is not apparent, seems to have taken the view that these persons had nothing to do with the occurrence and that most or part of the relevant evidence against them had been fabricated by persons whom the learned Judge boldly described as 'liars'.

Upon reading the letter of reference it did appear at first sight that the case against each of these accused persons was of a somewhat slender character. But there are certain observations in the letter of reference which it is difficult to understand. The learned Judge commenting on the evidence given by the witnesses as to the events which took place prior to the time when Hriday set out on his last journey says:

"All this is no doubt very realistic though it did not carry any conviction to me for reasons that will be found set out in my charge to the jury. In any case this is clearly not enough to show that Hriday was verily the victim of a murderous attack, though his widow was indeed brought to Court to say that she found a swelling on her husband's neck when she saw him the next morning, a swelling which nobody else appears to have detected."

The learned Judge somewhat surprisingly seems to make sarcastic comment on that part of the evidence on very little material. Then he proceeds to say:

"The prosecution therefore produced certain more witnesses to prove the following."

We are entirely at a loss to understand why the learned Judge thought fit to insert the word 'therefore' because it would seem to suggest that the prosecution originally relied on a certain body of evidence and then finding that insufficient, had proceeded to call additional evidence which they originally had not intended to call at all; whereas we find from the evidence of persons whom the learned Judge described as 'certain more witnesses' that they really gave the most material part of all the evidence implicating these accused. I have said that on the face of the letter of reference the case against the accused appears to be somewhat weak to say the least of it. But when one looks at the summary of the whole of the evidence as given in the heads of charge to the jury, one finds the case very much stronger and that there is plenty of direct evidence indicating that these four persons had at any rate agreed together to bring about the death of this man Hriday.

Even to read the charge to the jury indicates that there was ample material upon which the jury could have convicted the four persons with whose position we are now concerned and when one looks into the actual evidence given in Court at the trial one finds that the case made by the prosecution was even stronger than appears from the Judge's charge to the jury, because there are one or two small pieces of evidence and a certain number of inferences to be drawn from the evidence which were never touched upon at all, as far as one can see, or at any rate not sufficiently emphasized by the learned Judge in his charge to the jury. To put the matter in more general terms, the charge to the jury was clearly and obviously what is sometimes described as a charge for an acquittal. In other words, it appears that the learned Judge made up his mind when he started the charge to the jury, that none of the eight accused persons ought to be convicted.

Again it is a little difficult to understand how the mind of the learned Judge was working because he seems to have emphasized the fact that it was not established that there was any foul play at all and he seems to have become suspicious as to the genuineness of the whole case put forward by the prosecution by reason of the fact as he said that the story told by Sonatan, Bisweswar and others was 'psychologically incoherent.' Whatever that expression may mean, we find ourselves totally unable to accept that view. From the circumstances of the case apart altogether

from anything which was disclosed or not disclosed by the inquest and by the post mortem demonstration, we have definitely come to the conclusion that it is beyond all doubt that Hriday was subjected to an attack shortly after he had forded the river to make his way to Madla and that he met his death by violence.

The evidence in the case if believed shows that the four persons Benat Pramanik, Gayanath Sarkar, Kasi Pramanik and Baser Fakir had some kind of ill feeling towards the deceased by reason of the fact that he was their creditor and had obtained decrees in the local Courts against each one of them, so that it was established that there was some kind of motive which might have operated in the minds of these persons is as to cause them to desire the death of this man Hriday. There is evidence, which seems to us entirely worthy of credit that Baser Fakir on the afternoon of 17th June persuaded or induced the deceased man to leave his house at Madla and to come down to the Court at Potazia apparently upon the pretext that Baser was desirous of entering into some arrangement with him for settling the accounts outstanding between them. They did in fact come down to the Court at Potajia and they were seen there by certain persons who gave evidence at the trial, namely Biseswar Biswas and Suresh Das who was a clerk of the Union Board Court, and therefore presumably a person with some sense of responsibility. The deceased man was towards nightfall seen starting from Potajia with his lantern. Shortly afterwards the man Rumi came into Potazia and informed Biseswar and Suresh that he had heard cries which had raised a suspicion in his mind that Hriday was being attacked. Then there is the evidence of a number of witnesses who saw these four accused persons loitering about in the vicinity of the Babla tree which was situated near the track which would be taken by Hriday on his way from Potajia to his own house. There is the evidence that Baser was seen and recognized on the side of the river opposite to where stands the Babla tree after he had emerged from the river, accompanied by four or five men. All the four accused were seen by different witnesses in circumstances which raise the irresistible inference that they were concerned in the death of Hriday. As regards Gayanath there is the further fact that on the bank of the river near the spot where the body of Hriday was found there were discovered two umbrellas one of which was identified as belonging to Hriday himself and the other was identified by three witnesses as belonging to the accused Gayanath.

When one looks at the evidence and considers the matter as a whole one can only come to the conclusion even after eliminating that part of the evidence which relates to antecedent facts and incidents that there was ample material to warrant the jury in coming to the conclusion that these four persons were at the very least guilty of conspiracy to murder. One must bear in mind in considering the whole of this case that there were originally eight persons accused. The jury had to consider the case of each of these eight persons and the Jury made a discrimination in that they convicted the first four and they acquitted the last four. That was an entirely reasonable thing for the jury to do because apart from the evidence relating to events antecedent to the day of the murder, there was practically no evidence at all against any of the last four of the accused persons. On the other hand one has only to cast one's eyes over the summary of the evidence as set forth by the learned Judge in his heads of charge to the jury to see how frequently the names of Benat, Kazi, Gaya and Baser appear in the evidence of one or the other of the witnesses.

The arguments put forward very forcibly by Mr. Lahiri and the comments he made with regard to the credibility of the witnesses, have only served to bring into relief the strength of the case for the prosecution, and the more one scrutinizes the evidence given in the case the more does it become apparent that the verdict of the jury so far from being perverse as the learned Judge thought was not only a reasonable verdict but a right verdict. It would have been surprising if the jury had arrived at any other conclusion. The main method of attacking the evidence given in the case was, as the learned Judge said, to seek to discredit many of the witnesses as being deliberate and wilful liars. We see nothing whatever in the evidence all of

which have been placed before us to indicate that any one of the witnesses was a deliberate liar, or anything of the kind. It seems that the learned Judge for some unknown reason himself took a somewhat perverted view of the whole of this case. A perusal of the evidence indicates, in our opinion, that the making of the reference which has been sent to us was wholly unwarranted in the circumstances of this case.

At a late stage of the argument before us Mr Lahiri on behalf of the accused persons raised aquestion as to the legality of the trial owing to the fact that the jury was composed of no more than seven jurors. It appears from the order sheet that the jurors were duly chosen by lot without objection from either side, and it is stated that the trial proceeded with the aid of seven jurors only as all the other eleven jurors who were duly summoned were absent on call; Mr. Lahiri contended that there is nothing in the record to show that the provisions of sub-S. (2) of S. 274, Criminal P. C, were properly complied with. That proviso was added to the sub-section by Act 12 of 1923 and reads as follows:

"Provided that where any accused person is charged with an offence punishable with death, the jury shall consist of not less than seven persons and if practicable, of nine persons."

It was argued that the learned Judge ought to have satisfied himself that it was not practicable to secure the additional number of jurors necessary to make up a total number of nine, and that the learned Judge ought to have made some entry in the record to indicate that he had exahusted all possible sources for obtaining the extra number of jurors. I doubt very much whether there is any such obligation imposed upon the learned Judge by the provisions of S. 274 even read with the provisions of S. 276.

The point now under discussion came under the consideration of this Court in the case of 1931 Cal 793 (1). In that case there had been a trial of one of a number of accused persons on a charge under S. 302 and of all the other accused under S. 148, I. P. C. The case was tried by the Additional Sessions Judge of Mymensingh with a jury of seven persons When the appeal came before this Court for hearing on 12th December 1930 an order was made by Lort Williams, J. and S. K. Ghose, J. In giving reasons for the making of the order the learned Judges said:

"It is contended that the trial was vitiated by reason of non-compliance with the provisions of S. 274, Criminal P. C. and attention, is drawn to the following order of the learned Judge, dated 12th May 1930: The charges under Ss. 148 and 302, I. P. C, were amended at the instance of the public prosecutor. The charges under Ss. 148, 302 and 324, I. P. C., were read out and explained to the accused, who all pleaded not guilty."

Then comes the material part of the matter:

"18 Jurors were summoned for this case. The cards of the jurors were, one by one, drawn by lot. The names and addresses of the jurors were called aloud as each card was drawn. In this way seven jurors were chosen by lot. None of them was challenged by either side. Other jurors summoned were found absent on call. The jurors chosen appointed their foreman and were sworn. It is contended that from this order it does not appear that the learned Judge at all applied his mind to the question as to whether it was practicable to have nine jurors. That certainly does not appear from the terms of the order. Nor does it appear that the learnsd Judge considered the possibility, under proviso 2 to S. 276, of making up the deficiency by choosing from such other persons as might have been present."

Then the learned Judges said;

"We think it is necessary to call for a report from the learned trial Judge as to whether he considered if it was practicable to have nine jurors and also whether if in fact it was so practicable regard being had to the number of persons present."

The record was sent down with a direction that the learned Sessions Judge should return it as soon as possible with his report. When the matter came before the Court again it appeared that the learned Judge who had tried the case had retired from service and, therefore it was not possible to obtain from him a report as to whether he had considered the question of the practicability of securing nine jurors or not. It was then argued that the onus was on the appellants to prove that the Court had not considered the practicability of having nine jurors. S. K. Ghose, J. ,in his judgment at p. 1279 says:

"We have already polnted out that it does not appear from the terms of the Judge's order that he at all applied his mind to the question as to whether it was practicable to have nine jurors aud for that reason we called for report. It is the duty of the Judge to consider whether it is practicable to have nine jurors and there is no duty cast upon the accused."

Mr. Lahiri has relied upon that decision in support of the argument placed before us attacking the validity of the

1. Shabeb Ali v. Emperor, 1931 Cal 793=135 I C 435=33 Cr L J 129=58 Cal 1272.

trial with which we are now concerned. With all respect to the learned Judges in 1931 Cal. 793 (1) we find ourselves unable to agree with the view they adopted. In our opinion, where, as in the present case, there is nothing on the record to show otherwise, this Court ought to proceed on the principle embodied or implied in the phrase 'omnia rite acta,' that is to say, we ought to proceed upon the assumption that the trial in the Court below took place in full accordance with the requirements of S. 274, sub-S. (2) and its proviso, and that everything in connection with the empanelling of a jury was done in due form of law. There is weighty authority for that point of view in a judgment of Sir George Rankin, Chief Justice, which he gave with the concurrence of two other Judges of this Court in the case of 1931 Cal. 261 (2). That case came before this Court upon a Reference under S. 307, Criminal P. C., from the Additional Sessions Judge of Jessore who had disagreed with the unanimous verdict of the jury and it was numbered as Jury Reference No. 31 of 1930. We have taken the precaution of sending for the printed record of the case as it came before this Court, in order to ascertain as far as possible what the situation had been at the time of the trial, and we find in the order sheet of the proceedings at the trial this entry:

"Dated 30th May 1930. The accused is brought before the Court. Charge under S. 302 is read and explained to the accused who pleads guilty to the charge. As the Court thinks it reasonable to record the evidence of some of the eye witnesses in the case and as there are eight jurors out of 18 jurors called for, present in Court, seven jurors of cards Nos. 37. 44, 45, 147, 152, 154, 156 are selected by lot without objection and their foreman elected. They are then sworn and empanelled."

The position, therefore was very much the same as the situation which arose in the present case, the only difference being that instead of seven jurors out of eighteen being present as they were in the present case, there were eight jurors out of eighteen present in Court. So far as that difference is of any materiality at all it tells against the argument put forward by Mr. Lahiri because it opens the way to an argument that as there was only a deficiency of one juror, it would have been comparatively an easier matter to secure one more juror from amongst the bystanders than to secure two more jurors as would have been necessary in the present instance.

The passage in the judgment of Sir George Rankin to which I have referred appears at p. 1128 of the report and it is in these words :

"It is pointed out by the learned counsel for the accused that in this case, though eighteen jurors were summoned, the accused was tried with seven jurors only because only eight jurors attended. It is suggested that the learned Judge should have obtained two more jurors from among the by-standers. But there is nothing on the record before us to show that this course was practicable in the circumstances of this case."

With all due respect we entirely agree with the view taken by the learned Chief Justice and adopt the passage just quoted as being a correct enunciation of the law. In that view of the matter unless there is an indication on the face of the record itself or there is other material before the Court which leads to the conclusion that it was or might have been practicable to have the jury composed of nine jurors rather than seven one must assume that it was not practicable to have nine jurors.

In the reference now before us just as in the reference before Sir George Rankin, C C. Ghose, and Patterson, JJ., there is nothing to show that it was practicable in the circumstances of this case to obtain the full number of jurors. We must therefore assume that the Sessions Judge had sufficient knowledge and experience to know what was required under the terms of S. 274, Criminal P. C., and therefore in the circumstances in which the trial began it was not practicable to have more than seven jurors for the trial of the accused persons. In our judgment, the point of view indicated in the judgment of Sir George Rankin is preferable to that adopted in the case cited by Mr. Lahiri, so it follows that there is no substance in the point of law belatedly taken by Mr. Lahiri.

There is one other matter to which I desire to call attention in connection with this reference and it is this : that in spite of the unanimous verdict of the jury convicting Benat Pramanik Gayanath Sarkar, Kasi Pramanik and Baser Fakir of an offence which is punishable with death, the learned Judge saw fit to

2. Emperor v. Damullya Molla, 1931 Cal 261= 1931 Cr C 293=128 I C 608=32 Cr L J 187 (SB).

make an order that these four accused persons might be released on bail of Rs. 500. It would have been quite wrong to have released these persons on bail even during the pendency of the trial or during the course of the trial, and it is therefore still more wrong that they should be released on bail after they had been convicted of such a serious offence by the unanimous verdict of the jury even though the Sessions Judge disagreed with the verdict of the jury and made up his mind to refer the matter to this Court. In circumstances such as those in the present case, it is desirable that the convicted persons be held in custody pending the final decision of this Court. The bail required for these persons was of a very trifling amount, and apparently no sureties were called for. There was in fact little or no sanction provided to prevent them from endeavouring to escape from the just consequences of the crime of which they had been convicted. It is to be hoped that in future cases of this kind these observations will be borne in mind by Sessions Judges making references to this Court.

Having regard to the view taken by us of the facts in this case and there being no substance in the point of law raised by Mr. Lahiri, the result is that this reference is rejected. The four persons whose names I have mentioned therefore stand convicted of an offence under S. 120-B read with S. 302, I. P. C., and the sentence of the Court upon each and every one of them is that of transportation for life.

Panckridge, J.—With regard to the point of law raised on behalf of the accused persons, I only wish to observe that our judgment as well as the judgment in the case to which my learned brother has referred, assumes that in circumstances like the present, it is in the discretion of the Sessions Judge to permit supplementary jurors to be empanelled under the second proviso to S. 276, Criminal P. C. The learned Deputy Legal Remembrancer however has argued that when there are seven jurors in attendance in obedience to the summonses issued to them there is not a deficiency of the persons summoned within the meaning of the proviso. If that view is correct it is clear that it would be illegal to increase the number of jurors to nine in the manner which is suggested. I merely desire to say that as far as I am concerned the fact that our judgment is based on the assumption that it was within the discretion of the Judge to permit the procedure laid down in the proviso to be followed must not be taken to mean that I have come to the conclusion that the submission made by the Deputy Legal Remembrancer is incorrect. I desire that the point made, as far as I am concerned, be left open for consideration in any future case in which it may arise.

M. C. Ghose, J.—In this case eight persons were charged with murder and conspiracy to murder. They were tried by a jury of seven persons in the Court of the Sessions Judge of Pabna. The jury unanimously found four of the men guilty and the other four to be not guilty. The learned Sessions Judge accepted the finding of not guilty in respect of the four men and acquitted them. He disagreed with the finding of guilty in respect of the other four men, and referred the case to this Court recommending that the jury's verdict is perverse and these men should be acquitted. Upon hearing Mr. Lahiri the learned advocate for the four men who has taken us through the whole of the evidence, I am of opinion that there is no sufficient reason to set aside the unanimous verdict of the jury. I agree that the reference should be rejected and these men should be convicted of conspiracy to murder. It was argued that the trial was illegal inasmuch as it was held with the aid of seven jurors only. Under the proviso to S. 274 (2) where any accused person is charged with an offence punishable with death, the jury shall consist of not less than seven persons and if practicable of nine persons. In this case the order sheet shows that eighteen persons were summoned but only seven of them were present, the other eleven were absent and therefore the trial was held with seven jurors only. It has been argued that the Judge should have considered the second proviso to S. 276 which provides that

"in case of a deficiency of persons summoned, the number of jurors required may with the leave of the Court be chosen from such other persons as may present."

It was strenoously urged by Mr. Lahiri following the decision of Lort Williams, J, and S. K. Ghose, J., in the case of 1931 Cal 793 (1) that it was the duty of the Judge to apply his mind to the question whether it was practicable to have nine jurors and as the record did not show positively that he had applied his mind to that purpose, the trial should be held to be illegal. But the case of 1931 Cal 261 (2), decided on 25th July 1930 by Sir George Rankin C. J., C. C. Ghose, and Patterson, JJ., the argument was that where eighteen jurors were summoned and the accused was tried with seven jurors because only eight jurors attended, the trial Judge should have had two more jurors from among the bystanders. The learned Chief Justice remarked:

"But there is nothing on the record before us to show that this course was practicable in the circumstances of this case."

In the present case there were seven jurors present out of eighteen jurors summoned and the record does not show that it was practicable for the trial Judge to obtain two other qualified men to serve as jurors. I agree with the view expressed by Sir George Rankin in the case of 1931 Cal. 261 (2) and am of opinion that the trial was not illegal in this case.

K.S. *Reference rejected.*

A. I. R. 1935 Calcutta 413

MITTER, J.

Surendra Nath Saha and *others* — Appellants.

v.

Harendra Kumar Saha and *others* — Respondents.

Appeal No. 264 of 1932, Decided on 19th November 1934, from appellate decree of Sub-Judge, First Court, Faridpore, D/- 30th June 1931.

(a) Civil P. C. (1908), O. 1, R. 8—Representative suit with leave of Court — Death of plaintiff—Others can proceed with suit after bringing it to notice of Court—No substitution is necessary.

Where a representative suit is brought by a plaintiff with leave of Court, on his death, no substitution is necessary and others who have been granted authority to represent the class can go on and all that is required is that the Court should be apprised of his death : *Case law referred.* [P 415 C 2; P 416 C 2]

(b) Easement—Public right of way claimed over land of private owner — Evidence must be taken as a whole in presuming intention to dedicate land for public use — Mere fact of long user is not sufficient.

Where a public right of way is claimed over lands belonging to a private owner it is wrong to deal with the evidence in compartments. It is not legitimate to presume from long user an intention to dedicate and then examine the evidence adduced on behalf of the private owner and to see if the said presumption has been rebutted by him. The evidence must be examined as a whole and the inference either in favour of or against the dedication must be drawn. It would be wrong for the Court to draw the inference of dedication from the mere fact of long user, but the Court should require some additional evidence to support the claim of the public and the fact that cul de sac has been maintained and repaired at public expense would be a very cogent piece evidence: *English cases referred.* [P 416 C 2; P 417 C 1]

(c) Easement — Public highway — That it must begin and end in public place is not sine qua non.

It is usual that a public highway implies a thoroughfare that is, it must begin from and end in a public place, but is not sine qua non. There is no rule that a cul de sac cannot be a public highway. If there is access from a public place at one end only, a piece of ground can be a public highway, if the evidence supports the case of its dedication to public use. [P 417 C 1]

Brojolal Chakraburty, *Amarendra Nath Bose* and *Rajendra Bhusan Baksi* —for Appellant.

Bijan Kumar Mukherjee—for Respondents.

Judgment.—This appeal is directed against the judgment and decree of the Subordinate Judge, First Court of Faridpur which affirmed the decree of the Munsif, First Court of Goalundo. Four persons instituted the suit for declaration that the portion of the Khal, which is the subject-matter of the suit is a part of a public water passage and for injunction to restrain the defendants from obstructing the same. The suit was instituted by the said persons on behalf of the public. They applied for and were given the permission to sue on behalf of the public under the provisions of O. 1, R. 8, Civil P. C.

It is admitted that the Khal flows in a westerly direction from the Pachuria River, a tributary of the River Padma, passes over Dag No. 321, which belongs to the Secretary of State, then over Dag No. 303, which belongs to the contesting defendant, then over Dag No.299 which belongs to one Sorojendra Shaha, and goes to a long distance towards the west. The plaintiffs' case is that it extends many miles towards the west and terminates in a Beel called the

Singer Beel. The water course over Dag Nos. 321 and 303 is the subject matter of the suit as the obstruction has been placed in Dag No. 303. The Commissioner who was appointed for local investigation has not shown on his map the course of the whole khal. He has shown that it takes its rise from the Pachuria River, admittedly a public channel, near Dag No. 321, passes over the defendants' lands (Dag Nos. 321 and 303) and that it extends further westward. He has shown its course to about four miles further west of the defendants' lands but has not shown on his map either the Singer Beel or the course of the khal thereto, possibly because none of the parties desired him to go further down. In the Record of Rights prepared under Ch. 10, of the Bengal Act and finally published about 20 years before the suit Dags Nos. 303 and 321 have been recorded in the ownership of the contesting defendant and the Secretary of State respectively, but in respect of both of them the record is that the members of the public have a right of boat-passage. This record has remained unchallenged and the Secretary of State who has been made a defendant also does not contest the plaintiffs' claim. The existence of the khal for over 40 years is admitted by the contesting defendant-appellant, but his case is that the disputed portion of the khal is a private water-passage belonging to him, primarily intended for access to his Hat known as the Pachuria Hat which is on a part of Dag No. 303 and adjoining plots, and that boats that passed over Dag No. 303 had to pay to him and his Ijardars tolls for passage. Both the Courts below however on a detailed examination of the evidence have come to the conclusion that members of the public have been using the whole of the khal as of right for a very long period, and that the contesting defendant's case abcut the collection of tolls is false. The learned Subordinate Judge has placed reliance mainly on the following facts:

(i) Entry in the Record of Rights, recording Dag No. 303 as a part of a public highway, (ii) user by the public for a long time, (iii) falsity of the defendant's case as to the levy of tolls, iv) findings in a judgment of competent jurisdiction in a suit instituted on behalf of the public against the contesting defendant for establishment of a public highway over Dag No. 302 belonging to the defendant, (v) the terminus of the khal in the east in a public highway, e. g., the Pachuria River and (vi) the length of the khal, it is a long one which passes over the defendant's land, and goes beyond to the west to a length of 3 or 4 miles at least.

He has come to the conclusion that there was an intention to dedicate Nag No. 303 as a public passage and that it was so dedicated. Other contentions raised by the contesting defendant, one of them being that the suit was not maintainable as no special damage has been alleged or proved by the plaintiffs, have been negatived by the learned Subordinate Judge, and nothing has been said before me with regard to them. The only point that the defendant-appellant urges before me is that the learned Subordinate Judge has erred in law in inferring an intention to dedicate, inasmuch as it has not been proved that the khal terminates at a public place on the west. Put shortly his contention is that as

"a public right of way means a right to the public of passing from one public place to another public place,"

there is no scope in law for inferring an intention on the part of the owner of the land to dedicate it as a public highway, when it is not proved that both the terminii are public places. In support of this contention reliance has been placed on certain observations of Kay, J., in 44 Ch. D. 110 (1) at p. 121 and of Lord Dunedin in (1914) A. C. 338 (2) at p. 375. Reliance has also been placed on three passages to be found at pp. 235, 238 and 241 in Peacock on Easements.

Before dealing with this question it is necessary to decide a preliminary objection raised by the respondents as to the competency of the appeal. It appears that after presentation of the appeal to this Court one of the four persons who got permission to sue on behalf of the public, namely Uma Charan Shaha died. No attempt was made to substitute his legal representatives

1. Bourke v. Davis, (1890) 44 Ch D 110=38 W R 167=62 L T 34.
2. Folkstone Corporation v. Brockman, (1914) A C 338=83 L J K B 745 = 78 J P 273 = 110 L T 834=30 T L R 297.

within 90 days of his death, but some time later an application was put in on behalf of the defendant-appellant to set aside the abatement against his legal representatives and to bring them on the record. On this application a rule was issued but that rule was ultimately discharged. On these facts it is contended on behalf of the respondents that as a joint decree has been passed fn favour of four plaintiffs, the appeal cannot proceed at all in the absence of the legal representatives of the said deceased plaintiff. At the hearing an application has been put in on behalf of the appellant stating that as the suit has been instituted by the plaintiffs in a representative capacity no substitution of his legal representatives is necessary and praying that the memorandum of appeal may be amended by simply noting the death of Uma Charan Saha.

In the course of the argument on the preliminary point I indicated that if substitution of his legal representatives is not required under the law a misconceived application for substitution or a misconceived application to set aside an imaginary abatement would not affect the defendant appellant's appeal. Dr. Mukherjee, the respondents' advocate very properly and with his usual and characteristic fairness accepted this position, The broad question, namely whether substitution of the legal representatives of such a plaintiff is necessary, was accordingly argued before me. On this precise point there is, so far as I have been able to ascertain, no, decision of this Court and the decisions of the High Courts are conflicting. The earlier decisions of the Lahore High Court lay down that no substitution is necessary and that the appeal would not be incompetent (see for instance 1921 Lah. 390 (3). The later decisions of the same Court however do not lay down the rule in such an uuqualified form. In them a distinction is drawn between (a) the persons who get the permission from Court to sue on behalf of a class under para. 1, O. 1, R. 8 or who are made parties on their application under the provisions, of para. 2, O. 1, R. 8,and (b) the rest of the class. It is said that on the death of any one falling within class (a) substitution must be made and in default the appeal would be incompetent, but if a person of class (b) is put on the record, that is if his name finds a place on the record as respondent, although he did not apply to be made a party to the suit according to para 2, O. 1, R. 8 and thereafter dies the defendant appellant need not take notice of his death and his appeal would proceed. The reason for this distinction is sought to be based on the fact that persons falling within class (a) but not those falling in class (b) are parties to the suit and all the consequences for non-substitution of their legal representatives would ensue. 1924 Lah. 124 (4), 5 Lah 432 Notes (5) explaining 1919 Lah. 273 (6), and 1920 Lah. 338 (7): See also: 1931 Lah. 610 (8).

The Madras High Court is however inclined to the view that in no case substitution is necessary: 1931 Mad. 452 (9) and 1931 Mad. 590 (10). In the last mentioned case the point does not seem to have been argued and the learned Judge merely agreed with the concession made by the advocate. I am however not inclined to agree with the later decisions of the Lahore High Court and in my judgment no substitution is necessary in a representative suit instituted with the permission of the Court under O. 1, R. 8. It is essential in these matters to have regard to the nature of the suit and the nature of right sought to be enforced. To take an instance: a claim may be based on a customary right vested in the inhabitants of a village but the plaintiff may either claim relief in his personal character for an infringement, violation or disturbance thereof or claim relief on behalf of himself and all the other villagers. In the latter case all the villagers need not appear on the record but one or more of them may be autho-

3. Rahim Buksh v. Channam Din, 1921 Lah 390 =55 I C 210.

4. Wali Mahamad v. Barkhurdar, 1925 Lah 124 =86 I C 592=5 Lah 429.
5. Rup Chand v. Bunyad Ali, (1922) 5 Lah 432 notes.
6. Ram Dayal v. Mahammad Raju Shah, 1919 Lah 273=51 I C 437=46 P R 1919.
7. Udmi v. Hira, 1920 Lah 338=60 I C 111=1 Lah 582.
8. Mt. Afzal-un-nisa v. Fayazuddin, 1931 Lah 610=132 I C 657=13 Lah 195.
9. Venkatakrishna v. Srinivasachariar, 1931 Mad 452=130 I C 761=54 Mad 527.
10. Mahomed Kanni v. Naina, 1931 Mad 590= 132 I C 289=54 Mad 770.

rised by the Court to represent the absent persons. O. 1, R. 8 is a rule of convenience founded on the old chancery practice established to prevent delay, expense and multiplication of suits to establish the same right. The scope of a suit so instituted is in essence of a different nature than that cf a suit to enforce a claim based on a general right but in an individual or personal character. The person or persons derive their authority to represent the others of the class from the Court, and the Court can grant such authority to any person of the class. The decree passed in such a suit binds all the members of the class. Before decree the persons so authorised may with leave withdraw from the suit but in such a contingency any member of the class who is not already on the record can intervene, apply to the Court for necessary authority and continue the suit. If a suit founded on such a general right is instituted by some on behalf of the class, with no alternative prayer for relief in a personal character, a material defect in the permission granted under O. 1, R 8, para. 1, or the absence of such permission would be a fatal defect to the suit.

When such an authority to represent the class is conferred on more persons than one they in a body represent the class: 1925 Cal. 547 (11). When one one of such persons die I do not see how his legal representatives can come in their right of succession. If they fall within the class they can come only by obtaining the permission of the Court to represent the class or under the provisions of para. (2) of O. 1, R. 8. In the case of death of one of such persons, where authority to represent the class has been conferred on more than one persons, two possible views and two only can in my judgment be taken, namely, the surviving persons can go on with the suit or a fresh permission from the Court is necessary. The last mentioned position has been taken in the case of 1931 Mad. 452 (9) and would seem to follow from the reasonings of Mukherjee, J., given in 1925 Cal. 547 (11). The legal representative of the deceased plaintiff does not come in unless the Court expressly conferred the power of representation on him and his heir. I am however inclined to the view that on the death of such a person the others who had been granted by the Court the authority to represent the class can go on and all that is required is that the Court should be apprised of his death. But it is not necessary for me to decide the question, for had I been able to persuade myself that the appeal is a sound one on the merits I would have given the necessary permission to the defendant-appellant to have the surviving plaintiffs on the record as representing the public. I may however shortly state my reasons. No doubt a person authorized eo nomine under O. 1, R. 8, para. 1 is not strictly a bare trustee of the action. He himself has a beneficial interest in the action, for as a member of the class, and only as such he gets the advantage of a favourable decree and is affected by an adverse one : see Kekewich, J., in 94 L. T. 502 (12) But his position is certainly analogous to the position of a person who with others brings a suit with the sanction of the Advocate-General under the provisions of S. 92, Civil P. C. In such a case Lord Dunedin has held in 1921 P. C. 123 (13) that there is no defect in the suit and the survivors can proceed with the same. In my judgment therefore the discharge of the rule for setting aside the fancied abatement of the suit as against the legal representatives of Uma Charan Shah cannot affect the competency of the appeal.

I now come to the merits of the appeal. As I have already indicated the only point urged before me by the appellant is that the learned Subordinate Judge has erred in law in presuming an intention to dedicate the land in suit for public use, when it is not proved that both the terminii of the Khal abut on public places. I may in the first place remark that when a public right of way is claimed over lands belonging to a private owner it is wrong to deal with the evidence in compartments. It is not legitimate to presume from long user an intention to dedicate and then examine the evidence adduced on behalf of the private owner and to see if the said presumption has been rebut-

11. Abdul Hakim v. Abdui Gani, 1925 Cal 547=80 I C 26.

12. Woolfe v. Van Boolen, (1906) 94 L T 502.

13. Anand Rao v. Ramdas, 1921 P C 123=62 I C 737=48 I A 12=48 Cal 493 (P C).

ted by him. The evidence must be examined as a whole and the inference either in favour of or against the dedication must be drawn. : Lord Kinnear, in 1914 A. C. 338 (2) at p, 354.

The argument of the learned advocate for the appellants proceeds mainly upon the proposition that a public highway implies a thoroughfare, that is, it must begin from and end in a public place. This is usual in most cases but is not a sine qua non. There is no rule that a cul de sac cannot be a public highway. I do not see, if there is access from a public place at one end only, why a piece of ground could not be a public highway, if the evidence supports the case of its dedication to public use. Some of the earlier cases in England no doubt proceed upon the view that both the terminii must be at public places, but since the decision in 18 Q. B. 870 (14) the said view has not been subscribed to in England (see the old cases collected in footnote (q), p. 11, Vol. 16 of Halsbury's Laws of England). As I read the cases they lay down that in case of cul de sac, it would be wrong for the Court to draw the inference of dedication from the mere fact of long user, but the Court should require some additional evidence to support the claim of the public and that the fact that cul de sac has been maintained and repaired at public expense would be a very cogent piece of evidence. The fact that a passage leading from a public place does not stop at the land of the private owner but proceeds further to a great distance, as in the case before me, would be an important factor in support of the claim of the public, especially when it is not shown that the pathway has terminated in private grounds. To hold that a long khal, which begins from a public channel and extends for miles can be regarded as a matter of law to be a private boatway or a boatway restricted only to the use of a class of persons and over which the public would have in no circumstances a right of passage, simply because it is not proved that the other terminus is at a public place. would in Bengal lead to serious consequences. To me it seems that the fact that one of the terminii is on private land is a circumstance, and it may be an important circumstance, to be taken into consideration by the Court, of fact and when it has taken that into consideration and on the evidence has come to the conclusion that there has been in the past a dedication, the inference drawn by it is an inference of fact. In (1905) 2 Ch 188 (15), Farwell. J., says:

"Now the cases establish that a public road is prima facie a road that leads from one public to another public place: see per Lord Cranworth in 1 Macq. 451 (16) and 1 Macq. 455 (17) or as Holmes, L. J., suggests in Giants' Causeway case (18), there cannot prima facie be a right for the public to go to a place where the public have no right to be. But want of terminus ad quem is not essential to the legal existence of a public road; it is a question of evidence in each case. But in no case has mere user by the public without more been held sufficient."

In the case before me the evidence of user is not the only evidence on which the learned Subordinate Judge has relied. I have already summarized that evidence and the conclusion arrived at by the learned Subordinate Judge regarded as an inference on a question of fact is also correct. The cases cited by the learned advocate for the appellant namely, 44 Ch. 110 (1) and 1914 A. C. 338 (2), have no application to the facts of the case before me. In 44 Ch. 110 (1), a public right of boating was claimed on behalf of the defendant on a portion of the river Mole, a small tributary of the river Thames, between Cobhan Bridge and the dam of a paper mill. Kay, J., pointed out at p. 119 of the report, that although the river Mole was a natural stream, its depth, if the dam were removed, would not be sufficient even for a canoe to pass between the two bridges. Its depth was entirely artificial and upon it depended its capacity for boating purposes. It was in fact a long pond and although at some points along its course a public road ran near it, the road at these places was fenced from the water course by posts and rails. It was never used as a water way except for the purpose of pleasure and recreation.

The defendant who was not a riparian owner had put in boats at the places for about eight years and had let

14. Bateman v. Black, (1852) 18 Q B 870=21 L J Q B 406=17 Jur 386.

15. Attorney-General v. Antrobus, (1905) 2 Ch 188=74 L J Ch 599=3 L G R 1071=92 L T 790.
16. Campbell v. Lang, (1853) 1 Macq 451.
17. Young v. Cuthbertson, 1 Macq 455.
18. Freeman's Journal, 15-1-1898.

them out for hire. In these circumstances he refused to draw an inference of dedication. In 1914 A. C. 338 (2), the question of liability to repair a road was the question at issue. There the road was made in 1827 by Jacob, Earl of Radnor, over lands of which he was a life-tenant. In 1835 the High-way Act was passed. Thereafter roads could not be dedicated so as to be deemed public highways, reparable by the inhabitants at large, except in accordance with statutory requirements, which had not been complied with in the case. The user which was material therefore was that between 1827 and 1835 or 1836. The Earl of Radnor on completion of the road erected many houses abutting on it which he let out to tenants. The road was necessary for his lessees, their servants and trades people. The road was all along in the course of 80 years repaired by the owner of the soil and never at public expense. Jacob, Earl of Radnor, was a life tenant and had no power to dedicate a right of way to the public. In 1825 his disability in this respect was removed by a private Act of Parliament so as to enable him "to allot and set out a component part of the ground for public squares, roads, streets, avenues etc," but during the short period from 1827 to 1836 he made no actual allotment for such purposes. In these circumstances it was held that the user did not lead to the inference of dedication to public use. Lord Kinnear moreover pointed out that the presumption of dedication from certain facts is not a presumption juris et de jure. In my judgment therefore the decree made by the learned Subordinate Judge is right and ought to be maintained. The appeal is accordingly dismissed with costs. Leave to appeal under the Letters Patent asked for is refused.

K.S. *Appeal dismissed.*

A. I. R. 1935 Calcutta 418

GUHA AND BARTLEY, JJ.

Midnapore People's Urban Co-operative Credit Society, Ltd.—Plaintiff.

v.

Bhupendra Nath Basu and *others*—Defendants.

Civil Ref. No. 6 of 1934, Decided on 4th January 1935.

Execution — Execution of void decree — Solenama filed by judgment-debtor and agreed to by decree-holder and recorded by Court can be enforced by execution—Consent decree.

The solenama has the force of a valid and complete contract between the parties, and enforceable in execution as such. A solenama filed by the judgment-debtor in the execution case started for the purpose of executing a decree which may be invalid decree, agreed to by the decree-holder and recorded by the Court, can be enforced in execution, in terms of the agreement between the parties. [P 419 C 2]

Radhabinode Pal and *Sarat Chandra Jana*—for Reference.

Apurbadhan Mukherjee—Against Reference.

Order.—This is a reference under O. 46, R. 1, Civil P. C., made by the Subordinate Judge, Third Court, Midnapore, inviting the decision of this Court on two questions of law, on the facts and circumstances stated in the letter of reference. The plaintiff decree-holder, the Midnapore People's Urban Co-operative Credit Society, Ltd., obtained a decree for recovery of money lent on a bond by the Society to the defendant, in Suit No. 43 of 1929 in the Court of Small Causes at Midnapore. There was no contest in the suit, and a decree was passed ex parte. The decree-holder Society, in the first execution case, failed to realize any part of the decretal amount by attachment of the salary of the judgment-debtor; when the second execution case was started, the judgment-debtor made two payments, and filed a petition in Court agreeing to satisfy the debt due to the decree-holder Society, by instalments of Rs. 10 a month. It appears that in terms of this agreement dated 26th July 1930, the amount of Rs. 150 was realized by the decree-holder.

When the last execution, which has given rise to this reference, was started for the realization of the decretal amount, that remained unpaid, the judgment-debtor having failed to comply with the terms of the agreement referred to above, objection was raised by the judgment-debtor to the execution, on the ground that the decree sought to be executed was void and without jurisdiction. The case of the judgment-debtor was that the civil Court had no jurisdiction to pass a decree in view of the provisions contained in S. 43, Co-operative Societies Act (2 of 1912) and R. 22 of the Rules framed thereunder, by the Government of Bengal. It was urged on behalf of the judgment-debtor that a claim on

a bond by the Society against a member of the Society was a dispute as contemplated by the above provisions of the law, and as such it had to be referred to the Registrar of the Society for decision, the jurisdiction of the civil Court in cases of the present description having been excluded by the operation of R. 22 mentioned above; the sub-R. (1), R. 22 making a reference to the Registrar obligatory. It was on the other hand contended on behalf of the Society that a claim for money based upon a bond executed by a member in favour of a Co-operative Credit Society, was not a dispute within the meaning of Rule 22, and that the jurisdiction of the civil Court was not therefere taken away by the statute. It was further contended that it was not open to the judgment-debtor to raise objection to the manner of realization of the money due from him, after he had a filed a solenama on 26th July 1932, which was an agreement governing the rights of parties in the matter of satisfaction of the decretal debt. The learned Subordinate Judge has formulated the two questions of law referred by him to this Court in this way:

"(1) Whether the jurisdiction of the civil Court is barred in respect of suit upon bonds brought by Co-operative Credit Societies against their members by R. 22 of the Rules framed by the Local Government under S. 43, Co-operative Societies Act? Whether such suits are barred in cases where the claim of the Society was not disputed by the member before the suit was filed? (2) Whether a solenama filed by a judgment-debtor in an execution case brought to execute a void decree, agreed to by the decree-holder and recorded by the Court, can be enforced by execution?"

In view of the facts and circumstances of the case before us, we propose to deal with the second of the two questions mentioned above first. There can be no doubt that the judgment-debtor admitted existence of the debt, evidenced by the bond on the footing of which a decree was passed against him. There was no dispute as to the same; there was no contest, and an ex parte decree was suffered to be passed; two payments were made towards satisfaction of the decree, and it was finally and conclusively settled as between the parties concerned by an agreement that the entire debt was to be satisfied by payments by instalments; and that agreement was partly performed, as it is apparent from the petition filed in Court by the decree-holder society on 3rd August 1933. According to the terms of the agreement any failure of payment by instalments was to be followed by execution of the decree for realization of the amount due.

On the materials on the record, we are of opinion that the agreement for satisfaction of the debt, filed in Court on 26th July 1930, which was partly performed, was a valid agreement between the parties, and the Subordinate Judge, is in our judgment right in his observation that even if nothing was recoverable under the decree passed by the Court in Suit No. 43 of 1929, on the footing that it was not a valid decree under the law, decree having been passed by a Court which was not competent to pass the same, the amount sought to be realized in the present execution was realizable on the terms of the solenama, which had the force of a valid and complete contract between the parties, and enforceable in execution as such. The second question referred to us is therefore answered in the manner following:

On the facts and in the circumstances of the case before us, the solenama filed by the judgment-debtor in the execution case, started for the purpose of executing a decree which may be an invalid decree, agreed to by the decree-holder and recorded by the Court, can be enforced in execution, in terms of the agreement between the parties. It is not necessary to give any decision on the first question referred to this Court, regard being had to our decision on the second question, as mentioned above; and we do not express any opinion on the question whether the decree passed in Suit No. 43 of 1929 is void or not, on the ground suggested in the first question referred to us for decision, and which it is wholly unnecessary to decide in the present case.

K.S. *Reference answered.*

** A. I. R. 1935 Calcutta 419

(Full Bench)

DERBYSHIRE, C. J., MUKERJI, COSTELLO, LORT-WILLIAMS AND JACK, JJ.

In the matter of *Tushar Kanti Ghosh. Editor, Amrit Bazar Patrika*, and *another*.

Contempt of Court Proceedings, Decided on 8th April 1935.

* * (a) **Contempt of Court** — (Per *Full Bench*, excepting *Mukerji, J.*)—**Contempt of High Court can be punished by summary procedure — Contempt can be committed apart from any case in the High Court.**

Per *Derbyshire, C. J.*—The right to punish by summary procedure contempts of Court by scandalising the Court still exists: *R.* v. *Gray*, (1900) 2 *Q B* 36; *Rex* v. *New Statesman*, (1928) 44 *T L R* 301; 1914 *Cal* 9; 41 *Cal* 173; *Mac Dermott* v. *Judges of British Guiana*, (1868) 2 *P C* 341 and *R.* v. *Davies*, (1906) 1 *K B* 33, *Appr.*; 10 *Cal* 109 and 26 *C L J* 459, *Foll*; *McLeod* v. *St. Aubyn*, (1899) *A C* 549 (561), *Disc.* [P 423 C 2; P 424 C 1]

The contention that there can be no contempt of Court except in respect of a case which has been heard or is pending is wrong. [P 424 C 1]

It is immaterial whether the attack on the Judge is with reference to a cause about to be tried, or actually under trial, or recently adjudged; in each instance, the tendency is to poison the fountain of justice, to create distrust, and destroy the confidence of the people in the Courts, which are of prime importance to the public in the protection of their rights and liberties. [P 426 C 1]

Per *Costello, J.*—It cannot be gainsaid that the Courts of Record have an inherent power of punishing and in a summary way any act done or writing published calculated to bring the Court or a Judge of the Court into contempt or to lower its authority, (i. e. the class of contempt characterised by Lord Hardwicke in *In re Read and Hoggonson* (1742) 2 *Atk.* 471, as scandalising a Court or a Judge). That is part of the common law of England and was so at the time when that law was introduced into India in the 18th century and thenceforward administered by the Courts in this country. Thus it comes about that the High Courts in India have inherited or acquired by Charter a similar power. [P 445 C 2]

Per *Mukerji, J.*:—

Every form of contempt of Court is not to be dealt with in the summary form. The embarrassing situation in which the Court itself is placed when it adopts that procedure is apparent, and the disadvantages that it causes to the party brought up before the Court to be dealt with, precluding him from taking a plea and depriving him of his defence are obvious. These are no technical considerations but very serious considerations indeed. And unless the Court is sure that such a procedure has ever been adopted in any case similar in nature to the one before it, or the Court feels that no other efficient remedy is really available, the Court cannot justify its summary action in any given case. Vindication of the dignity of the Court apart from any question of a tendency to obstruct justice or prejudice a trial in connexion with any particular case has never been considered in any decision as justifying summary proceedings in contempt. It is this actual interference with justice which is involved in contempt of Court with regard to which Courts have chosen to take action in summary proceedings. [P 432 C 1,2; P 433 C 1]

The object of the power to punish summarily is protective and admonitory; the reason of the Court's jurisdiction to commit for contempt is not for the protection of the dignity of the Court or of its individual members but for the protection of the public, though it may be and often is that the public are to be protected by the upholding and maintaining untarnished the glory and reputation of the Court as regards its authority, fairness and impartiality. The true point of view from which the question has to be looked at in order to ascertain whether a scandalisation of the Court is a contempt deserving of being dealt with summarily is to examine the circumstances of the case and see whether in reality there is a tendency in the offending publication to obstruct the ordinary course of justice or prejudice the trial. [P 433 C 1,2]

The essence of contempt is action or inaction amounting to an interference with or obstruction to or having a tendency to interfere with or to obstruct the due administration of justice. Lowering the dignity of the Court or shaking the confidence of the public in it is undoubtedly reprehensible. But if general remarks impugning the independence of a Court are made, such remarks can tend to interfere with or obstruct the administration of justice, only indirectly and remotely and in an ideal sense. And in such cases there can be no warrant for the exercise of the extraordinary powers which the Court possesses to deal with contempts : *Case law fully reviewed*; 1935 *All* 1, *Diss.* [P 435 C 1]

* * (b) **Contempt of Court—Meaning.**

Per *Full Bench.*—It is as much a contempt of Court to say that the judiciary has lost its independence by reason of something it is alleged to have done out of Court, as to say that as a result of a case it has decided, it is clear that it has no independence or has lost what it had. [P 426 C 1, 2]

* * (c) **Contempt of Court—Defined.**

Per *Mukerji, J.*—There are three different sorts of contempt. One kind of contempt is scandalising the Court itself. There may likewise be a contempt of the Court in abusing parties who are concerned in causes. There may be also a contempt of Court in prejudicing mankind against persons before the cause is heard. There cannot be anything of greater consequence than to keep the streams of justice clear and pure, that parties may proceed with safety both to themselves and their characters: *In re Read and Hoggonson*, (1742), 2 *Atk* 469, *Adopted.* [P 429 C 2]

Contempt may be in respect of orders of Court or may be by letters or pamphlets addressed to the Judge who had to decide upon the case, with the intention either by threats, or flattery or bribery, to influence his decisions or constructive contempt depending upon the inference of an intention to obstruct the course of justice: *Birch* v. *Walsh*, 10 *Ir Eq Rep* 93, *Appr.* [P 429 C 2]

The word 'Court' means the Judges who constitute it and who are entrusted by the constitution with a portion of jurisdiction defined and marked out by the common law, or Acts of Parliament. 'Contempt of Court' involves two ideas: contempt of their power and contempt of

their authority. The word 'authority' is frequently used to express both the right of declaring the law which is properly called jurisdiction and of enforcing obedience to it, in which sense it is equivalent to the word 'power'; but by the word 'authority' that coercive power of the Judges is not meant but the deference and respect which is paid to them and their acts from an opinion of their justice and integrity.
[P 430 C 2]

**** (d) Precedeents—Privy Council—Dictum (obiter) is entitled to highest respect in precedents.**

Per *Mukerji, J.* — Dictum of the Judicial Committee even if it be an obiter is entitled to the highest respect from all Indian Courts.
[P 442 C 1]

*** (e) Privy Council— Privy Council decisions are not binding on King's Bench.**

Per *Mukerji, J.* — Decisions of the Privy Council, though entitled to very great weight everywhere, are not binding on King's Bench Division. [P 442 C 1]

*** * (f) Letters Patent (Calcutta), Cl. 41—Contempt proceedings are not within 'original criminal jurisdiction.'**

Per *Derbyshire, C. J.* and *Costello, J.* — Proceedings for contempt of Court do not come within the phrase "original criminal jurisdiction of this Court" in Cl. 41. Proceedings for contempt of Court are of a peculiar nature; though it may be that in certain aspects they are quasi criminal they are not exercised as part of the original criminal jurisdiction. [P 451 C 2]

*** * (g) Contempt of Court—Leave to appeal to Privy Council ought not to be granted.**

Per *Derbyshire, C. J.* and *Costello, J.*—Every Court of Record is the sole and exclusive judge of what amounts to a contempt of Court and leave to appeal ought not to be granted unless there was something in the order committing the appellant which rendered it improper, and therefore the subject of appeal. [P 453 C 2]

IN THE FULL BENCH CASE: *Tej Bahadur Sapru* and *C. C. Biswas* — for the Editor.

S. N. Banerji and *S. C. Mitter*—for the Printer.

IN THE P. C. APPLICATION: *S. N. Banerji, C. C. Biswas* and *B. K. Basu*—for the Editor.

S. N. Banerji, C. C. Biswas and *N. C. Chunder*—for the Printer.

Derbyshire, C. J.—On 21st March 1935, a speech was made in the Legislative Council of Bengal by Mr. N. K. Basu in which an attack was made upon the Chief Justice and Judges of this Court. On 23rd March this speech was reported in the Amrita Bazar Patrika, a newspaper having a large circulation in Calcutta and other parts of Bengal. In the same issue of the newspaper a leader appeared headed "Calcutta High Court". After reading the said leader which was formally brought to the notice of the Judges of this Court upon an affidavit sworn by Mr. Collet, the Registrar of this Court on its Original Side, I, on 28th March after consultation with the Judges of the Court, directed that a rule should issue upon the Editor (Tushar Kanti Ghose) and the Printer and Publisher (Tarit Kanti Biswas) ordering that the two said persons should show cause before this Court, on 5th April, why they should not be committed or otherwise dealt with according to law for contempt of Court alleged to have been committed by them in having unlawfully published in the said issue of the said newspaper the article mentioned. The printer and publisher was served with the rule on 29th March, but the Editor could not be served, because of his absence from Calcutta, until the 1st April. In the meantime, in its issue of 30th March the Amrita Bazar Patrika published the salient parts of the rule (except the leader) in the paper. On 1st April, Mr. Collet applied to a Bench of this Court consisting of Costello, J., and myself for leave to serve notice of motion of less than four days. Such leave was granted, although in my view it was not necessary, lest any question should arise as regards the length of service later. The Editor was served on 1st April. On the following day an application was made by Mr. Biswas on behalf of the Editor that the returnable date for the Rule be made 8th April, but this was refused by the Bench consisting of Costello, J., and myself. At the hearing of the said application by Mr. Biswas I mentioned that the Amrita Bazar Patrika had published the rule as aforesaid in its issue of 30th March and this was not denied by Mr. Biswas. Mr. Biswas stated that he did not intend to raise any question as to validity of service. On the same day, 2nd April, permission was asked on behalf of the Editor that Sir Tej Bahadur Sapru, an advocate practising in the Allahabad High Court, should be granted permission to appear for the Editor. Such permission was granted by me.

The affidavit of Mr. Collet, the Rule and the copy of the Amrita Bazar Patrika of Saturday, 23rd March, are before

the Court, as also are affidavits of the Editor and the Printer and Publisher which were filed and delivered to the Court on 4th April. No objection has been taken to the length of notice; and from the affidavits filed by the respondents it is clear that they have had ample time in which to prepare their reply. The matter came on for hearing before a Full Bench of this Court consisting of myself, Mukerji, J., Costello, J., Lort-Williams, J., and Jack, J., on 5th April, when the Editor was represented by Sir Tej Bahadur Sapru and Mr. C. C. Biswas, whilst the Printer and Publisher was represented by Mr. S. N. Banerjee and Mr. S. C. Mitter.

The first part of the leading article referred to, reads as follows:

We are glad to find that in the Bengal Legislative Council yesterday there was a discussion about administration of the Calcutta High Court. Every word of Mr. N. K. Basu was true. It is so unfortunate and regrettable that at the present day the Chief Justice and the Judges find a peculiar delight in hobnobbing with the Executive, with the result that the judiciary is robbed of its independence which at one time attracted the admiration of the whole country. The old order of things has vanished away. We wish the Chief Justice and the Judges appreciate the sentiments of the public. The generation that has gone by should be an ideal to them.

The rest of the article is concerned with matters which this Court does not think necessary to take note of. At the hearing, at a very early stage, I requested Sir Tej Bahadur Sapru to give his attention to the words: "It is so unfortunate . . . . the admiration of the whole country."

Sir Tej Bahadur argued that the article as a whole was not a contempt of Court, or if one, only a technical contempt not obstructing the course of justice, nor interfering with any trial and that the construction most favourable to the respondents should be placed upon it. He then proceeded to argue that having regard to the nature of the article, the Court had no jurisdiction to take this summary procedure; that if it did amount to contempt, the proper procedure was by way of information under S. 194, Criminal P. C.; that other legal remedies were open to this Court to protect its honour; and that the Law Member, Sir B. L. Mitter, had in the Legislative Council vindicated the Court. With regard to the proceedings in the Legislative Council, this Court cannot take any action. With regard to the words, "Every word of Mr. N. K. Basu was true", the Court decided to take no action upon them as it considered that the subsequent words reflecting on the Chief Justice and the Judges and their independence were far more serious. As regards the contention that S. 194, Criminal P. C., provided the proper remedy, this section reads as follows:

(1) The High Court may take cognisance of any offence upon a commitment made to it in manner hereinafter provided. Nothing herein contained shall be deemed to affect the provisions of any Letters Patent granted under the High Courts Act, 1861, or any other provisions of this Code. (2) (a) Notwithstanding anything in this Code contained, the Advocate-General may, with the previous sanction of the Governor-General in Council or the Local Government exhibit to the High Court, against persons subject to the jurisdiction of the High Court, informations for all purposes for which Her Majesty's Attorney General may exhibit informations on behalf of the Crown in the High Court of Justice in England. (b) Such proceedings may be taken upon every such information as may lawfully be taken in the case of similar informations filed by Her Majesty's Attorney General so far as the circumstances of the case and the practice and procedure of the said High Court will admit.

The rest of the section is not relevant. It will be noticed that for any proceedings under S. 194, Criminal P. C., to be taken, the sanction of the Governor-General or the Local Government is necessary. In previous cases of contempt of Court it has been the practice of this Court to issue a rule upon its own motion—see the case of 10 Cal 109 (1), where a libel was published concerning one of the Judges regarding his conduct in a case which had concluded, and this Court acted by way of a rule and summary procedure. The respondent contended that he ought to be proceeded against under the provisions of the Penal Code and the Criminal Procedure Code, but this Court took the view that summary procedure was the proper procedure and on a consideration of the matter in the Privy Council it was held that this procedure was correct. The same point was also taken in 26 C L J 459 (2)—and overruled—see per Ashutosh Mukerjee, J. at

1. Surendra Nath Banerjee v. Chief Justice and Judges of Calcutta High Court, (1884) 10 Cal 109=10 I A 171 (P C).
2. In the matter of the Amrita Bazar Patrika, 1918 Cal 988=45 I C 338=19 Cr L J 530=45 Cal 169=26 C L J 459 (S B).

pp. 541-542. That the summary jurisdiction in respect of a contempt of this Court which is a Court of Record does exist and has been exercised is beyond all question. It was then argued by Sir Tej Bahadur Sapru that the words complained of could be no contempt cf Court because they did not refer to any case which has been heard or is pending; also that contempt of Court proceedings for scandalizing the Court itself had become obsolete. The latter contention was based upon the remarks of Lord Morris in (1899) A C 549 (3), at p. 561, which says:

It (i. e. the summary process for contempt by scandalising the Court) is a summary process, and should be used only from a sense of of duty and under the pressure of public necessity; for there can be no landmarks pointing out the boundaries in all cases. Committals for contempt of Court by scandalising the Court itself have become obsolete in this country. Courts are satisfied to leave to public opinion attacks or comments derogatory or scandalous to them. But it must be considered that in small colonies, consisting principally of coloured populations, the enforcement of proper cases of committal for contempt of Court for attacks on the Court may be absolutely necessary to preserve in such a community the dignity of and respect for the Court.

Now this is not a case of a small colony consisting of coloured populations and we must therefore examine Lord Morris' words that committals for contempt of Court by scandalising the Court itself have become obsolete in England in the list of subsequent events. The year following the decision of (1899) A C 549 (3), the case of (1900) 2 Q B 36 (4), came before a Court in England consisting of the Lord Chief Justice (Lord Russell) and two other Judges. A journalist had written scandalous matters of a Judge at the Birmingham Assizes in connection with his words in Court. He wrote them after the case was over but before the Assizes had concluded. It was held that this was a contempt of Court. Gray apologised to the Court for his contempt and was fined £100 and ordered to pay £25 costs. Lord Russell said that but for the apology the Court would have thought it its duty to send him to prison for a not inconsiderable period of time (p. 41). That case was reported in the Law Reports and a footnote states that it is being reported as showing that in England a Court will still, where circumstances demand its action, exercise its jurisdiction to punish by summary process a contempt by scandalising the Court, although no contempt has been committed exfacie of the Court or in respect of a case pending. (1900) 2 Q. B. 36 (4) was followed by the present Lord Chief Justice (Lord Hewart) in 1928 in 44 T L R 301 (5), where the summing up of the Judge in a libel action was commented upon and it was said that an individual holding views of Dr. Stopes on birth-control cannot apparently hope for a fair hearing in a Court presided over by Avory, J., and there are many Avorys.

It was held that the respondent was guilty of contempt, but as he had apologised, he was ordered merely to pay the whole costs of the proceedings. Lord Hewart in his judgment said :

Mr. Jowitt (Counsel for respondent) in his extremely able argument had used from time to time phrases beginning with a conditional clause : If on the fair meaning of the words, they mean so and so; then he expressed apology. In the Court's opinion there was no room for these conditional clauses. The words meant that in the opinion of the writer it was impossible for a person holding certain views to get a fair hearing before that Judge. If the expressions had ended with these conditions, it would have been necessary to take a very serious view of the matter, but before the end that which had been conditional and reserved became unconditional and unreserved and indeed was in that form in Mr. Sharpe's affidavit.

That such is the law in India is clear from the judgment of Ashutosh Mukerjee, J., in 26 C L J 459 (2) at p. 543, where the learned Judge says as regards the remarks of Lord Morris in (1899) A C 549 (3) :

I do not read the statement that committals for contempts of Courts by scandalising the Court itself had become obsolete in England, as destructive of the authority of the earlier decisions on the subject. Indeed, the proposition taken literally seems to go too far and it is significant that, in the very next year, proceedings were taken in England for contempt of Court in the case of (1900) 2 Q B 36 (4). There can I think be no doubt that where the circumstances clearly demand action of this description, the Court will not hesitate to exercise its undoubted power to punish on summary process the contempt of scandalising it and thereby attempting to interfere with the due course of justice.

There can be no question therefore that the right to punish by summary

3. McLeod v. St. Aubyn, (1899) A C 549=68 L J P C 137=15 T L R 487=48 W R 173=81 L T 158.

4. Reg v. Gray, (1900) 2 Q B 36=69 L J Q B 502=16 T L R 305=64 J P 484=48 W R 474=82 L T 534.

5. Rex v. Editor of the New Statesman, (1928) 44 T L R 301.

procedure contempts of Court by scandalising the Court still exists. As regards the contention that there can be no contempt of Court except in respect of a case which has been heard or is pending, I am unable to accept this proposition. In (1900) 2 Q B 36 (4) at page 40, Lord Russell said :

Any act done or writing published calculated to bring a Court or a Judge of the Court into contempt, or lower his authority, is a contempt of Court. That is one class of contempt. Further, any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts is a contempt of Court. The former class belongs to the category which Lord Hardwicke, L. C., characterised as 'scandalising a Court or a Judge.' That description of that class of contempt is to be taken subject to one and an important qualification. Judges and Courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no Court could or would treat that as contempt of Court. The law ought not to be astute in such cases to criticise adversely what under such circumstances and with such an object is published; but it is to be remembered that in this matter the liberty of the press is no greater and no less than the liberty of every subject of the Queen. Now, as I have said, no one has suggested that this is not a contempt of Court, and nobody has suggested, or could suggest, that it falls within the right of public criticism in the sense I have described. It is not criticism; I repeat that it is personal scurrilous abuse of a Judge as a Judge. We have therefore to deal with it as a case of contempt and we have to deal with it brevi manu. This is not a new-fangled jurisdiction; it is a jurisdiction as old as the common law itself, of which it forms part. It is a jurisdiction the history, purpose and extent of which are admirably treated in the opinion of Wilmot, C. J. (then Wilmot, J.) in his Opinions and Judgments, in Wilmot's Opinions, 243 (6).

Judgment was never delivered in Wilmot's Opinions 243 (6), but the judgment written by Wilmot, C. J., was published some years afterwards and has been approved as just shown by the Chief Justice in (1900) 2 Q B 36 (4) and in many other cases including 26 C L J 459 (2) in 1917 by Ashutosh Mukerji, J., at p. 539. Wilmot's opinion was discussed and approved by Wills, J., in (1906) 1 K B 32 (7), at p. 41, where the question was raised as to whether inferior Courts in England should be protected by the High Court against interference in their proceedings by comments in the press. At p. 40 Wills, J., says :

And a considerable part of the undelivered judgment of Wilmot, C. J., to which we have referred is devoted to showing that the real offence is the wrong done to the public by weakening the authority and influence of a tribunal which exists for their good alone. He adds that such conduct is pre-eminently the proper subject of summary jurisdiction. Attacks upon the Judges, he says, excite in the minds of the people a general dissatisfaction with all judicial determinations . . . . . and whenever men's allegiance to the laws is so fundamentally shaken, it is the most fatal and dangerous obstruction of justice, and in my opinion calls out for a more rapid and immediate redress than any other obsrtuction whatsoever, not for the sake of the judges as private individuals, but because they are the channels by which the King's justice is conveyed to the people. To be impartial and to be universally thought so are both absolutely necessary for giving justice that free, open, and unimpaired current which it has for many ages found all over this kingdom.

I will now turn to the words complained of and consider what is their ordinary meaning. They consist of two allegations: (1) that the Chief Justice and Judges take a peculiar delight in hobnobbing with the Executive; and (2) with the result that the judiciary is robbed of its independence which at one time attracted the admiration of the whole country. The word "hobnobbing" is defined in dictionaries as "drinking with or being on familiar terms with." If the first allegation had stood alone, it would be scurrilous abuse with a suggestion which might or might not have been contempt of Court; but when the words follow: "with the result the judiciary is robbed of its independence which at one time attracted the admiration of the whole country" the words beyond doubt make a very serious allegation upon the Chief Justice and Judges of this Court in their judicial capacities.

The plain inference is that the Chief Justice and Judges by their conduct have put themselves in a position in which they cannot exercise their judicial functions with independent minds; that they lean towards the Executive in matters coming before them in which the Executive may be interested; and that they are no longer capable of doing even-handed and impartial justice according to law. In this Court there are at all times cases being tried or waiting to be tried in which the Crown through some branch of the Executive is interested, either as a prosecutor or a litigant, and the inference is that in these

6, Rex v. Almon, (1765) Wilmot's Opinions 243.
7. Rex v. Davies, (1906) 1 K B 32=75 L J K B 104=22 T L R 97=54 W R 107=93 L T 772.

cases the Chief Justice and the Judges cannot do even-handed and impartial justice. This Court has, and I trust always will have, the deserved reputation of doing even-handed and impartial justice. Once the impression is created in the minds of the public that the Chief Justice and the Judges of this Court are not independent, and that they lean towards the Executive and that consequently in matters in which the Crown is concerned either as prosecutor or litigant, the case of the prisoner or accused or the opposite party cannot or will not be heard and determined solely according to the evidence and the law, the confidence of the whole community in the administration of justice in this province of Bengal will be undermined. No greater public mischief than that can be possible. Such words are in my view clearly within the definition of contempt by scandalising as enunciated by Lord Russell in (1900) 2 Q B 36 (4) and are clearly within the definition given by Wilmot, C. J.

In the course of his argument Sir Tej Bahadur Sapru cited a book on contempt of Court by Sir John Charles Fox in which the opinion expressed by Wilmot, C. J., in Wilmot's Opinions 243 (6) was attacked and alleged to be not historically accurate. That same opinion had previously been published by Mr. Fox, as he then was, in the Law Quarterly Review Vol. 24, pp. 184 and 266. That opinion was quoted in 26 C L J 459 (2) and was dealt with by Ashutosh Mukerji, J., at p. 541 as follows:

> I am not unmindful that a learned writer (Mr. John Charles Fox in the Law Quarterly Review Vol. 24, pp. 184 and 266) has maintained the view that the opinion expressed by Wilmot, C. J., in Wilmot's opinions 243 (6) is not historically accurate. Let us assume that this criticism is well-established on the ancient authorities, and that while originally the superior Courts of Common Law had jurisdiction to punish only disobedience to the King's writ summarily by fine and imprisonment upon attachment, they had jurisdiction only on indictment or bill to punish contempts in facts and other obstructions to the administration of justice such as libelling the Court or the Judge. Let us assume also that the development of the summary jurisdiction to punish contempts has been of slow growth and that the earliest recorded case of libel or slander on the Court or a Judge by a stranger unconnected with the service of process, which was punished summarily by attachment, cannot be traced to a period anterior to 1720. Surely this cannot but be regarded now as a matter of other than antiquarian interest. We have abundant 'competent authority' 'not irreconcilable to clear legal principle' in support of the view that a superior Court of Record does possess the power to punish summarily contempts of Courts of the description now before us. Sir Barnes Peacock, C. J. maintained and applied this principle in 8 W R Cr 32 (8) and *Re William Taylor* (9) which upon a full review of the authorities was reaffirmed in 1914 Cal 69 (10). We have also the pronouncement of the Judicial Committee to the same effect in (1868) 2 P C 341 (11), where they confirmed the view indicated in the earlier cases of 3 Moo P C 361 (12) and 8 Moo. P. C. 47 (13). As regards the power of Indian High Courts, in a case of this character, we have two decisions by the Judicial Committee, namely, 10 Cal 109 (1) and 29 All 95 (14). In the former case it was ruled that the High Court had power to punish in a summary manner, by fine or imprisonment or both, a contempt of Court, which, in that case, as in the present, consisted in the publication out of Court of a libel on one or more of the Judges. In the latter case, the Judicial Committee held that there was no doubt that the publication of the libel in question constituted a contempt of Court, which might have been dealt with by the High Court in a summary manner, by a fine or imprisonment or both. In my opinion, these repeated pronouncements by the Judicial Committee conclude the matter, so far as 'competent authority' is concerned, and no useful purpose can be served by an examination of the historical basis of the opinion expressed by Wilmot, C. J.

I have given attention to the arguments of the learned advocates appearing for both the editor and the printer to the effect that these words are reasonable criticism and fair comment on a matter of public interest. To be fair comment they must have some basis in fact. These allegations are untrue. The words used are intemperate "taking peculiar delight in hobnobbing; the judiciary is robbed of its independence." Such words are not

> reasonable argument or expostulation offered against any judicial act as contrary to law or the public good

such as no Court could or would treat as contempt (to use the words of Russell, C. J., in (1900) 2 Q. B. 36 (4) p. 40),

8. Re Abdool and Mahtab, (1867) 8 W R Cr 32.
9. (1869) 1918 Cal 713=44 I C 930=19 Cr L J 402.
10. Legal Remembrancer v. Matilal Ghose, 1914 Cal 69=20 I C 81=14 Cr L J 321=41 Cal 173 (S B).
11. McDermott v. Judges of British Guiana, (1868) 2 P C 341=5 Moo P C (n s) 466=17 W R 352=20 L T 74.
12. Smith v. Justice of Sierra Leone, (1841) 3 Moo P C 361.
13. Rainy v. Justices of Sierra Leone, (1852-53) 8 Moo P C 47.
14. Re Sarbadhicary, (1906) 29 All 95=34 I A 41 (P C).

but are definite allegations that the Court has lost its independence. It is argued that the words

> which at one time attracted the admiration of the whole country. The old order of things has vanished. We wish the Chief Justice and and Judges appreciate the sentiments of the public. The generation that has gone by should be an ideal to them

show that the article was no more than a sincere attempt to draw the attention of the Judges to a matter of public concern. I do not accept that view. It seems to me that the addition of the subsequent words was a device intended to give the writer some plausible way out of his difficulties if he found himself in trouble by reason of the words he had written previously. Whether that view is correct or not I find nothing in the rest of the article, either as regards the words preceding or following those complained of, which make them any the less a contempt of Court. Mr. Banerji suggested that the words were a criticism of the administration of the Court, not of its judicial work. If so, how could the judiciary be said to be robbed of its independence? Further it was the independence of the judiciary, not the independence of the administration of the Court "which at one time attracted the attention of the whole country." The whole country might know of the judiciary of the Court, but it could hardly know of the administrative side of the Court which is of much lesser importance. With regard to the contention that it is not contempt of Court because it has not arisen out of any case which has been heard or a case pending, it must be remembered that there are at all times many cases pending in this Court in which the executive in some branch or other is concerned. Such cases both on the criminal and civil sides of the Court are day in day out being tried or waiting to be tried. On this point Ashutosh Mukerjee, J., in 26 C. L. J. 459 (2), says at p. 540:

> From this standpoint, it is immaterial whether the attack on the Judge is with reference to a cause about to be tried, or actually under trial, or recently adjudged; in each instance, the tendency is to poison the fountain of justice, to create distrust, and to destroy the confidence of the people in the Courts, which are of prime importance to them in the protection of their rights and liberties.

It seems to me to be as much a contempt of Court to say that the judiciary has lost its independence by reason of something it is alleged to have done out of Court, as to say that as a result of a case it has decided, it is clear that it has no independence or has lost what it had. I am therefore of opinion that the words complained of were a contempt of Court. With regard to the argument that these proceedings, summary in nature, were not the appropriate proceedings, and that the appropriate course would have been to lay an information against the respondents and have the matter tried in a criminal Court; if these words are a contempt of Court, and I have held that they are, then the Court has jurisdiction to deal with them in the usual way in which contempts are dealt with, namely by summary procedure. This is a contempt which, in my view, unless dealt with speedily, is likely to produce the gravest results as regards respect for law in this province, since it is calculated to undermine the confidence of the public in the administration of justice. No instance of a case of this kind being dealt with by way of information or indictment in modern times was brought to our notice by the respondents' advocates and I have not been able to find any. My view is that taken by Wills, J., in (1906) 1 K B 32 (7) :

> The undoubted possible recourse to indictment or criminal information is too dilatory and too inconvenient to afford any satisfactory remedy. It is true that the summary remedy, with its consequent withdrawal of the offence from the cognizance of a jury, is not to be resorted to if the ordinary methods of prosecution can satisfactorily accomplish the desired result, namely to put an efficient and timely check upon such malpractices. But they do not. Wilmot, C. J., said : 'I am as great a friend to trials of facts by a jury, and would step as far to support them as any judge who ever did or now does sit in Westminister Hall, but if to deter men from offering any indignities to Courts of Justice, it is a part of the legal system of justice in this kingdom that the Court should call upon the delinquents to answer for such indignities, in a summary manner by attachment, we are as bound to execute this part of the system as any other.'

Mr. Justice Ashutosh Mukerji in 26 C L J 459 (2) said :

> No doubt, as Lord Morris observes in (1899) A C 549 (3) at p. 561, Courts may be satisfied sometimes to leave to public opinion attacks or comments derogatory or scandalous to them. But I do not accede to the argument that it is invariably prudent for the Court to assume an attitude of indifference or to institute regular criminal proceedings against the offender. In this connexion reference may appropriately be made to the weighty words of Kent, C. J., in an

American case, (1810) 5 Johnson 282 (15): 'Whenever we subject the established Courts of the land to the degradation of private prosecution, we subdue their importance and destroy their authority. Instead of being venerable before the public, they become contemptible; and we thereby embolden the licentious to trample upon everything sacred in society and to overthrow those institutions which have hitherto been deemed the best guardians of civil liberty.'

These were the words used by Ashutosh Mukerji, J., 18 years ago in a contempt of Court case in this Court. For the above reasons I hold that the words complained of are properly dealt with by this summary procedure. I am further of the opinion that it was and is our duty in our administration of justice in this province to proceed in this summary manner to deal with the matter. Towards the end of the case an opportunity was given by the Court to each of the respondents, through their advocates, to tender an apology. The advocate for each respondent replied that he had his instructions and had nothing further to say. No apology was offered. The Editor, Tushar Kanti Ghose, in his affidavit (para. 4) says that he had not seen the article before publication but takes full responsibility for the same. He also says in para. 5 that the article was written by way of reasonable criticizm and fair comment on the basis of the reports of the Legislative Council and refers to certain annexures to the affidavit. I have perused the annexures but I cannot see how they would help either of the respondents in any way if indeed they were relevant. The Editor further says that the object is to guard the reputation possessed by this Court. As regard this plea, I can only say that to attack the Judges of the Court in the way they have been attacked in the words complained of cannot in any way guard the reputation of the Court; on the contrary it is bound to undermine it. As to the other matters raised in the affidavit I have dealt with them in the above judgment.

The Printer, Tarit Kanti Biswas, says in his affidavit that he is only imperfectly acquainted with the English language and as printer has no control over the insertion of any matter in the columns of the newspaper; that his knowledge of the English language is very limited and in the course of his duties he has got to take any orders from the editorial and managerial staff of the paper. He also says that he had no intention to show any disrespect to the Chief Justice and Judges and he denies that he had committed any contempt of Court. I am bound to say that it is an unfortunate state of affairs if the official printer of newspapers printed in English has only an imperfect acquaintance with the English language. He, like the Editor, has a duty to see that a contempt of Court is not committed by the paper he prints and publishes. The printer further craves leave to refer to the Editor's affidavit as part of his affidavit, and by so doing adopts the Editor's attitude. The Editor in his affidavit took responsibility for the article. In my judgment the words of the article complained of with or without the preceding and succeeding words are a contempt of this Court and in my judgment Tushar Kanti Ghosh and Tarit Kanti Biswas should be adjudged to be guilty of contempt of Court in respect of the publishing of the same.

Mukerji, J. — This rule has been issued on Tushar Kanti Ghosh, the Editor, and Tarit Kanti Biswas, the Printer and Publisher of a newspaper called the "Amrita Bazar Patrika," to show cause why they should not be dealt with in accordance with law for publishing in that newspaper of 23rd March 1935, an article on the Calcutta High Court. The article is headed "Calcutta High Court." It consists of two paragraphs. In para. 1 reference was made to a discussion which was said to have taken place the day before in the Bengal Legislature Council about the administration of the Calcutta High Court. Then it was said that every word of Mr. N. K. Basu who, it may be mentioned here, was one of the speakers in that discussion, was true. Then appeared the following passage:

> It is so unfortunate and regrettable that at the present day the Chief Justice and the Judges find a pecular delight in hobnobbing with the Executive with the result the judiciary is robbed of its independence which at one time attracted the admiration of the whole country.

Then it was said:

> The old order of things has vanished. We wish the Chief Justice and the Judges will appreciate the sentiments of the public. The generation that has gone by should be an ideal to them.

In para. 2 some suggestions were made as regards the principles to be

15. Yates v. Lansing, (1810) 5 Johnson 282.

adopted in the recruitment of Judges, and later on it was said :

> Really good men with practical experience would consolidate that pleasant feeling of the public towards the High Court and would help in its efficient administration.

Lower down the following passage occurs :

> If the powers-that-be deliberately and systematically ride roughshod over the feelings of the public, a time would soon come when things will be beyond all redemption and their mistakes will be beyond all repair.

The opposite parties have appeared in this case and have filed affidavits in answer to the Rule. The Editor in his affidavit has said that the article was not written by him and that though in fact he had not seen it before publication yet he took full responsibility therefor as Editor of the said newspaper. He has said further that the object of the said article was to guard the reputation possessed by the Honourable Court ever since its establishment. And it has been submitted that the said article on a fair reading of it does not constitute any contempt of this Honourable Court, nor was it written with a view to bring this Honourable Court or the Hon'ble the Chief Justice and Judges into contempt. The Printer and Publisher in his affidavit has stated that he draws a salary of Rs. 110 per month, that he is imperfectly acquainted with the English language, that as Printer he has no control over the insertion of any matter in the columns of the newspaper, but in the course of his duties he has got to take any orders from the editorial and the managerial staff regarding matters to be inserted. He has said further that in printing the article he had no intention to show any disrespect to the Hon'ble the Chief Justice or any of the Judges of this Honourable Court.

Almost at the commencement of the hearing of this case, it was pointed out by the Court that the portion of the article, to which attention should be confined for the purposes of this case, is contained in the following words :

> It is so unfortunate and regrettable that at the present day the Chief Justice and the Judges find a peculiar delight in hobnobbing with the Executive with the result the judiciary is robbed of its independence which at one time attracted the admiration of the whole country.

Sir Tej Bahadur Sapru appearing on behalf of the Editor and Mr. Banerjee appearing on behalf of the Printer and Publisher have endeavoured to make out that the word "administration," which appears in the first sentence with which the article opens, plainly indicates that the writer was dealing with the subject of administration of the Calcutta High Court in the sense of the administrative supervision that it exercises over subordinate Courts. It has also been argued that the articles expressed the sentiments of the public and wanted the Judges to appreciate them because it was the duty of a newspaper to call attention to the sentiment of the public with regard to the administration of the High Court.

It has also been said that the Editor probably was taking a wrong and exaggerated view of public sentiment but that the reputation of the Court was so profound that the passage like the one in the article could not possibly undermine the confidence of the public in its independence and integrity. It has also been said that the word "hobnobbing" was used in the sense of eating and drinking together, or, in other words, of cultivating social intercourse and that although it may have been a very silly thing to have referred to such conduct on the part of the Chief Justice and the Judges and to have said that the judiciary is robbed of its independence, the writer only intended to say that in the eye of the public the reputation of the Court was suffering. I have given this passage the very best consideration that I possibly can, but I am unable to accept the interpretation that has thus been sought to be put upon it. I am clearly of opinion that the word "administration" that is to be found in the first sentence of the article has not been used in the sense of such administrative superintendence as the High Court exercises over its subordinate Courts but that the word means the administration of the Court itself including the administration of the justice which the Court purports to deal out. That, in my opinion, is made plain by the passage that follows, in which "hobnobbing" is referred to and then the result of the "hobnobbing" is also spoken of, namely that the judiciary is robbed of its independence. The word "hobnobbing" as far as I have been able to gather has three different

meanings: It primarily means "to drink to each other alternatively", "to take wine with each other with clinking of glasses"; its secondary meaning is "to be in terms of familiar social intercourse"; and it is popularly understood in the sense "of having the honour and so to feel such honour of being on familiar terms" or in other words, "mixing freely in a cringing spirit with a view to curry favour". I am inclined to the view that the word has been used in the last-mentioned sense; for, it is by taking the word in that sense only that the result that is referred to in the passage is easily appreciated. I think that it is only if the word is taken in that sense that the independence of the judiciary, not only of this Court but also of all Courts subordinate to it, can be expected to be affected. I am, however, prepared to concede that the word is capable of the other meanings, which are the meanings which the opposite parties desire to attribute to it. But whichever of the meanings be taken, there is, in my opinion, no difference in the result. The passage obviously constitutes a libel on the Chief Justice and the Judges of this Court; and inasmuch as it is a libel on them in their judicial capacity it amounts to contempt of Court. At the same time I am clearly of opinion that such contempt of Court, even though the Court may have power to deal with it summarily, is not a species of contempt which should be so dealt with. For summary proceedings in the matter of a contempt of this character there is no precedent whatsoever except a solitary decision given quite recently by one of the High Courts in this country. From that decision I shall take the liberty to respectfully differ.

I leave the article for the present but will have to refer to it again towards the close of this judgment for the purpose of making certain observations in connection with it. Inasmuch as in taking the view aforesaid I am differing from the weighty opinion of the other members of this Bench, I propose to give my reasons somewhat fully.

What is contempt of Court? Lord Blackburn in 9 Q. B. 230 (16) said: "The phrase 'contempt of Court' often misleads persons, not lawyers". And Lindley, L. J., in 15 P. D. 59 (17) observed: "There are obviously contempts and contempts; there is an ambiguity in the words". It is very necessary, therefore, to ascertain the exact significance of the expression "contempt of Court".

In 2 Atk. 469 (18) cited under different sub nom in different reports, Lord Hardwicke, L. C., gave a classical classification of contempts. He said:

> There are three different sorts of contempt One kind of contempt is scandalising the Court itself. There may likewise be a contempt of this Court in abusing parties who are concerned in causes here. There may be also a contempt of this Court in prejudicing mankind against persons before the cause is heard. There cannot be anything of greater consequence than to keep the streams of justice clear and pure, that parties may proceed with safety both to themselves and their characters.

In 10 Ir. Eq. R. 93 (19) Cusack Smith M. R., in discussing the law of contempt, observed that cases in which Courts of Equity exercise the authority of committing parties for contempt of Court might be divided into three classes. The following is an extract from the judgment in that case:

> The first class may be described in the language of an eminent person, afterwards on the English Bench, thus: "where the Court which issues the attachment has awarded some process, given some judgment, made some legal order or done some act, which the party, against whom it issues, or others on whom it is binding, have either neglected to obey, contumaciously refused to submit to, incited others to defeat by artifice or force, or treated with terms of contumely or disrespect in the face of the Court, or of its Minister charged with the execution of its acts". There may be some other cases of a similar nature falling within this class, although not exactly within the above description; and it is clear that a Court of Equity, as well as every other Court, must be entrusted with power to enforce its orders. The second class of cases, in which Courts of equity have exercised the jurisdiction of committing for contempt, are those in which letters or pamphlets have been addressed to the Judge who had to decide upon the case, with the intention either by threats or flattery or bribery, to influence his decisions ... The third class of cases in which Courts of Equity have committed for contempt are those adverted to by Lord Erskine in the case 13 Ves 237 (20), that is cases of constructive contempt depending upon

16. Skipworth's case, (1873) 9 Q B 230.

17. O'Shea v. O'Shea and Parnell, (1890) 15 P D 59=59 L J P 47=17 Cox C C 107=38 W R 374=62 L T 713.
18. St. James's Evening Post Case, Roach v. Garvan, (or Hall), (1742) 2 Atk 469.
19. Birch v. Walsh, (1846) 10 Ir Eq R 93.
20. Exparte Jones, (1806) 13 Ves. 237.

the inference of an intention to obstruct the course of justice.

He pointed out that in the second of these three classes of cases there is a direct attempt to taint the source of justice and to obtain a result of legal proceedings different from that which would follow in the ordinary course, and that the third class, namely constructive contempt, depends upon the inference of an intention to obstruct the course of justice. He placed contempt in scandalising the Court itself in the third category, viz. that of constructive contempt. Libelling the Court is contempt of the Court because it is either intended to obstruct or tends to obstruct the course of justice. In Holt on Libel there is a discourse on libel on the Court in which it has been very clearly explained how such libel would tend to the disgrace of the justice of the realm and so amount to contempt. In (1742) 2 Atk 469 (18), Lord Hardwicke, L. C. pointed out the distinction between libel against the public or private persons and libel which amounts to contempt of Court, observing thus:

But to be sure, Mr. Solicitor-General has put it upon the right footing that notwithstanding this should be a libel, yet unless it is a contempt of Court, I have no cognisance of it; for whether it is a libel against the public or private persons the only method is to proceed at law.

In 1765 one Almon was brought up before the King's Bench for publishing a pamphlet containing libellous passages upon the Court of King's Bench and Lord Mansfield, C. J., for his conduct both in Court and out of it and charging the Court, particularly the Chief Justice, with having introduced a method of proceeding to deprive the subject of the benefit of the Habeas Corpus. Wilmot, J., as he then was (he afterwards became Chief Justice of the Common Pleas) drew up an opinion on the case which was never delivered in Court because the proceedings were eventually dropped. But after his death this opinion was published in 1802, some 37 years later and has since been referred to in numerous decisions of every high authority. The following is an extract from that opinion:

But it is said that the course of justice in those cases is obstructed, and the obstruction must be instantly removed; that there is no such necessity in the case of libels upon the Courts or Judges which may wait for the ordinary method of prosecution without any inconvenience whatsoever. But when the nature of the offence of libelling Judges for what they do in their judicial capacities, either in Court or out of Court, comes to be considered, it does, in my opinion, become more proper for an attachment than any other case whatsoever. By our constitution, the King is the fountain of every species of justice which is administered in this kingdon: 12 Co. 25. The King is de jure to distribute justice to all his subjects, and because he cannot do it himself to all persons he delegates his powers to his Judges who have the custody and the guard of the King's oath and sit in the seat of the King concerning his justice.

The arraignment of the justice of the Judges is arraigning the King's justice; it is an impeachment of his wisdom and goodness in the choice of his Judges and excites in the minds of the people a general dissatisfaction with all judicial determinations, and indisposes their minds to obey them; and whenever men's allegiance to the law is so fundamentally shaken, it is the most fatal and most dangerous obstruction of justice and in my opinion calls out for a more rapid and immediate redress than any other obstruction whatsoever, not for the sake of the Judges, as private individuals, but because they are the channels by which the King's justice is conveyed to the people. To be impartial, and to be universally thought so, are both absolutely necessary for the giving justice that free, open, and uninterrupted current, which it has, for many ages, found all over this Kingdom, and which so eminently distinguishes and exalts it above all nations upon the earth. In the moral estimation of the offence, and in every public consequence arising from it, what an infinite disproportion is there between speaking contumetious words of the rules of the Court, for which attachments are granted constantly, and coolly and deliberately printing the most virulent and malignant scandal which fancy could suggest upon the Judges themselves. It seems to be material to fix the ideas of the words 'authority' and 'contempt of the Court,' to speak with precision, upon the question.

By the word 'Court,' I mean the Judges who constitute it and who are entrusted by the constitution with a portion of jurisdiction defined and marked out by the common law, or Acts of Parliament. 'Contempt of the Court' involves two ideas: contempt of their power and contempt of their authority. The word 'authority' is frequently used to express both the right of declaring the law which is properly called jurisdiction and of enforcing obedience to it, in which sense it is equivalent to the word power; but by the word 'authority' I do not mean that coercive power of the Judges, but the deference and respect which is paid to them and their acts, from an opinion of their justice and integrity.

Livy uses it according to my idea of the word, in his character of Evender: 'authoritate magis quam imperio pollebat'; it is not 'imperium'; it is not the coercieve power of the Court, but it is homage and obedience rendered to the Court, from opinion of the qualities of the Judges who compose it; it is a confidence in their wisdom and integrity, that the power they have is applied to the purpose for which it was deposited in their

hands; that authority acts as the great auxiliary to their power and for that reason the constitution gives them this compedious mode of proceeding against all who shall endeavour to impair and abate it, and therefore every instance of an attachment for contumelious words spoken of a rule of the Court (of which there are great many) is a case in point to warrant an attachment in the presant case, where a rule of Court is the object of defamation, and it would be a very strange thing that Judges, acting in the King's Supreme Court of Justice in Westminster Hall should not be under the same protection as a bailiff's follower, executing the process which those Judges issue; it is not their own cause but the cause of the public which they are vindicating, at the instance of the public, for I do not think that Courts of Justice are to take their complaints up of themselves, it must be left to His Majesty who sustains the person of the public to determine whether the offence merits a public notice and animadversion; and in this state of the proceedings they are only putting the complaint into a mode of trial, where the parties' own oath will acquit him, and in that respect it is certainly a more favourable trial than any other, for he cannot be convicted if he is innocent, which by false evidence he may be by a jury; and if he cannot acquit himself, he is but just in the same situation as he would be in, if he was convicted upon an indictment or upon an information; for the Court must set the punishment in one case as well as the other, they do not try him in either case, he tries himself in one case and the jury try him in the other.

The opinion of Wilmot, J., has been referred to with approval by very eminent Judges and in numerous cases: by Holroyd, J., in 4 Barn & Ald 218 (21), by Lord Lyndhurst, L. C., in (1844) De Gex 55 (22); by Lord Esher, M. R. and Bowen, L. J., in 20 Q. B. D. 68 (23); by Lord Russel of Killowen, C. J., in (1900) 2 Q.B. 36 (4); and many others. It is true that a learned author, Sir Charles Fox in his History of Contempt of Court has endeavoured to show that the opinion of Wilmot, C. J., in (1765) Wilmot's Opinions 243 (6) is not historically accurate. Also it is a fact that Fletcher, J., in *Taaffe* v. *Downes* (24), decided in the Irish C. P. in 1813, and reported in a note in 13 E. R. 15, but without the judgment of Fletcher, J., a copy of which is said to be in the Inner Temple Library (vide, Halsbury's Law of England (1909) Vol. 7, para. 604 Note (d), denounced the opinion in most scathing terms. In that case the question that was considered was whether the Chief Justice of the King's Bench in Chambers granting a warrant to arrest a party for a breach of the peace was protected from liability to action on the ground that the act was a judicial one. Fletcher, J. refused to be bound by the opinion of Wilmot, C. J., in (1765) Wilmot's Opinions 243 (6) pronouncing it to be

> the hasty and warm ebullition of a mind fraught with arbitrary notions, irritated and excited by a severe attack upon his whole Court, especially upon his venerated and adored Chief Justice, and the very reverse of what is called a considered, digested and ulterior opinion.

But the weight of approval which the said opinion has received is overwhelming and it is too late now to reject it as a mere opinion, and as not having the force of a delivered judgment. At the same time it should be noted that the opinion should be regarded as of any real value only in so far as it was relevant for the decisions in which it has been approved. As regards points not arising in the cases themselves, actual decisions even if made upon such points would have been but mere obiter dicta; and by approvingly referring to the opinion as a whole the decisions cannot be regarded as having conferred any authoritative character on such points in the opinion as had no bearing on the cases themselves. The decisions, as I shall presently proceed to show, are in respect of cases which in their facts were essentially different from the case now before us. I am not unaware that Mookerjee, J., in his judgment in 26 C. L. J. 459 (2) at p. 538 has referred to the passage in the opinion which has been quoted above and also to the celebrated passage in Blackstone's Commentaries (Vol. 4, p. 25) in which he includes in his description of contempts of Court, contempts which arise

> by speaking or writing contemptuously of the Court or Judges acting in their judicial capacity and which demonstrate a gross want of that regard and respect which, when once Courts of Justice are deprived of their authority, so necessary for the good order of the Kingdom, is entirely lost amongst the people.

But to my mind it is perfectly clear that the learned Judge was only considering the question whether the article which formed the subject-matter of that case amounted to contempt of Court, and not the question whether every species of contempt, whatever its exact nature may be, was to be dealt with

21. Rex v. Clement, (1821) 4 Barn & Ald 218.
22. Ex parte Van Sandau, (1844) De Gex 55=1 Ph 650=15 L J B K 13.
23. In re. Johnson, (1887) 20 Q B D 68=57 L J Q B 1=52 J P 230=36 W R 51=58 L T 160.
24. (1813) 13 E R 15 *note* =3 Moore P C 36*n*.

summarily. The reference that he made, vide 26 C. L. J. 459 (2), at p. 539, to Howell's State Trials, Vols. 3 and 8, confirms me in this view that I take. In my opinion, therefore, there is yet room for the contention that the objectionable passage, amounting though it does to a libel on this Court, is one which this Court has no jurisdiction to deal with in a summary manner. But I think I am on a more firm and sure ground when I say that there having been no proof that such jurisdiction has ever been exercised in a case of the present nature, this Court should not proceed to exercise such jurisdiction in the present case, even if it has any. I am unable to assent to the view that every form of contempt of Court is to be dealt with in the summary form. The embarrassing situation in which the Court itself is placed when it adopts that procedure is apparent; and the disadvantages that it causes to the party brought up before the Court to be dealt with, precluding him from taking a plea and depriving him of his defence, are obvious. These are no technical considerations but very serious considerations indeed. And unless the Court is sure that such a procedure has ever been adopted in any case similar in nature to the one before it, or the Court feels that no other efficient remedy is really available, the Court cannot justify its summary action in any given case.

Lord Blackburn in 9 Q. B. 230 (16) has clearly explained that it is a misapprehension to suppose that a proceeding for contempt of Court amounts to some process of vindicating the personal dignity of the Judges and protecting them from personal insults as individuals; that very often it happens that contempt is committed by a personal attack upon a Judge or an insult offered to him, but as far as their dignity as individuals is concerned, it is of very subordinate importance compared with the vindication of the dignity of the Court itself. He has pointed out that there would scarcely be a case in which any Judge would consider that so far as his personal dignity goes, it would be worth while to take any steps. He has then explained that the other and important purpose for which proceedings for contempt of Court is necessary—or in other words the vindication of the dignity of the Court become imperative—is where there is a case pending before the Court and the act of the delinquent has a tendency to obstruct the ordinary course of justice or prejudice the trial. In many cases since then as well as before, the question has turned on the term "pending." And I confess that I can see very little of relevancy or necessity of the discussions in those cases if the general remarks to be found in Wilmot, C. J.'s opinion are to be taken as concluding the question. Mookerjee, J., in his decision in 26 C. L. J. 459 (2) at p. 540 has said:

> It is a public wrong, a crime against the State, to undertake by libel or slander on the Judges, to impair confidence in the administration of justice . . . . . It is immaterial whether the attack on the Judge is with reference to a cause about to be tried, or actually under trial, or recently adjudged: in each instance the tendency is to poison the fountain of justice, to create distrust and to destroy the confidence of the people in the Courts, which are of prime importance to them in the protection of their rights and liberties: (1900) 2 K. B. 36 (4).

The case before the learned Judge himself as well as the case which he quoted as an authority in the passage just mentioned were both cases in which the libel was in respect of specific cases, one about to come up for decision and the other just disposed of. No case of the present nature was, I venture to think, in the mind of the learned Judge. The learned Judge cited the celebrated passage of Lord Denman in his speech in 11 Cl & F 155 (25) at pp. 372 and 373 relating to "law taken for granted", and held that there was nothing "irreconcilable to some clear legal principles" to hold that the Superior Courts have power to deal summarily with contempts. That is undoubtdly correct, if I may presume to say so. But I think it is a clear contravention of the fundamental rights of an accused to be regularly tried to deal with him summarily if no real urgency to resort to a summary procedure is disclosed. Vindication of the dignity of the Court apart from any question of a tendency to obstruct justice or prejudice a trial in connexion with any particular case has never been considered in any decision as justifying summary proceedings in contempt. It is this actual interference with justice which is involved in con-

25. Connell v. The Queen, (1844) 11 Cl & F 155= 9 Jur 25=1 Cox C C 413.

tempt of Court with regard to which Courts have chosen to take action in summary proceedings. And when action is so taken the manner in which the Judges should deal with the matter has been explained by Lord O'Brien, L. C. J., in 2 Ir. Rep. 82 (26) in these words:

> Of course Judges are very reluctant to deal with matters which may affect themselves, but they must be very careful not to yield to contrivances, resorted to in order to disqualify and get rid of them. At the same time if a Judge in the infliction of punishment acts vindictively because he has been assailed, he should, indeed feel degraded, because in that case he would not only have done what was wrong, but he would have betrayed his own manliness as an individual and his dignity as a Judge

As regards the power to proceed by attachment in cases of contempt, which according to Hold and Gilbert and other writers took its rise from the Statute of Westminister, Ch. 2. Wilmot, J., in his opinion in (1765) Wilmot's Opinions 243 (6) observed:

> "I have examined very carefully to see if I could find out any vestiges or traces of its introduction but can find none. It is as ancient as any other part of the Common law; there is no priority or posteriority to be discovered about it and therefore cannot be said to invade the Common law but to act in an alliance and friendly conjunction with every provision which the wisdom of our ancestors has established for the general good of society.

But in Halsbury's Laws of England Vol. 7, p. 6 note (h), after referring to Wilmot, C. J's., opinion in (1765) Wilmot's Opinions 243 (6) in support of the proposition that the issuing of attachment by the Supreme Cuurt of Justice for contempts out of Court is founded upon the same immemorial usage as supports the whole fabric of Common Law, it is thus observed:

> It is clear however that in early times some forms of contempt out of Court were punished not by summary process but in the ordinary course of law.

In Stephen's Commentaries on the Laws of England, Vol. 4, under the heading Contempt of Court, it has been said:

> And the King's Bench Division of the High Court of Justice as the inheritor of the powers of the old Court of King's Bench has an inherent authority to punish such acts by attachment for contempt of Court; whereupon the offender is consigned to prison during the pleasure of the Court.

The jurisdiction of the High Court to imprison for contempt is a jurisdiction that it has inherited from the Old Supreme Court and was conferred upon that Court by Crown Charters which invested it with all the powers and authority of the then Court of King's Bench and the High Court of Chancery in Great Britain : 4 Cal 655 (27). And in 10 Cal 109 (1), the Judicial Committee held that a libel which was a contempt of Court published out of Court when the Court was not sitting was an offence which by the Common Law of England was punishable by the High Court in a summary manner by fine or imprisonment or both, that that part of the Common Law of England was introduced into the Presidency towns when the late Supreme Courts were respectively established by the Charters of Justice and that the High Courts in the presidencies are superior Courts of Record and the offence of contempt and the powers of the High Court for punishing it are the same in India as in England not by virtue of the Penal Code of British India and the Code of Criminal Procedure, but by virtue of the Common Law of England.

The distinction between criminal and non-criminal contempt need not detain us; there may oftentimes be a difficulty on finding first authority for deciding where the line is to be drawn, and secondly, instances in practice for drawing it ; yet that line has always been recognised : see per Lord Brougham L. C. in 2 Russ & M 639 (28). But I take it that the general principles which should guide Courts in the matter of the exercise or non-exercise of the summary jurisdiction cannot and ought not to differ, no matter what particular division or jurisdiction such Courts may be sitting to deal with or exercise, unless it be that it is only the dignity of the Court that is to be regarded—a proposition which cannot be supported. The object of the discipline enforced by the Court in case of contempt of Court, says Bowen, L.J., is not to vindicate the dignity of the Court or the person of the Judge but to prevent undue interference with the administration of justice : 35 Ch D 449 (29). The object of the power to punish summarily is protective and admonitory ; the reason of the Court's jurisdiction to commit for

26. King v. Freeman's Journal, (1902) 2 Ir Rep 82.

27. Martin v. Lawrence, (1879) 4 Cal 655.

28. Wellesley v. Duke of Baufort, (1831) 2 Russ & M 639.

29. Helmore v. Smith, (1886) 35 Ch D 449 = 56 L J Ch 145=35 W R 157=56 L T 72.

contempt is not for the protection of the dignity of the Court or of its individual members but for the protection of the public, though it may be and often is that the public are to be protected by the upholding and maintaining untarnished the glory and reputation of the Court as regards its authority, fairness and impartiality. In a long line of cases the true measure of the jurisdiction and the principles determining the occasion for its legitimate use have been explained, and I propose to refer here to a few of them. Coleridge, J., in (1842), Dowling's Rep 805 (30) said :

As I did not recollect any case that could be considered in point I desired to pause before I granted the rule, because although no Court ought to shrink from the assertion of those privileges or the exercise of those powers with which the law has invested it in trust for the public yet, every Court, however high, ought to proceed with great caution in the use of summary power and to hesitate in making a precedent which may be abused even where there may be much seeming reason and convenience in the exercise of it in the particular instance.

In 46 L J Ch 375 (31) Jessel, M. R., observed :

This jurisdiction of committing for contempt being practically arbitrary and unlimited should be most jealously and carefully watched and exercised, and if I may say so, with the greatest reluctance and the greatest anxiety on the part of Judges to see whether there be no other mode which is not open to the objection of arbitrariness and which can be brought to bear upon the subject. I say that a Judge should be most careful to see that the cause cannot be fairly prosecuted to a hearing unless this extreme mode of dealing with persons brought before him on accusation of contempt should be adopted. I have myself on many occasions to consider this jurisdiction and I have always thought that necessary though it be, it is necessary only in the sense in which extreme measures are sometime necessary to preserve men's rights, that is, if no other pertinent remedy can be found, probably that will be discovered after consideration to be the true measure of the exercise of the jurisdiction."

In 58 L J N S 490 (32) Cotton, L. J. while holding that a publication of a particular article in the Star was a contempt, went to consider whether it was such a contempt as would require or justify the Court in making an order against the party in contempt in the exercise of summary jurisdiction and said:

"I express my opinion that if a thing is done wilfully which really will prejudice the parties to the cause before it comes on, I should not hesitate to commit to prison anyone who so offended, but of course that jurisdiction by the Court is only to be exercised in extreme cases and it would be most unfortunate if this Court or any Court readily took upon itself to interfere in such a summary way and in such an extraordinary way unless there were something which required the interference of the Court in that way in order to ensure the due conduct of business .... It is not necessary that the Court should come to the conclusion that a Judge or a jury will be prejudiced, but if it is calculated to prejudice the proper trial of a cause, that is contempt, and would be met with the necessary punishment in order to restrain such conduct .... The question is not whether technically a contempt has been committed, but whether it is of such a nature as to justify and require the Court to interfere."

Lopes, L. J. in the same case observed:

"I think it was calculated to prejudice the defendant in his trial then pending and therefore calculated to interfere with the due course of justice."

In (1897) 1 Ch 545 (33), Lindley, L. J. pointed out:

"That the Court ought to be very chary in committing people for contempt particularly in cases of fanciful contempt. The Court, unless it is to become useless, must deal with such questions in the interest of the public, bearing in mind that the greater the power it possesses, the more caution it is necessary to use in exercising it."

The true point of view from which the question has to be looked at in order to ascertain whether a scandalisation of the Court is a contempt deserving of being dealt with summarily is to examine the circumstances of the case and see whether in reality there is a tendency in the offending publication to obstruct the ordinary course of justice or prejudice the trial. And I am of opinion that if the reality of the thing is to be regarded, the only cases in which such procedure would be justified would be cases where the offending publication has some relation to a cause or a proceeding either expected to come or is pending or I shall go further and say, has been disposed of. As Lord Blackburn has observed, very often it happens that contempt is committed by a personal attack upon a Judge or an insult offered to him, but as far as their dignity as individuals is concerned, it is of very subordinate importance compared with the vindication of the dignity of the Court itself. But while the dignity of the Court must always be upheld and maintained it is only the class of cases

30. Ex parte Wilton, (1842) Dowling's Rep 805.
31. Re Clements and Costa Rica Republic v. Erlangar, (1877) 46 C J Ch 375=36 L T 332.
32. Hunt v. Clarke, (1889) 58 L J N S 490.
33. Seaward v. Paterson, (1897) 1 Ch 545=66 L J Ch 267=45 W R 610=76 L T 215.

in which it becomes necessary to uphold and maintain it for some immediate specific purpose that the summary jurisdiction can be legitimately exercised. The essence of contempt is action or inaction amounting to an interference with or obstruction to or having a tendency to interfere with or to obstruct the due administration of justice. Lowering the dignity of the Court or shaking the confidence of the public in it is undoubtedly reprehensible. But if general remarks impugning the independence of a Court are made, such remarks can tend to interfere with or obstruct the administration of justice, only indirectly and remotely and in an ideal sense. And in such cases there can, in my opinion, be no warrant for the exercise of the extraordinary powers which the Court possesses to deal with contempts.

I have found in the books quite a number of cases in which Judges who had to deal with proceedings in contempt have expressed their unwillingness to go beyond decided cases and have shown an anxiety to look for precedents. I think, I have already referred to one of them before, namely (1842) Dowling's Rep 805 (30) decided by Coleridge, J. And it may again be said with truth, as has been said by Gibson, J., in (1902) 2 Ir Rep 82 (26) at p. 92 :

> So far as this branch of law represents the decision and discretion of the Court in dealing with particular facts they cannot be relied on as authorities, for as Lord Halsbury says in (1892) A C 201 (34) at p. 208 no one can on facts be regarded as an authority for another, and the books are full of examples where Judges have expressed disapproval of the exercise of discretion by their predecessors. Thus in 20 Q B D 68 (23) at p. 73, Lord Esher M. R. disagreed with the action of Coleridge, J., in refusing an attachment; and in 3 B & S 932 (35) the Queen's Bench dissented from the view of the Exchequer who also declined to attach.

But as Sargant, J., has very rightly pointed out in (1922) 1 Ch 276 (36) at p. 285, the Court ought not in any way to enlarge the jurisdiction or apply it to matters which are outside the well-established lines. To go beyond the range up to which precedents have gone would, in my judgment, be dangerous and unwise in the extreme. I have therefore examined the precedents with such care and scrutiny as the short time at my disposal has permitted, in order to find out whether there has been any case in which an offending publication of the present nature has been dealt with in contempt ; but I have not been able to find any single case, except one very recent decision of an Indian High Court and with which, as I have already said, I am unable to agree, which may directly or even indirectly support the proceedings in the present case. I propose briefly to refer to the precedents and shall in doing so try to confine myself in the first place to cases which have reference to constructive contempt and nextly to cases of scandalising of the Court.

In Sir John Fox's book on the History of Contempt of Court a large number of cases has been cited, of contempt out of Court, none of which approaches the present case. Indeed, as he has shown, even after Wilmot's Opinions 243 (6) in 1765 down to the end of the eighteenth century there were only two cases, namely of William Bingley and of Stead, both of which proceeded from libel on Lord Mansfield in connexion with cases dealt with by him. In 21 E R 723 (37) an attachment was ordered to issue and it was also suggested that the defendant might have been committed ; the case being one in which, when the plaintiff told the defendant that he had come to serve him with an order from the Master of the Rolls the defendant used language insulting to the latter. In (1703) 87 E R 799 (38), it was held that attachment lay for speaking contemptuously of the Court on being arrested. In (1736) 125 E R 1004 (39) the contempt was for cursing the Chief Justice and the Court on service of processes, and in that case an attachment was granted without any Rule to show cause. So also in (1752) Sayer's Rep 47 (40) and in (1754) Sayer's Rep 114 (41). In 2 Term Rep 199 (42) an order was made by a Corporation and entered in their books stating that a person against

34. London Joint Stock Bank v. Simmon, (1892) A C 201=61 L J Ch 723.
35. Cooper v. Osprey, 3 B & S 932=32 L J Q B 209=11 W R 641=8 L T 355.
36. Dunn v. Bevan, (1922) 1 Ch 276=91 L J Ch 299=127 L T 14.
37. Witham v. Witham, (1669) 21 E R 723.
38. R. v. Crosse, (1703) 87 E R 799.
39. Philips v. Hedges, (1736) 125 E R 1004.
40. R. v. Jermy, (1752) Sayers Rep 47.
41. R. v. Hendrick, (1754) Sayers Rep 114.
42. R. v. Watson, (1788) 2 Term Rep 199.

whom a jury had found a verdict in an action for malicious prosecution and perjury was actuated by motives of public justice in preferring the indictment and it was held that this was a libel reflecting on the administration of justice for which the Court would grant an information against the members making that order. A case of libel on Court, in which order was made committing the defendants for public reflections on the Court and the parties then before the Court, is cited in (1846) De Gex 303 (43) at p. 312 as *Re Quick* decided in 1806. In Holt on Libel two cases are referred to in the portion where the subject of Libel on Court is dealt with. These cases are *King* v. *Hart* and *White* and *King* v. *Northampton*. The former of these cases is noticed under the name of *Rex* v. *White* (44). This case was on an information filed by the Attorney-General against the proprietor and printer of a Sunday newspaper called 'The Independent Whig' for a libel upon Le Blank, J., and the jury before whom a Captain of a merchant ship had been tried for a murder at the Old Bailley. Gros, J., said:

> It certainly was lawful, with decency and candour, to discuss the propriety of the verdict of a jury or the decision of a Judge, and if the defendants should be thought to have done no more in this instance they would be entitled to an acquittal, but on the contrary transgressed the law and ought to be convicted if the extracts from the newspaper set out in the information contained no reasoning or discussion but only declamation and invective and were written not with a view to elucidate the truth but to impugn the character of individuals and to bring into hatred and contempt the administration of justice in the Court.

Of the second case I have not been able to find any trace, within the limited time at my disposal. (Note: when I am revising this judgment I find that this case is of 1344. It was a case in which an attorney confessing that he had written a letter to one of the King's Counsels reflecting on the Judges of the King's Bench, the King's Bench adjudged that the letter was a scandal upon the Court and the attorney was committed and afterwards found sureties for his good behaviour. Holt cites it as a case of indictment). (1806) 13 Ves. 237 (20) is an important case. The Committee of a lunatic and his wife and other persons had been brought up before the Court for libelling the petitioner as regards the management of the lunatic under the Court's order. Lord Erskine, L. C., in giving judgment distinguished the case from ordinary cases of constructive contempt "depending upon the inference of an intention to obstruct the cause of justice" and said that whatever may be said as to a constructive contempt, the case before him was one in which there was not only an obvious tendency but a design to obstruct the ordinary course of justice. 4 Barn & Ald. 218 (21) was a case where proceedings in Court had been contemptuously published. (1842) Dowl. Rep. 805 (30) was a case where the parties attending a reference for decision before the Master left the office at the conclusion of the reference for the day and one of those parties, who during the reference had insulted the other, then, on the steps of the Master's office assaulted the latter. (1844) De Gex 55 (22) was a case in which the defendant who was a solicitor in a case, being dissatisfied with the decision of the Court wrote, printed and published a libel upon the Judges of the Court and upon other persons. In 10 Irish Eq. Rep. 93 (19) a barrister had caused to be published a garbled and improper account of the proceedings in a case. In that case Cusack Smith, M. R., after classifying cases of contempt into three classes, as has already been referred to in this judgment and reviewing a number of cases dealing with constructive contempt, expressed his view in these words:

> In all the cases therefore in which there has been commitment for constructive contempt, except the case of 2 Ves. Sen. 520 (45) the publication was either calculated to produce false evidence or attributed perjury to witnesses pending the suit.

He refused to make an order for attachment or committal and referred approvingly to certain observations made by Mr. Hargrave on the case of 2 Ves. Sen. 520 (45) which were in the following words:

> If the doctrine of contempt be thus wide, if any of the great Courts of Westminster Hall may construe what they please into contempts and may under the denomination without trial by jury convict all persons of crime and have also an indefinite power of punishing by fine and imprisonment, and if all this when done be unappealable and unexaminable, what is there but their own wisdom and moderation and the danger of abusing so arbitrary a power to pre-

43. Ex parte Sandan, (1846) De Gex 303.
44. Rex v. White, (1806) 1 Campbell 350n.
45. Cann v. Cann, (1754) 2 Ves. Sen. 520.

vent any act under shelter of the law of contempts from practising all the monstrous tyranny which disgraced and at length overwhelmed the Star Chamber.

I have looked into the case of 2 Ves. Sen. 520 (45) to see what the facts of the case were. It was a case in which a person had published an advertisement as to the proceedings in Court which tended to prepossess people as regards those proceedings.

In 9 Q. B. 219 (46), Cockburn, C. J. pointed out how public discussions upon a pending trial may disturb and interfere with the course of justice and might in the end influence the proceedings in it. A careful perusal of the judgment, in my opinion, shows that some real obstruction or interference is what is meant and not a general opinion as regards the independence of the Court, which is the only thing alleged here. 9 Q. B. 230 (16) was a case in which vituperative epithets had been used and scurrilous matters published as regards the Lord Chief Justice in connection with his conduct while sitting in Court; and the decision of Blackburn, J. proceeded on the footing that the effect of such contempt was to prevent justice being administered in the ordinary way. (1877) 46 L. J. Ch. 375 (31) was a case in which contempt was committed with regard to a pending cause and Jessel, M. R., observed that a judge should be most careful to see that the cause cannot be fairly prosecuted to a hearing unless this extreme mode of dealing with a person brought before him on accusation of contempt should be adopted. 20 Q. B. D. 68 (23) was a case in which a solicitor who had attended the hearing of an application before a Judge in Chambers in the Royal Courts of Justice, immediately after such hearing and while the parties were on their way from the Judge's room to the entrance gate of the building, made use of grossly abusive expressions and threatening gesture to the solicitor of the other side in relation to such application, and it was held that such conduct in relation to proceedings before a Judge in Chambers was a contempt of Court punishable by attachment. Lord Esher, M. R. in that case observed that if the Judge is acting judicially in the office of a Judge he is acting as a Judge of the High Court of Justice; it signifies not where he is sitting or what he is doing in such judicial capacity; and if one attempts to interfere improperly with such judicial proceedings provided it is done with sufficient nearness it is a contempt, a contempt not of the Judges but of the High Court as a Judge of which he is acting. In 58 L J N S 490 (32), it was held that the publication in a newspaper, pending an action or before the trial of an action, of any observations which in any way prejudice the parties to the action is technically a contempt of Court. In 15 P D 59 (17) the contempt of Court consisted in the publication of comments, by a party in a pending action against his wife for dissolution of marriage, which were calculated to prejudice the fair trial of the action.

The case before the Judicial Committee in (1893) A C 138 (47), at first sight seems to have no importance so far as the question arising in the present case is concerned because in that case the alleged contempt consisted in publishing a libel against the Chief Justice of the Bahama Islands, not in connexion with his conduct as a member of the Court. Yet it certainly is a case in which the extreme proposition of Wilmot, C. J., in *Almon's case* (6) could not possibly have found favour with the Judicial Committee; because although it was insinuated in the article that the Chief Justice was incompetent and so the article was a libel, their Lordships held that it was not calculated to obstruct or interfere with the course of justice or the due administration of the law and so did not amount to contempt of Court. This decision, in my opinion, indicates the real meaning of obstruction or interference, such as would be necessary to constitute contempt. A decision which in my view is of very great importance in its relation to the present case is that of the Judicial Committee in (1899) A C 549 (3). That was an appeal from the Supreme Court of St. Vincent. A letter and an article had been published in a newspaper called the Federalist in which scurrilous abuses were made charging the honesty, independence and impartially of Mr. St. Aubyn. The whole trend of the publi-

46. Onslow's and Whalley's case, (1873) 9 Q B 219.

47. In the matter of a Special Referee from the Bahana Islands (1893) A C 138.

cation was to shake the confidence of the public in the administration of justice by that Judge stating that he was incapable of maintaining the noble tradition of the British Bench, that he had been wrapped up and intermingled with personal disputes and squabbles of a questionable character, that he was incapable of dealing honestly and impartially with questions which came before him to be judicially settled, that his conduct on the Bench was not at all dignified, that he had been severely rebuked and censured by Mr. Chamberlain,and similar other allegations of a very serious and highly objectionable nature were made as regards him. There was nothing said with regard to any case whether expected or pending or disposed of. Their Lordships in dealing with this case observed thus :

> It is a summary process and should be used only from a sense of duty and under the pressure of public necessity, and there can be no landmark to point out the boundaries in all cases. Committals for contempt of Court by scandalising the Court itself have become obsolete in this Country. Courts are satisfied to leave to public opinion attacks or comments derogatory or scandalous to them. But it must be considered that in small colonies consisting principally of coloured population the enforcement in proper cases of committal for contempt of Court for attacks on the Court may be absolutely necessary to preserve in such a community the dignity and respect for the Court.

Their Lordships then dealt with the case on its merits and eventually held that the committal could not be sustained. The judgment was delivered by Lord Morris. The Board consisted of Lord Watson, Lord Macnaughten, Lord Morris and Lord Davey. The observations just quoted recite that committal for contempt of Court by scandalising the Court itself had ceased to be in practice in the Courts in England and also in other Courts under the British Crown, except in small colonies consisting principally of coloured populations where by reason of exigencies of circumstances enforcement in proper cases of such committal for contempts of that description was absolutely necessary to preserve the dignity and the respect for the Court. Their Lordships did not disapprove but, as far as one can gather, approved of the discontinuance of such committals and their Lordships also referred, as far as one can gather, approvingly to the practice of leaving such attacks or comments to be dealt with by public opinion. And their Lordships laid stress upon absolute necessity as the only justifying ground for a departure from the practice that was obtaining. Such absolute necessity, in my judgment, does not arise, unless there is a real obstruction to or interference with the course of justice, of which I can see nothing in this case. The present case resembles that case before the Judicial Committee in one of its essential features, namely, that in neither of them is there any question of any cause or proceeding being in view. It differs from that case in two respects; in that case the libel was on the Judge, while in this it is on the Chief Justice and the Judges and so on the entire Court; and also, here there is a general remark that the Court has lost its independence, while in that case the abuse was virulent and scurrilous.

The case in (1900) 2 Q. B. 36 (4) was one in which there was a publication in a newspaper of an article containing a scurrilous personal abuse of a Judge with reference to his conduct as a Judge in a judicial proceeding which had terminated. It was held that it was a contempt of Court punishable by the Court on summary process. The decision of the Judicial Committee in (1899) A. C. 549 (3) does not appear to have been referred to by Lord Russell of Killowen, C. J., who delivered the judgment in that case. I shall not be presumptuous enough to suggest that the Lord Chief Justice was not aware of that decision, but the fact remains that even the counsel for the accused did not refer to it at all, not even for the purpose of showing that in the opinion of the Judicial Committee, consisting of such members as I have already named, committals for contempt of Court for scandalising the Court had gone out of use. Whatever the reason for this omission may have been, the point the Lord Chief Justice was considering in that case was whether such publication amounted to contempt of Court and whether the fact that the judicial proceedings had terminated would deprive the Judge of his power to deal with the contempt on summary process.

The Lord Chief Justice gave a definition of contempt, one class of which according to him was any act done or writing

published calculated to bring a Court or a Judge of the Court into contempt or to lower his authority and this class, he observed, belonged to the category which Lord Hardwick, L. C., had characterised as scandalising a Court or a Judge. He held that such a publication amounted to contempt of Court. He held also that he had to deal with it as a case of contempt and brevi manu. He then observed thus, and it is these observations which, in my opinion, are of supreme importance :

> This is not a new jurisdiction. It is a jurisdiction as old as Common Law itself of which it forms a part. It is a jurisdiction the history, purpose and extent of which are admirably treated in the opinion of Wilmot, C. J. (then Wilmot, J,) in his Opinions and Judgments. It is a jurisdiction however to be exercised with scrupulous care, to be exercised only when the case is clear and beyond reasonable doubt, because if it is not a case beyond reasonable doubt the Court will and ought to leave the Attorney-General to proceed by criminal information.

He held that there was no reasonable doubt whatsoever with regard to the case. The only doubt with which he was concerned was whether by reason of judicial proceeding having terminated the Judge or the Court had lost its power to deal with it on summary process. If any libel on the Court irrespective of a specific case to which it related could be contempt of Court punishable summarily why was it necessary for the learned Chief Justice to think of any doubt at all ? The decision, in my opinion, cannot be read as legalising the exercise of a jurisdiction with regard to contempt of Court of a nature for which no precedent whatsoever is to be found and with regard to which the opinion of the Judicial Committee pronounced only ten months before was that such proceedings had become obsolete. In a note which the reporter of this case has put in at the end of the report it has been said :

> The present case (1900) 2 Q. B. 36 (4) is reported as showing that in this country the Court will still, where the circumstances demand its action, exercise its jurisdiction to punish on summary process the contempt of scandalising the Court although no contempt has been committed ex facie of the Court or in respect of a case pending.

Neither the decision nor this note can, in my judgment, be read as suggesting that apart from any consideration of any cause or proceeding either expected to come to or pending in or disposed of by a Court, summary process brevi manu can or should be adopted. The case last mentioned was referred to soon after in 2 Irish Rep. 82 (26) and was treated as an authority for the proposition that scurrilous abuse of a Judge with reference to a concluded trial may be punishable as the contempt of Court. One of the learned Judges in this case also observed that the exercise of summary jurisdiction in such a case had been so rare that it had been regarded as obsolete. The point that was considered in the case was whether the trial of a prosecution for seditious libel had ended in a disagreement amongst the jury and it was intended, though not formally stated, that a new jury would be empanelled, the proceedings could be tried as pending proceedings for the purpose of taking action for alleged contempt of Court. The judgments of Lord O'Brien, L. C., and Gibson, J., contain sufficient materials from which it may be fairly inferred that the exercise of summary jurisdiction can only be justified in a case where a real obstruction or a real tendency to obstruct the ordinary course of justice is apprehended.

The learned Lord Chancellor referred to and quoted at lengh Lord Blackburn's judgment in 9 Q B 230 (16), a case of contempt in connexion with a pending case. He also referred to the case in (1896) 1 Q B 577 (48), in which the libel was not of the Court but of a person awaiting trial in a Court and in which some very important observations were made which go to indicate what is the kind of obstruction or interference which the idea of contempt involves. These observations are to be found in the judgments of Lord Russel of Killowen, C. J. and of Wright, J. 29 All 95 (14) was a case in which an advocate of the High Court at Allahabad had been dealt with by that High Court under Ss. 7 and 8 of its Letters Patent and the rule framed thereunder for having published an article which was a libel upon the judges in their judicial capacity and in reference to their conduct in the discharge of their public duties. The article itself or at least a substantial portion of it will be found reported in 23 Times Law Reports 180. Their Lordships held that

48. The Queen v. Payne, (1896) 1 Q B 577=65 L J Q B 426=44 W R 605=74 L T 351.

by the publication of the article not only was the advocate guilty of conduct which could be dealt with by the High Court in the exercise of its disciplinary authority, but the publication of the article amounted to a contempt of Court. It should be noted that a portion of the article at least referred to a particular Judge in connexion with his conduct in the course of the hearing of a case. (1906) 1 K B 32 (7) was a case in which the question as regards the power of the King's Bench Division to punish by attachment contempts of inferior Courts was canvassed. Wills, J., referred to a number of decisions explaining the law as to contempt, and quoted elaborately from the undelivered judgment prepared by Wilmot, J., in (1765) Wilmot's Opinions 243 (6), and held that the King's Bench Division had such jurisdiction. The learned Judge was concerned with making out that the King's Bench Division has power to punish by attachment contempts of inferior Courts. He applied Wilmot, J.'s words to libel of inferior Courts and observed:

> The public mischief is identical and in each instance the undoubted possible recourse to indictment or criminal information is too dilatory and too inconvenient to afford any satisfactory remedy.

In so far as India is concerned, contempts of inferior Courts except those within the limits of the original jurisdiction of the High Courts were never treated on that footing: see 1914 Cal 69 (10). And I am not sure that any High Court even at the present day would feel justified in taking summary proceedings in contempt in respect of a general opinion expressed by anybody against the competence or independence of a subordinate Court in the mofussil. I have read the decision in (1906) 1 K B 32 (7) as carefully as I can, but I cannot read it as suggesting that the summary remedy should be applied in any classes of cases to which it had not been applied before. In (1922) 1 Ch 276 (36) the issuing of a circular letter containing misleading comments on the judgment of a Court was not regarded as constituting contempt of Court on the ground that the action being at an end and the judgment delivered, there could be no possible interference with the course of justice and that any such publication must be left to be dealt with by the ordinary law of libel. The case in 44 Times L R 301 (5) was a case in which Avory, J., was scandalised for having made certain order on the Press in connexion with proceedings in Court which he was dealing with. In (1928) Ir R 308 (49) it has been noted that committals for contempt of Court by scandalising the Court itself have not become obsolete and the dictum to the contrary in (1899) A C 549 (3) cannot be accepted as accurate having regard to the subsequent decisions in (1900) 2 Q B 36 (4) and 44 T L R 301 (5). The contempt in this case consisted in libelling a Judge for what he did in connexion with a trial held by him with the assistance of a Jury.

I shall now refer to a few other decisions which are generally cited in connexion with contempt of superior Courts committed out of Court. These are (1868) 2 P C 341 (11); 3 Moore P C 361 (12) and 8 Moore P C 47 (13). These are all cases of such libel in connexion with some particular acts of the Court as had a direct tendency to interfere with or obstruct the course of justice. These are all the cases, apart from certain decisions of the Indian Courts, to which I shall presently refer, which in my opinion have got any bearing on the question I am now considering. As regards the decisions of the Indian Courts I propose only to refer to a few. The point now under consideration does not appear to have ever arisen or been considered. The first case is 8 W R Cr 32 (8) in which the accused who were chaprasis of the Court attached to a particular Judge had received presents from suitors, etc. In *Re William Tayler* (9) the insult which had been offered to the Judge was in connexion with a trial which had been held by him. So also are the facts of the case in 1918 Cal 752 (50) which arose out of *Re William Tayler* (9) just cited. 1914 Cal 69 (10) was a case of an alleged contempt of a Mofussil Criminal Court said to have been committed by a publication in connexion with a case in that Court. In 1918 Cal 988 (2) the Chief Justice had been scandalised by an article which implied that he had constituted or was about to constitute a packed Bench to deal with a particular

49. Attorney-General of the Irish Free State v. O'Kelly, (1928) Ir R 308.
50. In the matter of Banks and Fenwick, 1918 Cal 752=45 I C 113=19 Cr L J 449.

case. 1926 Cal 701 (51) has no relevancy to the question now under consideration. In 33 Bom 240 (52) a learned Judge had been defamed in connexion with his trial and decision in a particular case. In 1922 Bom 426 (53) scandalous attacks had been made upon the integrity and impartiality of the High Court after it had delivered its judgment in a particular case. In 1926 All 623 (54) the contempt was of an inferior Court and it was a case of public insult to the Judge and the dignity of the Court after the termination of a case.

The only decision in which the point I am at present considering has been decided against the view that I am taking is the case in 1935 All 1 (55). I have very carefully read the decision of the learned Judges in that case, but with the utmost regard for their decision I must say that I am unable to agree in the view which they have taken. And I may also be permitted to say that if the extract from the publication as given in the report is the only offending passage, I should be very reluctant to hold that it was any contempt of Court at all.

If constructive contempt depends, as it in my opinion does, upon an inference of intention to obstruct the course of justice or of a tendency to create such obstruction, the presence or absence of a cause or proceeding, either expected or pending or disposed of, in my judgment forms a most important factor to be taken into account. It may be argued that what difference does it make that no particular cause or proceeding is expected, when daily and from day to day hundreds of cases are coming up for disposal before the Court, and if the litigants lose faith in the independence of the Court, free flow of justice in those cases would be impeded? My answer is that the obstruction that is required must be a real and not merely an ideal one; and I think I have already quoted sufficient authority which establishes that proposition. While I would strongly deprecate any publication which may have the tendency to undermine the reputation of the Court or lower it in the estimation of the public for whose benefit it exists, I cannot bring myself to hold that contempts of that character were ever intended to be dealt with in the exercise of the Court's summary jurisdiction. I have heard it suggested that if such proceedings can be taken in respect of objectionable remarks against the conduct of a Court or of a Judge in connexion with a case that is over, on what principle should a distinction be made where objectionable remarks of a general nature are made as have been made in the present case?

In my judgment, there is an essential and material difference between the two classes of cases. In the former class of cases the remarks may have the tendency to affect the administration of justice in other cases to follow, or there is the danger of the course of justice being diverted or perverted on the risk of justice not being permitted to flow the ordinary course, elements which must be entirely absent in the latter class of cases. When a case has been decided that may not be the end of it; the decision may be subject to appeal or revision or some further proceeding, e. g., in the nature of execution, may follow. When the matter is final, it may give rise to other proceedings or may furnish a precedent. Scandalising the Court with reference to a decided case may bring the decision itself into disrepute by means outside the ordinary course of justice, and may have the effect of deterring the Court from proceeding on the lines on which the Court had proceeded in arriving at the decision. By general remarks of the character as in the case before us, the Court is not prevented in any way from following its normal course.

I am not for the moment directly concerned with the question whether the Court has any other effective remedy for its protection, but I may point out S. 194, Cl. (2) and S. 108, Criminal P. C. I do not feel pressed by the consideration that the Local Government may in any particular case withhold the necessary sanction under the former of the two provisions, because I am not prepared to assume that such a lamentable situation can ever arise. If the existing

51. Bason v. Skone, 1926 Cal 701=94 I C 532=53 Cal 401.
52. In Re N. C. Kelkar, (1909) 33 Bom 240=2 I C 288=8 Cr L J 426.
53. In re Satya Bodha Ram Chandra, 1922 Bom 426=69 I C 84=47 Bom 76=23 Cr L J 644.
54. Re Abdul Hasan Jowhar, 1926 All 623=97 I C 108=48 All 711 (F B).
55. Re Advocate of Allahabad, 1935 All 1=1935 Cr C 1=154 I C 955=1935 A L J 125.

law is not sufficient, legislation may with propriety be resorted to. But simply because the summary procedure is a more convenient remedy, convenient only from a point of view of the Court itself, I am unable to assent to go beyond the well-established lines beyond which Courts in England have never gone, and create a precedent by departing from the dictum of the Judicial Committee in (1899) A. C. 549 (3) which, even if it be an obiter, is entitled to the highest respect from all Indian Courts. Decisions of the Privy Council, though entitled to very great weight everywhere, are not binding on King's Bench Division (see (1901) 2 K. B. 669 (56). It is undisputed that the authority of the Judicial Committee so far as its effect on Indian Courts are concerned is far greater than that of any other Court in the British Isles. And their Lordships in 1925 P. C. 272 (57), have observed thus:

> Their Lordships think it desirable to point out that it is not open to the Courts in India to question any principle enunciated by this Board, although they have a right of examining the facts of any case before them to see whether and how far the principle on which stress is laid applies to the facts of the particular case.

I here once again refer to the objectionable passage but only for the purpose of concluding the judgment. The passage is a highly offensive one. By putting his ideas in the form of a positive assertion that the Chief Justice and the Judges take a peculiar delight in hobnobbing with the Executive and then stating the result that follows from such hobnobbing he has put up before his readers a picture of the Court which is bound to lower the Court in the estimation of the public. This intention is not a matter of inference only, for he has expressed that intention in the words which immediately follow the passage. Taking the article as a whole, I am prepared to hold that the object was that the administration of the High Court might improve; but by writing the passage in question he has not secured that end but the contrary. The Court undoubtedly had a glorious past and possesses traditions of which it may justly boast; and if in the opinion of the writer or, as he says, of the public that reputation has suffered, remarks such as those contained in the passage in question can in no way improve the situation and can only make matters worse.

So far as the Rule is concerned, I am of opinion, for reasons I have already given, that it should be discharged.

Costello, J.—I entirely agree with the views expressed by my lord the Chief Justice.

Sir Tej Bahadur Sapru in his argument on behalf of the respondent Tushar Kanti Ghosh made the submission that the article which appeared in the Amrita Bazar Patrika on 23rd March last did not refer to any case pending before this Court or to any case decided by this Court either recently or in the past, and that assuming in any view of the matter that the article in question amounts to contempt of Court, it is at the most a technical contempt, and as it does not seek to obstruct the cause of justice or interfere with any trial, this Court has no jurisdiction whatever to take proceedings by way of summary procedure. The proper procedure should be by information under S. 194, Criminal P. C.

The first question we have to determine in this matter whether the article referred to in the affidavit of Mr. Collet does amount to a contempt of Court and at the outset I think it should be emphasised that we act in these matters not to defend the dignity of the Court but to safeguard the proper administration of justice and to ensure as far as possible that the confidence of the public in that administration shall not be destroyed or in any way diminished. In that connection one should bear in mind the weighty words of Wills, J., who delivered the judgment of the Court in (1906) 1 K. B. 32 (7) when he said that the principle which is the root of and underlies the cases in which persons have been punished for attacks upon Courts will be found to be not the purpose of protecting either the Court as a whole or individual Judges of the Court from a repetition of them, but of protecting the public and especially those who either voluntarily or by compulsion are subject to its jurisdiction, from the mischief they will incur if the authority of the tribunal be undermined or impaired.

6. Dulien v. White, (1901) 2 K B 669=70 L J K B 837=50 W R 76=85 L T 126.
57. Mata Prasad v. Nageshar Sahai, 1925 P C 272=91 I C 370=52 I A 398=47 All 883=28 O C 352 (P C).

Wills, J., cited a part of the undelivered judgment of Wilmot, C. J., in Wilmot's Opinions 243 (6) where he said that :

" Attacks upon the Judge excite in the minds of the people a general dissatisfaction with all judicial determinations and whenever mens' allegiance to the laws is so fundamentally shaken it is the most dangerous obstruction of justice and in my opinion calls out for a more rapid and immediate redress than any other obstruction whatsoever, not for the sake of the Judges or private individuals but because they are the channels by which the King's justice is conveyed to the people. To be impartial and to be universally thought so are both absolutely necessary for giving justice that free, open and unimpaired current which it has for many ages found all over this kingdom."

These words of Wilmot, C. J., have been quoted with approval in innumerable cases throughout that one hundred and seventy years which have elapsed since they were written and despite the doubt as to their applicability to the present instance which Sir Tej Bahadur sought to establish, they must be taken to constitute the appropriate criterion and the right canon of interpretation for use in a matter of the kind now before us. Applying the principles enunciated above, I can only come to the conclusion that the article is not only a contempt but a contempt of a very serious nature in that para. 1 of the article is directly calculated to instil in the mind of the people a mistrust of and a dissatisfaction with the administration of justice in this Presidency. It seems clear that the object and intention of the attack was to induce the public at large to believe that future cases in this Court will be dealt with by Judges who are no longer free from outside control or influence specially in proceedings to which the Executive in some form or other is a party or in which the Executive is interested. A more scandalous and mischievous assertion against any Court as such it is difficult to imagine. To call the sort of statement published or permitted to be published by the respondents in this case fair comment or a mere technical contempt is to my mind an entire misuse of words and is a contention which must be rejected. It is to be observed that the question whether a particular publication be libellious or contemptuous and the construction of that publication is, as has been said in many instances, a question for the Court which deals with the matter: see per Paterson, J., in 13 Q B 613 (58) at p. 628. This brings me to the question of the jurisdiction of the Court to punish a contempt of this nature in summary proceedings such as the present before the Court itself, because in the case I have just referred to, 13 Q B 613 (58), it had been objected that the Court could have no general power of commitment for libel published out of Court. Paterson, J., in the course of that case, said that in (1765) Wilmot's Opinions 243 (6), there was a very learned judgment by Chief Justice Wilmot in which he satisfactorily showed that a Court of record has power to punish by commitment for contempt or libel published while the Court is not sitting. Patterson, J., then stated (p. 628) :

There must be a choice as to the mode of proceeding for he (e. g. Wilmot, C. J.), says that the punishment may be by indictment or by commitment for contempt. He treats it throughout as a matter for election.

Paterson, J., then held that the Court had the power i. e. to commit and stated "that is clear law." It has been strenuously argued in the proceedings now before us that as there is no question of a contempt in facie curiae or in connexion with a pending or recently determined cause, this Court, although admittedly a Court of Record, has no power to deal summarily with the offenders. There are however many authorities for the proposition that it is well within the competency of a High Court in India to deal summarily with a contempt consisting of scandalous or scurrilous comments made in connexion with a matter already adjudicated upon, and in this connexion having regard to what has already been said by my Lord the Chief Justice, I need only mention the case in 1922 Bom 426 (53), where Martin, J., referred with approval to the judgment of Wills, J. (from which I have already quoted) and to the undelivered judgment of Wilmot, C. J. Martin, J. also referred to several previous cases in the Bombay High Court in which a similar point had arisen. I am wholly at a loss to understand how it can be contended that it would be right to proceed by way of summary procedure in a case where a scandalous attack had been made upon a Court by reason of something which had happened in the past but wrong to proceed in like manner

58. In re Crawford, (1849) 13 Q B 613=13 Jur 955=18 L J Q B 225.

where a scandalous attack is made upon the Court which from its very nature must have a disturbing and indeed pernicious effect upon the mind of the public in general concerning the purity and impartiality of the adjudication of every succeeding case coming before the Court or at any rate regarding the ever constant succession of cases in which in some shape or form the Executive is a party interested.

In my opinion to endeavour to proceed by way of an information in cases of contempt by scandalising the whole Court would be to attempt something which upon a reasonable visualisation of its inevitable concomitants and implications would appear to be not only patently inconvenient and unseemly but also practically impossible. Sir Tej Bahadur based the whole fabric of his argument on the question of jurisdiction upon the dictum of Lord Morris in (1899) A C 549 (3) which has already been commented upon by my Lord and on the strength of that one authority the learned advocate has invited us to hold that the judgment of Wilmot, C. J., has long since ceased to be a correct enunciation of the law. It cannot be doubted and indeed it is beyond question that if the views expressed by Wilmot, C. J., hold good and apply in this country, then it is clearly competent for this High Court to proceed by way of summary procedure in cases of contempt by scandalising the Court and so the whole of Sir Tej Bahadur Sapru's argument falls to the ground. The learned advocate found himself bound to admit to the fullest extent that the judgment of Wilmot, C. J., has indeed been quoted with approval and his doctrine applied in a long series of cases many of which are tabulated at p. 30 of Sir John Fox's monograph on Contempt of Court to which book Sir Tej Bahadur referred as lending support to his argument. It is to be noted however that Sir John Fox at p. 33 of that book affirms that

> by a series of decisions and by citation Wilmot's doctrine has become part of the law of England though he does raise the question whether there is any solid ground for the contention that it was the law by immemorial usage in the year 1765.

Sir Tej Bahadur was quite unable to place before us even one case in which Wilmot's doctrine has been dissented from or even adversely commented upon by any Court with the solitary exception of a dissenting judgment given by an Irish Judge, Fletcher, J., in a case which has never been properly reported. As I indicated to Sir Tej Bahadur in the course of his argument, it seems to me to be asking too much of this or any other Court to invite it to reject Wilmot's doctrine on the strength of this one dissentient opinion which stands alone in the long catenation of decisions agreeing with the principles laid down in (1765) Wilmot's Opinions 243 (6). That the doctrine enunciated by Wilmot and the procedure approved of by him are still valid and subsisting in England is, in my opinion, quite clear from the judgments in (1900) 2 Q. B. 36 (4), (1906) 1 K. B. 32 (7) and 44 T. L. R. 301 (5) to which reference has been made by my Lord the Chief Justice.

It seems to me therefore with all possible respect to Lord Morris that his Lordship's speech in (1899) A. C. 549 (3) cannot be taken as being a correct enunciation of the law if indeed it was really intended to be such. It may well be, the noble and learned Lord was doing no more than stating as a matter of fact that the proceedings by way of summary procedure were obsolete—obsolete possibly for the reason that with the spread of education in England and the growth of a widespread healthy public opinion and a general respect for the administration of justice, occasions for resorting to summary procedure in cases of contempt by scandalising the Court had been few and far between, if not wholly non-existent. It happened that the point now under discussion came before the High Court of the Irish Free State in the year 1928 in (1928) Ir. R. 308 (49) when a Bench consisting of Sullivan P. Meredith and Hanna JJ., held that committals for contempt of Court by scandalising the Court itself have not become obsolete and that the dictum to the contrary in (1899) A. C. 549 (3) cannot be accepted as accurate having regard to the subsequent decisions in (1900) 2 Q. B. 36 (4) and 44 T. L. R. 301 (5). In (1928) Ir. R. 308 (49) a preliminary objection had been raised that the Court had no jurisdiction to entertain the application made by the Attorney-General that an order of attachment should issue against the Editor of The Nation newspaper. Sullivan, P. in his judgment

said that in order to appreciate the argument that was addressed to the Court on this preliminary point and to rule upon it it was necessary to consider in the first place the origin and nature of the power to commit, and then he stated that

the opinion of Wilmot in (1765) Wilmot's Opinions 243 (6) regarded as authoritative on this question. It is referred to by Palles, C. B. in 32 Ir. 220 (59), and I quote the judgment of the Chief Baron from the report of that case at p. 271—the judgment of the Chief Baron set forth in full the opinion of Wilmot, C. J.,

and then Sullivan, P. quoted in extenso the judgment of Lord Blackburn in 9 Q. B. 230 (16) at p. 332 and proceeded thus:

The power so defined has been exercised when the occasion required by the Courts in England and Ireland, not only (1) where some contempt has been committed in the face of the Court, or (2) where comments calculated to interfere with the course of justice have been made on cases pending in the Courts, but (3) where scandalous matter of the Court itself has been published.

This proposition was not disputed as regards the first and second classes of contempt I have mentioned; but the opinion of the Privy Council in (1899) A. C. 549 (3) was relied on as showing that committals for contempt of Court by scandalising the Court itself have become obsolete. In view of the subsequent decisions in (1900) 2 Q. B. 36 (4) & 44 T. L. R. 301 (5), I cannot accept the dictum in (1899) A. C. 549 (3) as accurate. In each of these cases the English Courts recognized and exercised the jurisdiction to punish on summary process the editor of a newspaper for contempt of Court in publishing scandalous matter of a Judge with reference to his conduct in judicial proceedings. Hanna, J., in his judgment (at p. 330) touching the question of whether procedure by attachment was one within the competence of the Court, expressed the opinion that it was, and that it was not obsolete or in any way confined, and said that he could not accept the argument that where the contempt was in facie curiae the cases were always dealt with either by the Judge himself or by the Court, nor the view that contested cases of consequential or constructive contempt, that is those other than those committed ex facie curiae, were always dealt with before a jury by indictment. The learned Judge then said:

The position of this power of attachment is made clear by the judgment in 32 Ir. 220 (59). Each of the three procedures was open for contempt of Court. The cases show that for many years before the hearing of (1899) A. C. 549 (3) the practice of proceeding by attachment had not been used, so much so that Lord Morris stated in that case that it had become obsolete. However this may be, it is clear that it has been frequently resorted to both in England and Ireland in the succeeding years during which the press has attained such a widespread influence, so that, though it may have been at one time dormant, it had at the date of the Constitution become a living procedure, with all its ancient powers. The latest case is but a few weeks age, 44 T L R 301 (5), reported in the current Times Law Reports.

Meredith, J. although differing from the other members of the Court on the merits of the particular case agreed with the President and Hanna, J., on the question of the extent of the jurisdiction of the Court. In my opinion it cannot be gainsaid that the Courts of Record have an inherent power of punishing and in a summary way any act done or writing published calculated to bring the Court or a Judge of the Court into contempt or to lower its authority, (i. e., the class of contempt characterisd by Lord Hardwicke in 2 Atk 469 (18) at p. 471 as scandalising a Court or a Judge). That is part of the common law of England and was so at the time when that law was introduced into India in the eighteenth contury, and thenceforward administered by the Courts in this country. Thus it comes about that the High Courts in India have inherited or acquired by charter a similar power.

It is however the fact that there does not appear to be any precedent exactly on all fours with the present proceedings with the exception of a case to which I shall refer in a moment, but there are as appears from the judgment just delivered by my Lord the Chief Justice, and as already indicated by me, a number of decisions sufficiently close and analogous to the present case to warrant the assumption that the powers of this Court are wide enough to enable it to deal with the respondents herein in a summary way. In my opinion this is essentially an example of a case where it is desirable that action should be taken swiftly and summarily owing to the obstruction to the administration of justice created by the precise nature of the allegations contained in the article complained of and its mischievous effect in the minds of the public and in

59. Attorney-General v. Kissane, 32 Ir 220.

particular of all litigants and accused persons. Neither Sir Tej Bahadur Sapru nor Mr. S. N. Banerjee was able to place before us a single example of a contempt of Court having been dealt with by way of information or by other method than brevi manu, but on the other hand there is 1935 All 1 (55) (which furnishes the exception mentioned above) where it was definitely held by the Allahabad High Court that the jurisdiction of the Court to punish for contempt is not confined to cases where the aspersion which is alleged to amount to contempt is a reflection upon a particular Judge or a particular Bench in connexion with the conduct of a particular case, but extends to cases where a general aspersion is made upon the character and capacity of the Court or a Judge, independently of any case. The cases in 1926 All 623 (54) and (1900) 2 Q B D 36 (4) were relied upon. It happened that Sir Tej Bahadur Sapru appeared also in the Allahabad case as Advocate for the respondent and he appears to have then put forward the same kind of argument as that which he has advanced in the present proceedings before us, an argument largely founded on the dictum of Lord Morris. With regard to this the Allahabad Bench said as follows :

> Once it is conceded that to scandalise the Court is a contempt then any publication which scandalises the Court and lowers its prestige is clearly a contempt, even though there is no record that similar publications have been held by the Courts in the past to constitute contempt. As we have already observed, general aspersions upon the character and the capacity of the Court must be comparatively rare and the absence of any report of such cases, in our view, affords no support for the contention of learned Counsel for the opposite parties. Learned Counsel further contended that the remedy where a Court and not a particular Judge has been defamed should not be by way of proceedings for contempt of Court but by criminal proceedings at the instance of the Government Advocate under the provisions of S. 194, Criminal P. C. We are unable to agree with this contention. The fact that proceedings may be directed against a person who has defamed the Courts generally is no reason for holding that he may not be proceeded against for contempt of Court. Criminal proceedings as well as contempt proceedings lie against a person who has committed contempt of Court by indulging in illegitimate criticism of the conduct of a particular Judge, and we see no reason in principle for holding that where a Court generally has been defamed proceedings for contempt of Court do not also lie against the delinquent. We would further observe in this connection that proceedings under S. 194, Criminal P. C., are initiated by the representative of a Government with the previous sanction of the Governor-General in Council or the Local Government. It is for the Government to decide whether such proceedings be instituted or not. If the contention of learned Counsel for the opposite parties is sound, then the High Court would be powerless to protect itself in a case where the grossest allegations against the Courts had been made; but where the Government refused, it might well be for purely political considerations to sanction a prosecution. We are clearly of the opinion that the inherent power of the Court to punish for contempt of Court is a power which is essential in the interest of the administration of justice and that that power is not restricted in any degree by the provisions in the Criminal Procedure Code relating to proceedings which may be instituted with the sanction of the Government where the Courts or His Majesty's Judges have been defamed. In our opinion the law upon this matter is not in doubt. It has been clearly enunciated in a number of decisions to many of which we were referred by learned Counsel for the opposite parties and by the learned Government Advocate. . . . .
>
> We are therefore clearly of the opinion that neither on general principle nor in a recorded decision is there any support for the contention of the learned Counsel for the opposite parties that the Court is not empowered to punish for contempt where the alleged contempt consists of a general defamation or aspersion of the Court and not of a particular Judge in regard to his conduct of a particular case. Learned Counsel has been unable to cite one single relevant authority in support of his argument, nor has he been able to suggest any cogent reason for differentiating between the cases of a defamation of a particular Judge or a particular Bench and the defamation of the Court generally. The distinction which he has attempted to draw is, in our judgment, clearly illogical and unsound.

I respectfully agree with that statement and adopt it as representing a correct view of the law. The objection taken to the jurisdiction of this Court in the present proceedings has therefore no substance in it and in my opinion must be rejected. With regard to the merits of the case I would respectfully adopt the language used by Sir Norman Macleod, C. J., in 1922 Bom. 52 (60), and to say that the article published on 23rd March was calculated to excite in the minds of the people not only the impression that persons would not get a fair trial at the hands of a Court alleged to be under the influence of the Executive authorities but also a general dissatisfaction with judicial determinations so that the danger was created that the people's allegiance to the laws might be fundamentally shaken and a most painful and dangerous obstruction

60. Emperor v. Bal Krishna, 1922 Bom 52=65 I C 753=23 Cr L J 177=46 Bom 592.

to the administration of justice erected. The administration of justice within this Presidency has been entrusted to us and we have the power in execution of the trust imposed upon us to provide that such dangers when they arise shall be removed, and in exercising these powers we seek not so much to protect ourselves as to protect the people from the evil which will result if their faith in the authority and justice of our tribunals be impaired.

The respondents in this case have made no real attempt to excuse or palliate their conduct. They have simply said in effect "This article is fair comment and we have done no wrong." In such circumstances I think we must inflict upon them some punishment which will bring home to their minds the fact that in our judgment they are entirely wrong and also the realisation that their action in publishing the article was in the highest degree improper and deplorable.

Lort-Williams, J.—There can be no reasonable doubt that the publication of the words complained of amounts to a criminal contempt of this Court. To say that

> at the present day the Chief Justice and the Judges find a peculiar delight in hobnobbing with the Executive, with the result that the judiciarry is robbed of its independence which at one time attracted the admiration of the whole country

means, and can only mean, that for the reasons given, the Judges of this Court are no longer independent or impartial. No one can deny that it is of the utmost importance to the administration of justice that public confidence in the impartiality of the Judges should not be impaired, and nothing is more calculated to destroy their authority than a statement that they are no longer independent. It strikes at the very roots of justice. As was said by Lord Russell of Killowen, C. J., in (1900) 2 Q. B. 36 (4), at p. 40, any writing published which is calculated to bring the Judges into contempt or to lower their authority is a contempt of Court. This is a class of contempt which was characterised by Lord Hardwicke, L. C., in (1742) 2 Atkins' Rep. 469 (18) as that of scandalising a Court or a Judge. The principle cannot be better stated than in the words of the opinion of Wilmot, C. J., a convenient reference to which is to be found in the report of the argument of the Attorney-General in 44 T. L. R. 301 (5), at p. 302, and is as follows:

> The arraignment of the justice of the Judges is arraigning the King's justice: it is an impeachment of his wisdom and goodness in the choice of his Judges, and excites in the minds of the people a general dissatisfaction with all judicial determination and indisposes their minds to obey them; and whenever men's allegiance to the laws is so fundamentally shaken, it is the most fatal and most dangerous obstruction of justice, and in my opinion calls out for a more rapid and immediate redress than any other obstruction whatsoever; not for the sake of the Judges as private individuals, but because they are the channels by which the King's justice is conveyed to the people. To be impartial, and to be universally thought so, are both absolutely necessary for giving the justice that free, open, and uninterrupted current, which it has, for many ages, found all over this kingdom, and which so eminently distinguishes and exalts it above all nations upon the earth.

The learned and distinguished advocate who has appeared on behalf of accused 1 has relied very strongly upon the statement of Lord Morris in (1899) A. C. 549 (3), at p. 561, that though the publication of scandalous matter of the Court itself was undoubtedly contempt, committals for such contempts had become obsolete in England, where Courts are satisfied to leave to public opinion attacks or comments derogatory or scandalous to them. But that it must be considered that in small colonies, consisting principally of coloured populations, the enforcement in proper cases of committal for contempt of Court for attacks on the Court may be absolutely necessary to preserve in such a community the dignity of and respect for the Court.

Obviously the statement that committals for such contempts had become obsolete was not intended to be a statement of the law. The learned Lord had correctly stated the law in the immediately preceding sentences of his judgment. The statement had regard only to the question of expediency. It was limited to England, and qualified by reference to the state of public opinion in that country. The question of expediency cannot be made to depend upon the size of the community or the colour of the population, but upon public standards. If the statement of the learned Lord was intended to be a statement of the law, it went too far. That is made evident by the decisions in (1900) 2 Q. B. 36 (4) in the following

year and in 44 T. L. R. 301 (5). The learned advocate felt the difficulty raised by these decisions, and sought to show that they were instances of the other and more common class of contempt, arising from comments upon cases pending in the Courts, wherein a summary remedy was necessary in order to prevent interference with the due course of justice in the trial of those particular cases. But neither of those decisions was in respect of any pending case, and to seek to extend that class of contempt so as to cover comments arising out of cases already disposed of, would be to travel outside the ambit of the principle upon which that jurisdiction is said to be founded.

An attack upon a Judge who has already disposed of a case cannot be said to be an interference with the due course of justice in that particular case. But such an attack is calculated to impair his authority when trying cases of a similar class, or his authority generally. Moreover, in (1900) 2 Q. B. 36 (4), the criticism of the Judge was not even in respect of the case or the facts of the case which had been tried, but in respect of advice which the Judge had given to representatives of the press about the way in which they ought to frame their reports. That advice had no more to do with the trial of the case than if the Judge had chosen to advise women to leave the Court, or to complain to those responsible for the Court building that the acoustics were so bad that he could not hear the witnesses. That case therefore was not one of the class mentioned by the learned advocate in which the criticism of the Judge relates to his conduct of the trial. Similarly in 44 T. L. R. 301 (5) Lord Hewart observed at p. 302, that the meaning of the words complained of was, that a person who held certain views could not hope for a fair hearing in a Court presided over by the learned Judge, not merely that he had acted unfairly in that particular trial. In neither of those cases could it be urged that summary proceedings were necessary because the criticism complained of was calculated to interfere with or obstruct the due course of justice in that particular case. Yet in both cases summary proceedings were held to be the appropriate remedy. In each of those cases the criticism was calculated to impair the authority of the Judge generally, and to destroy public confidence in his impartiality and integrity as a Judge. Surely it cannot be argued that it is a different kind of offence, or a more serious offence to impair the authority of a single Judge than to scandalise the whole Bench of Judges of which he is a member.

Nothing can be more serious than to publish statements calculated to diminish or destroy public confidence in Courts of Justice, and no offence calls for or deserves more swift or more summary punishment. The reason why such proceedings are rare nowadays in England is that public opinion and more especially standards of public decency and good conduct in that country for many years past have been such as to render the exercise of this jurisdiction unnecessary. The experience of Courts and Judges in India, especially in recent years, has not been such as to encourage them to allow this jurisdiction to become obsolete. I agree in finding both the accused guilty of contempt. This is not the first time that the second accused, Tarit Kanti Biswas, has been charged with this offence, and in the present instance the offences of both the accused have been gravely aggravated by the omission of any expressions of apology or regret from their affidavits and their unprecedented and unpardonable effrontery in making therein further charges of bias, partiality and unfairness against the Judges to whom has fallen the duty of hearing them in their defence.

Far more serious however is the fact that their learned Advocates stated that they had received from the accused definite and specific instructions not to offer to the Court either apology or regret, even in the event of their being found guilty of contempt. In my opinion such an attitude of open and deliberate defiance of the law as interpreted and decided by His Majesty's Judges, on the part of the Editor and Printer of a responsible newspaper, calls for such sharp and summary punishment of the offenders as will be a warning and deterrent to them, and to others similarly inclined towards such criminal practice, and such as will be a sufficient vindication of the integrity and independence of this Court.

Jack, J.—In this case the only two points raised in defence in which there appears to be any substance are: (1) that the objectionable passage in the newspaper article merely criticizes the High Court in its administrative capacity, and not in its judicial capacity, and therefore cannot be said to constitute contempt of Court since it does not in any way reflect on the judicial independence of the Court. This construction never occurred to me until suggested by the learned advocates appearing for the accused. A certain colour is however lent to it by the reference to administration at the commencement of the passage complained of, which runs as follows :

> We are glad to find that in the Bengal Legislative Council yesterday there was a discussion about the administration of the High Court. Every word of Mr. N. K. Basu was true.
>
> Then comes the statement that
>
> the Chief Justice and the Judges find a peculiar delight in hobnobbing with the Executive with the result that the judiciary is robbed of its independence which at one time attracted the admiration of the whole country.

It would be far-fetched to construe this as merely referring to the administrative work of the Court, as distinct from its judicial work. No one reading it would so limit its application especially in view of the concluding statement, for it is difficult to suppose that the administration of the Court (about which the public can have little knowledge), can have formerly attracted the admiration of the whole country. The use of the word judiciary also seems to imply reference to the Court in its judicial capacity. Had the administration only been referred to, surely the reference would have been clearly to the lack of independence in the administration of the Court, not in the judiciary generally. There can therefore be no doubt whatever that the writer means what he says, i. e., that the High Court judiciary has lost its independence through hobnobbing with the Executive. Had it not been so, surely the editor would have apologized in the terms that he was sorry that he had expressed himself in such language that this construction could be put upon it, but no such apology has ever been made. The only other point of any substance in the argument that has been addressed to us is that this is a case in which the Court should not have exercised the summary jurisdiction which it admittedly possesses as a Court of Record. The promulgation in a newspaper with a large circulation of such a statement is undoubtedly a contempt of Court of the very worst kind, for its publication obviously would tend to cause the public to lose their respect and regard for the law so administered, and, as stated by Wilmot, C. J.,

> to be impartial and to be universally thought so are both absolutely necessary for the giving justice that free, open and uninterrupted current which it had for many ages found all over the Kingdom,

and again

> the arraignment of the justice of the King's Judges excites in the minds of the people a general dissatisfaction with all judicial determinations and indispose their minds to obey them.

He maintains that

> the real offence is the wrong done to the public by weakening the authority and influence of a tribunal which exists for their good alone.

He adds that such conduct is pre-eminently a proper subject of summary jurisdiction. The same view is expressed by Sir Norman Mcleod in 1922 Bom 52 (60). Wilmot, J's. undelivered judgment in (1765) Wilmot's Opinions 243 (6) has been received with approval in many subsequent cases inspite of Master J. C. Fox's Opinion in 24 Law Quarterly Reports 184, 266, and the criticism of Fletcher, J., in the Irish case of 3 Moore P C 36n (24), in Hachell's Report. Such a sweeping attack on the whole administration of justice by the Court is very different from that fair and reasonable criticism which is always allowable except in connexion with a pending case. It is also very different from a case of constructive contempt, and a discussion of such cases is quite irrelevant. There is, no doubt, abundant authority for the view that contempt proceedings, involving as they do an exceptional interference with the liberty of the subject by an exceptional method, should only be used in cases where the administration of justice would be hampered by the delay involved in proceeding in the ordinary course of law. In this connexion the cases of (1899) A. C. 549 (3), (1906) 1 K. B. 32 (7) and (1873) 9 Q. B. 230 (16) and other cases have been referred to, and it has been argued that the summary procedure can only be used when the contempt has reference to the proceedings in a particular case. Almost all cases of contempt have reference to

a particular case, so that it is not surprising that the only case cited in which the summary procedure has been adopted, though the contempt is not connected with a particular case is the case of 1935 All. 1 (55). There are however a number of cases in which the summary procedure has been adopted although the cases with which the contempt was connected had been disposed of before the contempt was committed, for example the case of (1900) 2 Q. B. 36 (4) and in this country 1926 All. 623 (54) and 1922 Bom. 426 (53). In such circumstances the danger of justice being hampered by the delay involved in the ordinary procedure is in no way dependent on the fact that the contempt in question was connected with a particular case.

In the present case the contempt complained of would tend to hamper the administration of justice in every case in which the executive were specially interested by diminishing the confidence of the parties in the independence of the judiciary, e. g., in cases of a political character. The only alternative procedure in this country is that under S. 194, Criminal P. C. This procedure has not, I think, been employed in any High Court in cases of this kind of contempt of the High Court. It depends upon the exhibition of information by the Advocate-Goneral with the previous sanction of the Governor-General in Council or the Local Government, and would therefore place the maintenance of regard for the Court entirely in the hands of the Executive. Moreover, in the words of Will, J., in (1906) 1 K.B. 32 (7) at p. 41, it is "too dilatory and too inconvenient to afford any satisfactory remedy." There would be much to be said for the procedure under S. 194, Criminal P. C., in a case in which there could be any doubt as to the meaning of the words used, and which had therefore better be left to the decision of a jury, but where, as in this case, there is no ambiguity in the words used, the facts are not disputed, and the accused are thoroughly able and willing to defend themselves in summary procedure, there seems to be no reason why the Court should not adopt it. I think therefore that the Court was entitled in this case to take summary proceedings against the opposite parties and agree in finding that they are guilty of the contempt charged, and liable to be dealt with severely inasmuch as they have not attempted even a conditional apology for the language used.

Order.—Tushar Kanti Ghose, you have been adjudged by this Court to be guilty of contempt of Court by reason of the article that has been complained of. That article was capable of great public mischief. You, Tushar Kanti Ghose, are responsible in law for the publication of that article and you have, in fact, accepted responsibility for it in your affidavit. You have said that you were not there when it was written and that it was inserted in your absence, but that you take responsibility for it; and in this Court you have attempted, as far as you could, to justify it; your duty, if absent from the newspaper office, is to give such general or particular instructions that articles of this nature which could be contempt of Court should not be published. Apparently no such instructions could have been given and you accepted the responsibility for and approve of the article. The Judges of this Court know their duty; they are doing their duty and they will do their duty regardless of the consequences without fear or favour. No apology or regret has come from you and that leaves us only one course, and that is to send you to prison. The sentence and order of this Court is that you be detained in simple imprisonment for a period of three months.

Tarit Kanti Biswas: you are the Printer and Publisher of this newspaper and you have a responsibility not to publish such articles. You have made a plea of lack of knowledge of English. That is no excuse. If you cannot perform the duties of your office you ought not to hold that office. As long as you hold that office you must according to law perform the duties of that office. In this case it is obvious that the duties of your office were not performed, or that article would not have been published. You were before this Court in 1917 in a case in which you and others were charged with contempt of Court by publishing an article upon the then Chief Justice reflecting on the impartiality of his conduct or administration of justice in this Court. You were on that occasion subjected to a fine. That ought to have put

you on your guard and taught you a lesson for subsequent events. Apparently it did not. You adopt the same attitude as the Editor, and you make the same plea. In your case neither apology nor excuse has been offered for your conduct and the Court has only one course which it can take in your case and that is to send you to prison. The order of this Court is that you be detained in simple imprisonment for a period of one calendar month.

Order refusing to grant leave to appeal to Privy Council.

Derbyshire, C. J. — (2nd May 1935). This is an application made on behalf of Tushar Kanti Ghose and Tarit Kanti Biswas who were committed to prison on 8th April last in respect, of a contempt of this Court. Tushar Kanti Ghose was committed to prison for a period of three months and Tarit Kanti Biswas for a period of one month. The committals were in respect of publication of a certain matter in the Amrita Bazar Patrika on 23rd March 1935. Tushar Kanti Ghose was the Editor of the Amrita Bazar Patrika and Tarit Kanti Biswas was the printer and publisher of the same.

The application is made or purports to be made under Cl. 41 of the Letters Patent of this Court dated 1865. That clause reads as follows:

> And we do further ordain that, from any judgment, order or sentence of the said High Court of Judicature at Fort William in Bengal, made in the exercise of original criminal jurisdication, or in any criminal case where any point or points of law have been reserved for the opinion of the said High Court in manner hereinbefore provided, by any Court which has exercised original jurisdiction, it shall be lawful for the persons aggrieved by such judgment, order, or sentence to appeal to Us, Our heirs or successors in Council, provided the said High Court shall declare that the case is a fit one for such appeal and under such conditions as the said High Court may establish or require, subject always to such rules and orders as We may, with the advice of Our Privy Council, hereafter make in that behalf.

Mr. Banerji, who makes this application, asks for a certificate for a declaration by us that the case is a fit one for appeal. He says that the order was made in the exercise of the original criminal jurisdiction of this Court and that thereby he or his clients come within Cl. 41. In my view proceedings for contempt of Court do not come within the phrase "original criminal jurisdiction of this Court". The power of this Court, which is a Court of Record, to punish for contempt is derived as was pointed out by Sir Barness Peacock in the case of *Surendra Nath Banerjee* (1) from the common law of England at the time when the Supreme Court was constituted a Court by the Charter. This Court of course succeeded to the jurisdiction exercised by the Supreme Court. It may be well to note that the case, 10 Cal 109 (1), was a case in which the writer in a newspaper was held by the Judges of this Court to have committed contempt of Court by scandalizing the Court. He was committed to prison for a period of two months. He did not make any application under Cl. 41 of the Charter as is done in this case. He petitioned to the Privy Council to have his case considered and during the course of that matter Sir Barnes Peacock who delivered the opinion of the Board said:

> Their Lordships are of opinion that a contempt of the High Court by a libel such as the present, published out of Court when the Court is not sitting, is not included in the words 'offences under the IndianPenal Code', although the contempt may include defamation. Such an offence is something more than mere defamation, and is of a different character. It is an offence which by the common law of England is punishable by the High Court in a summary manner by fine or imprisonment, or both. That part of the common law of England was introduced into the Presidency towns when the late Supreme Courts were respectively established by the Charters of Justice. The High Courts in the Presidencies are Superior Courts of Record, and the offence of contempt, and the powers of the High Court for punishing it, are the same there as in this country, not by virtue of the Penal Code for British India and the Code of Criminal Procedure, 1882, but by virtue of the common law of England : 5 Moore's P. C. C., N.S. 466 (61) at p 497.

In my view, having regard to the words used by Sir Barnes Peacock particularly those "such an offence", i. e., scandalizing a Court "is something more than mere defamation and is of a different character" it is clear that proceedings for contempt of Court—a Court of Record, at any rate, this Court—are not made or done in the exercise of original criminal jurisdiction within the meaning of Cl. 41. These proceedings for contempt of Court are of a peculiar nature ; though it may be that in certain aspects they are quasi criminal, in

61. Mc Dermott v. The Justices of British Guina, (1869) 5 Moore P C n s 466=2 P C 341 =17 W R 352=20 L T 74=38 L J P C 1.

my view they are not exercised as part of the original criminal jurisdiction of this Court. Consequently the application must fail.

But I will consider the matter one step further. If it should be contrary to my view that proceedings for contempt of this Court are made or done in the exercise of its original criminal jurisdiction it seems to me that this Court would not, even in such a case, having regard to the decision of the Privy Council, declare under Cl. 41 that this case is a fit one for appeal to the Privy Council. This case is in its essentials a similar case to that of *Surendra Nath Banerjee's*. In that case Sir Barnes Peacock—I am now quoting from p. 132 of 10 Cal 109 (1) says :

Their Lordships having decided that the libel was a contempt of Court, and that the High Court had jurisdiction to commit the petitioner for a period of two months, the case is not a proper one for an appeal to Her Majesty. In 8 Moore P. C 47 (62) at p. 54, upon an application for leave to appeal to enable the petitioner to get rid of certain fines imposed upon him by the Court of Sierra Leons for contempt of Court, it was said: 'It is the opinion not only of the members of the Committee who 'heard' the petition, but also of the other members, who usually 'attend' here to whom the petition has been submitted, and we have had 'the benefit of their judgment as well as our own that we cannot interfere with such a subject. In this country every Court of Record is the sole and exclusive judge of what amounts to a contempt of Court.' That case was referred to as an authority by the Judicial Committee in the case of 5 Moore P C N S 466 (61). In the latter case an application was made ex parte for leave to appeal from an order of the Supreme Court of Civil Justice in British Guiana, by which the petitioner was, for a contempt of Court in publishing certain libels commenting on the administration of justice, and upon one of the Judges of the Court, committed to jail for a period of six months or unto further orders : see S. C., p. 490, and 4 Moore's P. C. C., N. S. 110 (63), at p. 120. Leave to appeal was granted, without prejudice to the question of the competency of Her Majesty in Council to entertain an appeal from an order of a Court of Record inflicting punishment by fine or imprisonment for a contempt of Court, which question was to be open to argument on the hearing of the appeal. The case came on for argument, and it was contended by the Solicitor-General, that the leave to appeal ought not to have been granted, as a Court of Record is the sole judge of what constitutes a contempt. He stated however that he was prepared to support the order upon the merits, but he was not called upon to do so. In delivering the opinion of the Judicial Committee Lord Chelmsford, after stating that the leave to appeal was conditionally granted, said the respondents might have come in to discharge the order upon the very ground which had been taken, namely that there could be no appeal against an order of aCourt of Record committing a person for contempt, and that, in order to support the propriety of the leave to appeal, the appellant must show either that the Court was not a Court of Record, or that, if it was a Court of Record, yet that there was something in the order committing the appellant which rendered it improper, and therefore the subject of appeal. Then after deciding that the Court of Sierra Leone was a Court of Record, his Lordships says (493):

'Not a single case is to be found, where there has been a committal by one of the Colonial Courts for contempt where it appeared clearly upon the face of the order that the party had committed a contempt, that he had been duly summoned, and that the punishment awarded for the contempt was an appropriate one, in which this Committee has ever entertained an appeal against an order of this description.' Again, after referring to the authorities and amongst others to 8 Moore P. C. 47 (62), his Lordship concluded by saying: 'Under these circumstances their Lordships entertain no doubt whatever as to the propriety of deciding that in this case the leave to appeal ought not to have been granted; that the Supreme Court of Justice was a Court of Record; and that as a Court of Record, it had power to commit for the particular contempt. As their Lordships do not enter into the merits of the case, they will say nothing as to the character of the libel upon which the Court thought it proper to commit the publisher for contempt.' Acting upon these authorities, and holding that the High Court had jurisdiction to commit the publisher of the libel in question for contempt, their Lordships will say nothing as to the character of the libel, or as to the extent of the punishment awarded. They will humbly advise Her Majesty to dismiss the petition.

Mr. Banerjee had made his application on the ground that this Court has no jurisdiction to commit the two applicants for contempt. That it has such jurisdiction is clearly laid down by their Lordships of the Privy Council in the case of *Surendra Nath Banerjee* (1). Mr. Banerjee has advanced a further argument which is based upon some words of Lord Morris in the case of (1899) A C 549 (3). The head-note is:

Contempt of Court may be committed by publication of scandalous matter respecting the Court after adjudication as well as pending a case before it. In England committals for such contempts have become obsolete; in small colonies consisting principally of coloured populations they may still be necessary in proper cases: But held, that where the appellant was neither printer nor publisher nor writer of such scandalous matter, but had innocently lent the paper containing it to a friend without knowledge of its contents, he was neither constructively nor necessarily guilty of contempt of Court.

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62. Rainy v. The Justices of Sierra Leons, (1872) 8 Moore P C 47.
63. *In the matter of* Mc Dermott, (1366) 4 Moore P C N S 110.

In that case Lord Morris at p. 561 says with reference to summary procedure for contempt :

It is a summary process, and should be used only from a sense of duty and under the pressure of public necessity, for there can be no landmarks pointing out the boundaries in all cases. Committals for contempt of Court by scandalising the Court itself have become obsolete in this country.

Then he goes on to say :

Courts are satisfied to leave to public opinion attacks or comments derogatory or scandalous to them. But it must be considered that in small colonies, consisting principally of coloured populations, the enforcement in proper cases of committal for contempt of Court for attacks on the Court may be absolutely necessary to preserve in such a community the dignity of and respect for the Court.

Lord Morris then goes on to consider the question whether there was contempt of Court in a man in lending a newspaper which contained scandalous matters, and he decides that it was not.

Now, Mr. Banerjee says that the words "committals for contempt of Court by scandalising the Court itself have become obsolete" indicate that there is no longer jurisdiction in this Court to exercise this summary procedure. That argument of course was raised when these applicants were before the Court and was dealt with in the judgment which was then delivered. But with deference to the argument of Mr. Banerjee I would like to point out that that statement "committals for contempt of Court by scandalising the Court itself have become obsolete in this country" is a statement of fact relating to England and Wales. It is a statement of fact which is proved to be incorrect because in the following year there was the case of (1900) 2 Q B 36 (4) in which the Courts in England punished the writer of a certain matter in a newspaper which scandalised a Judge. Again in 1928 the Courts in England punished the editor of the New Statesman in respect of some matter which was considered to be scandalising a Judge of the High Court in England. So as a statement of fact that is incorrect. Again in this country in 1917 there was the case, 1918 Cal 988 (2), in which an attack was made in the newspaper upon the conduct of the Chief Justice of this Court. There the delinquent, who happened to be one of the applicants in this case, was punished by this Court for a contempt that he had committed. Under these circumstances it seems to me that the argument which Mr. Banerjee has endeavoured to build on those lines from the judgment of Lord Morris in (1899) A C 549 (3) fails. In my opinion, having regard to the decision of their Lordships of the Privy Council in the case of *Surendra Nath Banerjee* (1) itwould not open to this Court to declare that this case is a fit case for appeal to His Majesty in Council, if, indeed, such leave could be given at all in such a case as this under Cl. 41, Letters Patent, of this Court of 1865. In my opinion, this application must be dismissed.

Costello, J. — I entirely agree with the views expressed by my Lord the Chief Justice. In my opinion the order or sentence made by this Court on 8th April last was not an order or sentence made in the exercise of its original criminal jurisdiction. Therefore, this matter is not one which falls within the purview of the provisions of Cl. 41, Letters Patent, of this Court dated 1865. The proceedings for contempt of Court of summary nature are proceedings derived from the Common Law of England. There is inherent right to take such proceedings in this Court by virtue of its position as a Superior Court of Record. Moreover, the power of this Court to exercise jurisdiction of a summary character in a case of contempt was conferred or affirmed by the Charter under which the Supreme Court was originally established : which power this Court has inherited. The power to punish for a contempt of Court is a power sui generis. In my opinion it is not a power which is or can be exercised under the ordinary criminal jurisdiction of the Court.

The judgment of Sir Barnes Peacock in 10 Cal 109 (1) in my view puts this matter beyond all question whatever and indicates that when this Court as a Court of Record thinks it fit to exercise summary jurisdiction and under that jurisdiction punishes for a contempt of Court it is not open to the person concerned to ask this Court for leave to appeal to His Majesty in Council. With regard to the observation of Lord Morris in (1899) A C 549 (3), as I pointed out in the judgment which I gave when this matter was before the Court on 8th April last, that observation is clearly not only in the nature of an obiter dictum

but a statement which could only have been intended to express the opinion of the learned Judge with regard to the state of fact existing in England at the time the observation was made. But whether one takes that observation as a statement of fact or even as an expression of opinion with regard to the state of the law it is obvious from the subsequent events from the proceedings and decisions in cases which have occurred since the time of Lord Morris that that observation even as a statement with regard to the law was not accurate. In any event, as the Chief Justice has already pointed out, Lord Morris was speaking solely as regards the state of things in England. That proposition has no reference whatever either to the state of fact or to the state of law existing in India.

In my opinion it is abundantly clear from the judgment in *Surendra Nath Bancrji's* case (1) that summary proceedings for a contempt of Court is not only competent but the decision, that is to say, judgment, order and sentence given in such proceedings must be taken to be final and not open to appeal. I think this application for leave must be refused.

V.V. *Editor & Printer sentenced;*
Leave to appeal to P. C. refused.

A. I. R. 1935 Calcutta 454

MITTER, J.

Jogendra Chandra Das — Defendant 3 --Petitioner.

v.

Birendra Lal Das Chowdhury and *others*—Opposite Parties.

Civil Rule No. 1166 of 1934, Decided on 21st January 1935, from decree of Munsif, Fourth Court, Habiganj (Sylhet), D/- 27th July 1934.

(a) Criminal P. C. (1908), S. 147 (2) — Mandatory orders for removal of fence cannot be passed under S 147 (2).

No mandatory order for removal of the fence can be passed under S. 147 (2) : 1925 *Cal* 991 and 1934 *Cal* 556, *Ref.* [P 455 C 1]

(b) Specific Relief Act (1877), S. 9—'Otherwise than in due course of law' is not synonymous with 'illegally'.

The words 'otherwise than in due course of law' are not synonymous with the word 'illegally.' The phrase means 'otherwise than in the regular, normal process and effect of the law operating on a matter which has been laid before a Court, civil or criminal, for adjudication.' [P 455 C 1]

(c) Specific Relief Act (1877), S. 9—Proceedings under S. 147, Criminal P. C. in respect of path-way started by defendants—Pending that, plaintiff putting up fence — Defendant removing fence after obtaining order in their favour—Suit by plaintiff under S. 9 held was not entertainable as there was no dispossession within meaning of S. 9.

The defendants started proceedings under S. 147, Criminal P. C., their case being that they had a right of way over the lands in suit and the plaintiffs were attempting to obstruct the pathway. At the date when this proceeding was started there were no obstructions but during the pendency of the proceedings the plaintiffs fenced the land. The proceedings under S. 147, Criminal P. C., terminated in favour of the defendants. The defendants removed the fencing and began to exercise their right of way and the suit under S. 9, Specific Relief Act, was filed by the plaintiff.

Held : that the plaintiffs' suit under S. 9, Specific Relief Act, was not entertainable. The act of the defendants in passing over the lands did not amount to dispossession within the meaning of S. 9 of the Act. The plaintiffs had not been turned out and they could use the land in any beneficial way they like provided they did not interfere with the reasonable use of the same by the defendants as a pathway. [P 455 C 2]

Atul Chandra Gupta and *Priyanath Dutt*—for Petitioner.

Bijan Kumar Mukherjee, Chandra Sekhar Sen, Nripendra Chandra Das, Nikunja Behary Roy and *Rohini Benode Rakhit*—for Opposite Parties.

Order.—This rule has been obtained by a defendant, (defendant 3) in a suit instituted under S. 9, Specific Relief Act. The points for consideration are (1) Whether the plaintiffs have at all been dispossessed, and (2) if dispossessed whether the dispossession was otherwise than in due course of law. The subject-matter of the suit is a narrow and long strip of land. It was with other lands, the subject-matter of a suit for partition between the plaintiffs and defendant 1 and others. Defendant 3 was not made a party in the partition suit. The partition suit ended in a decree some time in the year 1931. The plot in suit was given to the plaintiffs. On 9th April 1932 the plaintiffs took possession in execution of the decree for partition.

The defendants started proceedings under S. 147, Criminal P. C., on 3rd February 1932, their case being that they had a right of way over the lands in suit and the plaintiffs were attempting to obstruct the pathway. At the date when this proceeding was started there were no obstructions but during the pendency of the proceedings the plaintiffs fenced the lands. This was on

9th April 1932. The proceedings under S. 147, Criminal P. C., terminated in favour of the defendants. The order was in terms of S. 147 (2), that is, the plaintiffs were prohibited from interfering with exercise of the right of the defendants to use the land as a pathway. No mandatory order for removal of the fence was passed, as it could not be passed under that section: 1925 Cal. 991 (1) and 1934 Cal. 556 (2). On 7th December 1932 the defendants removed the fencing and began to exercise their right of way. On 9th January 1933 the suit under S. 9, Specific Relief Act, was filed.

Dr. Mukherjee, who appears for the opposite parties, seeks to support the order by stating that any substantial interference with enjoyment of immovable property amounts to dispossession within the meaning of S. 9, Specific Relief Act and when the defendants took the law in their own hands and demolished the fencing the dispossession is one "otherwise than in due course of law." He contends that the words "otherwise than in due course of law" are not synonymous with the word "illegally" and there he is right. The phrase means: "In the regular, normal process and effect of the law operating on a matter which has been laid before a Court, civil or criminal, for adjudication."

It would ordinarily exclude self-help. But the question in this case is whether the defendants who had removed the fencing, put up during the pendency of the proceedings under S. 147, after an order had been passed in their favour in terms of S. 147 (2), had acted otherwise than in due course of law. Assuming that the act of passing over the lands is dispossession, I think that the acts done by the defendants are acts done "in due course of law." There has been an adjudication by the criminal Court in their favour. If the fencing fell down and the defendants passed over the lands no new fencing could have been put up by the plaintiffs till they had obtained an adjudication in their favour in a regular suit. If the defendants climbed over the fencing and passed over the lands, they could not be obstructed. Any attempt to obstruct them would have been punishable under S. 188, I. P. C. There is therefore an effective sanction provided for in favour of the defendants. The case before me is governed by the principles formulated in the case 7 C. L. J 547 (3) which case is indistinguishable, though the matter under consideration there was a proceeding not under S. 147 but under S. 145, Criminal P. C.

In that case the proceeding under S. 145 was started before sub-S. 6, S. 145, Criminal P. C., was amended by giving the Court power to restore possession when a party affected by the order had taken possession within two months of the date of the initiation of the proceedings. The plaintiff in the suit under S. 9, Specific Relief Act, was in possession from the 3rd to 26th October 1906 when he was dispossessed by the defendant. On a date between 3rd and 10th November 1906 the order under S. 145 (1), Criminal P. C., was made. On 2nd February 1907 the Magistrate recorded the final order in favour of the defendant. The defendant entered into actual possession on 13th February 1907. There was an attachment under S. 145 (4) but Stephen, J., assuming that the plaintiff was in possession up to 13th February 1907, held that the act of the defendants taking possession on 13th February 1907 was an act done in due course of law, although there was no order of the Magistrate directing possession to be delivered to the defendant and no order for restoration to possession could be made by him on the law as it then stood. I accordingly hold that the plaintiffs suit under S. 9, Specific Relief Act, was not entertainable. I do further hold that the act of the defendants in passing over the lands does not amount to dispossession within the meaning of S. 9, Specific Relief Act. The plaintiffs have not been turned out and they can use the land in any beneficial way they like provided they do not interfere with the reasonable use of the same by the defendants as a pathway. The plaintiffs have misconceived their remedy and if they have felt aggrieved by the order passed by the Magistrate under S. 147 (2), Criminal P. C., their relief lies in instituting a re-

1. Hari Mati Dassi v. Hari Dassi Dassi, 1925 Cal 991=88 I C 1041=26 Cr L J 1265.
Tarini Mohan De v. Dwarka Nath Banikya, 1934 Cal 556=1934 Cr C 782=150 I C 600=35 Cr L J 1093.

3. Leo Moore v. Monoranjan Guha, (1908) 7 C L J 547=12 C W N 696.

gular suit. The rule is accordingly made absolute. Costs one gold mohur.

K.S. *Rule made absolute.*

A. I. R. 1935 Calcutta 456

COSTELLO, J.

Beryl Gertrude Sadler

v.

Harry Reginald Sadler

In the matter of application in Matrimonial Suit No. 29 of 1933, Decided on 13th July 1934.

Indian and Colonial Divorce (Jurisdiction) Act (1926), S. 1 (4), Rules under, R. 9—Person charged with adultery—Application for leave to intervene should be made by summons supported by affidavit—Divorce.

An application for leave to intervene under the provisions of R. 9 by a person charged with adultery should be made by summons supported by an affidavit but returnable before a Judge in Chambers and when the order is made giving leave, it should contain or be accompanied with such directions as to appearance and procedure as the Court may think fit in the circumstances of case. [P 457 C 2]

R. C. Banerjee—for Applicant.

F. S. R. Surita—for Mrs. Sadler.

Order.—This is an application by Enid Peychers, a married woman, for leave to intervene in a suit for dissolution of marriage brought by Beryl Gertrude Sadler against her husband Harry Reginald Sadler, the suit being based upon an allegation that on diverse and repeated occasions between October 1930 and September 1931 and indeed between that date and the month of June 1932 the respondent Harry Reginald Sadler committed adultery with the present applicant.

It appears that so far as the respondent is concerned, the suit is undefended, he neither having entered appearance nor made any answer to the petitioner's allegations against him. The suit as an undefended suit appeared on the list before Buckland, J., on 3rd July, but upon the case being called on, counsel for the petitioner drew the attention of the Court to the fact that by some inadvertence, if not negligence, the woman with whom adultery was charged, that is to say, the present applicant, had never been served with a certified copy of the pleadings containing the charges or with a notice that she was entitled to apply for leave to intervene in the cause as required by the provisions of R. 9 of the rules made under S. 1 (4), Indian and Colonial Divorce (Jurisdiction) Act, 1926. This matter once more brings into prominence the extraordinary anomaly and the glaring injustice which still exists as between the position of women charged with adultery where the suit is brought under the Indian and Colonial Divorce Jurisdiction Act and that of a woman charged with adultery in a suit brought under the provisions of the Indian Divorce Act of 1869. I have on a number of occasions pointed out that owing to what I consider the very unfortunate decision in the case of 30 Cal. 489 (1), in a wife's suit for divorce against her husband brought under the Indian Divorce Act of 1869, the Court has no power to allow the alleged adulteress to intervene, whereas in the case of a suit brought by a wife against her husband under the Indian and Colonial Divorce (Jurisdiction) Act, 1926, the alleged adulteress can intervene by reason of the provisions of R. 9 made under S. 1 (4) of that Act.

The startling and gross injustice of the position is at once apparent when it is observed that the right of a woman charged with adultery to intervene in a wife's suit for dissolution of marriage and to defend her honour by denying and rebutting the charges made against her depends not in any way upon her own nationality or her individual rights or personal status but entirely upon the nature of the domicile of the wife petitioner which, in effect, means the domicile of the husband respondent. Therefore the position is this: that if it so happens that Mrs. A brings a suit for dissolution of marriage against Mr. A and chooses to charge Mrs. or Miss B with having committed adultery with Mr. A, B cannot intervene in the suit but must remain outside powerless and helpless whatever foul allegations may be made against her, unless it happens to be the case that Mr. A is not domiciled in India but in England or Scotland.

Apart from the injustice inflicted on the woman charged with adultery, it is obvious that the situation might open the way to very grave abuses, because a woman who is desirous of getting rid of husband might deliberately implicate any particular woman, knowing that that woman would not be in a position in law to come to Court to repudiate and falsify the charges made. The in-

1. Ramsay v. Boyle, (1903) 30 Cal 489.

justice of the present state of the law is intensified a thousandfold, in cases where as in the present instance the husband respondent does not choose to defend the suit brought against him by his wife. In such cases the woman charged with having committed adultery with the husband respondent is obviously left defenceless and without any sort of protection. In this particular case, if it had not fortuitously happened that the respondent Harry Reginald Sadler is said to be domiciled in England and not in India, the present applicant would have had no opportunity whatever of coming to Court to deny the charges which Mrs. Sadler has made against her.

The Court has called the attention of Government to this point on previous occasions, and it has been pointed out that this is undeniably a state of affairs which requires the intervention of the legislature at the earliest possible moment with a view to remedying the injustice which I have described. It is fortunate for the present applicant Enid Peychers that if it was to be her lot to be charged with adultery at all, she is charged with having committed adultery with a man who is non-domiciled as regards this country, a fact which made it necessary for his wife to launch her petition under the Indian and Colonial Divorce Jurisdiction Act, 1926. Whether it was due to sheer inadvertence on the part of the petitioner's solicitors or whether it is possible to ascribe an even more blameworthy reason for the omission to give notice to the alleged adulteress, the fact remains that the institution of the wife's suit for dissolution of marriage did not either formally or informally bring to the attention of Enid Peychers the fact that serious charges of adultery were being made against her and she had no sort of intimation of that fact until at any rate the morning of the very day on which this suit appeared in the list for hearing. I am quite satisfied that but for the fortunate circumstance that this lady happened to notice in the newspapers that this case was down for hearing on the 3rd July, a decree might have been made in her absence and without her having any knowledge of the proceedings and she would have been deprived of any opportunity whatever of endeavouring to establish her innocence with regard to the charges brought against her. By the provisions of R. 9 she has the right to intervene on applying to the Court within the time specified in a notice served upon her, and I am told that after the omission to serve such a notice had been brought to the attention of Buckland, J., the case was adjourned by him in order that a proper notice might be duly served. A notice was subsequently served and she now comes before the Court, asking that she may be allowed to intervene in the cause.

Mr. Surita on behalf of the wife petitioner has very properly taken no objection whatever to her being allowed to come into the suit and defend herself. The only point he has raised is as to the proper procedure to be followed in a matter of this kind. There appears to be no provision in the Rules of this Court corresponding to R. 18 of the English Rules. By that Rule, an application for leave to intervene in any matrimonial cause has been made by summons to the parties supported by affidavit. In England, the application is ordinarily made to the Registrar and upon the return of the summons, leave may be given with such directions as to appearance and procedure as the Registrar shall think fit. I hold that in this Court an application for leave to intervene under the provisions of R. 9 should also be made by summons supported by an affidavit but returnable before the Judge in Chambers and that when the order is made giving leave, it should contain or be accompanied with such directions as to appearance and procedure as the Court may think fit in the circumstances of the case. In the present instance, I give the applicant Enid Peychers leave to intervene in the cause—Beryl Gertrude Sadler v. Harry Reginald Sadler, and direct that she do file her answer to the petition within ten days. The cause title will be amended and the suit will be titled Sadler v. Sadler and Peychers. The petitioner is represented before me by Surita, but the husband respondent is not represented because his whereabouts are not known, or, at any rate, there is difficulty in discovering exactly where he is at the present time and so it was not possible to give him notice

that this application would be made today. But so that everything may be completely in order I direct that notice of the order, which I am now making, be served upon him by the petitioner at his last known address by sending a registered letter with an intimation that if he desires to raise any objection to the order which has been made, he must do so within six weeks from the receipt of that letter. Mr. Bonnerjee's client is to have her costs in any event. Certified for counsel.

K.S. *Order accordingly.*

A. I. R. 1935 Calcutta 458

NASIM ALI, J.

Dinanath Chandra and *others* — Defendants—Appellants.

v.

Sudhanyamoni Dasi and *others*—Respondents.

Appeals Nos. 508, 509, 511 to 515 and 517 to 519 of 1932, Decided on 19th November 1934, from appellate decrees of Sub-Judge, First Court, Midnapur, D/- 31st July 1931.

(a) Records of Rights—Entry in Record of Rights showing tenants as tenure-holders —Onus of rebutting presumption is on tenants.

Where the Record of Rights showed that the tenants were only tenant-holders but the tenants contended that they were raiyats:

Held: that the onus was on them to rebut the presumption and that the present possession through bhagidars was not inconsistent with their status being that of tenure-holder.

[P 459 C 2 ;P 460 C 1]

(b) Bengal Tenancy Act (1885), S. 7—Suit for enhancement—Appeal by tenant—No appeal or cross-objection filed by landlord against lower Court's order — Appellate Court cannot further enhance rent—Civil P. C. (1908), O. 41, R. 33.

Where from a decree passed in a suit for enhancement, the tenants file an appeal but the landlord has not filed any independent appeal or even cross-objection, the appellate Court has no jurisdiction to grant further enhancement in favour of the landlord: 1914 *Cal* 722; 1916 *Cal* 250 and 261, *Rel on*; 1916 *P C* 182, *Dist.*

[P 460 C 1]

Gopendra Nath Das—for Appellants.

A. N. Bose and *Saroj Kumar Maity*—for Respondents.

Judgment.—These ten appeals arise out of as many suits for enhancement of rent under S. 7, Bengal Tenancy Act. The plaintiff, that is the landlord, brought these suits against the tenant defendants on the allegation that their rent was liable to be enhanced in view of the provisions of S. 7, Bengal Tenancy Act. In the finally published Record of Rights the tenant defendants' status was recorded as that of tenure-holders. The defendants however in their defence took the plea that they were not tenure-holders but were raiyats and consequently the provisions of S. 7, Bengal Tenancy Act, were not applicable. The defendants also stated that the amount of enhancement claimed was exessive and unfair.

The Courts below have concurrently rejected the defence of the tenants to the effect that they were raiyats. As regards the amount of enhancement, the trial Court on a consideration of the evidence in each individual case allowed to the landlord only 25 per cent of the nett profit in one case and 50 per cent the nett profit in the other cases. Appeals were thereafter taken by the tenants to the lower appellate Court. No cross-objections challenging the amount of enhancement granted by the trial Court were however filed by the landlord. The learned Judge in appeal however varied the decrees of the trial Court by allowing 60 per cent of the nett profit to the landlord. The present appeals are therefore by the tenant defendants.

The first point urged in support of the appeals by the learned advocate for the tenant defendants is that the finding of the Courts below on the question of status is vitiated by error of law. Inasmuch as the learned Judge based his finding on certain circumstances and facts which are not relevant evidence at all. It is argued by the learned advocate that the learned Judge should not have taken into consideration the fact that the tenants belonged to Bhadraloke class. It is further argued that the learned Judge fell into an error in thinking that khas possession of the land by the tenants now is not material evidence for the purpose of finding out the original purpose for which the tenancies were created. These contentions have no substance. The Record of Rights clearly shows these tenants to be tenure holders. The onus was upon them to rebut this presumption. In order to rebut the presumption, the tenants wanted to rely upon certain facts, one of the facts being that the lands are now in the khas possession of the tenants themselves. The learned

Judge was perfectly justified in holding that the present possession through Bhagidars is not inconsistent with their status being that of tenure holders. I am therefore of opinion that the finding of the Courts below on the question of status is not based on any inadmissible or irrelevant evidence and is therefore not vitiated by any error of law.

The next point urged in support of the appeals is that the learned Judge had no jurisdiction under O. 41, R. 33, Civil P. C., to award further enhancement to the landlord in the absence of any appeals or cross-objections on the part of the landlord claimiug further enhancement. In my judgment this contention must prevail. The language used in O. 41, R. 33, Civil P. C., is no doubt very wide but as has been pointed out by Jenkins, C. J., in the case of 1914 Cal. 722 (1) that

the power contained in R. 33 should be limited to those cases where, as the result of the appellate Court's interference with the decree in favour of the appellants further interference is required in order to adjust the rights of the parties in accordance with justice, equity and good conscience.

It has also been pointed out by this Court in the case of 1916 Cal. 250 (2) that

R. 33, O. 41 of the Code should not be applied so as to enable a party litigant to ignore the other provisions of the Code or the provisions of statutes like those which relate to limitation or payment of court-fees: see also in this connexion the case of 1916 Cal. 261 (3).

The learned advocate for the respondent however placed reliance upon a decision of the Judicial Committee in the case of 1916 P. C. 182 (4). The facts of the case however are entirely different from the facts of the present case. My conclusion therefore is that the learned Judge had no jurisdiction to grant further enhancement in favour of the landlord as the latter did not want further enhancement either by filing independent appeals or by filing cross-objections.

The result is that the judgment and decrees of the lower appellate Court, so far as these appeals are concerned, are varied in the manner indicated above. Parties will bear their own costs throughout. The cross-objections are not pressed and are dismissed without costs.

K.S. *Decree varied.*

1. Gangadhar Muradi v. Banabashi Padihari, 1914 Cal 722=24 I C 208.
2. Abja Majhi v. Intu Bepari, 1916 Cal 250=32 I C 494.
3. Akimannessa Bibi v. Bepin Behari Mitter, 1916 Cal 261=32 I C 499.
4. Tricomdas Cooverji Bhoja v. Gopinath Jiu Thakur, 1916 P C 182=39 I C 156=44 I A 65=44 Cal 759 (PC).

A. I. R. 1935 Calcutta 459

GUHA AND BARTLEY, JJ.

Akshay Kumar Saha—Plaintiff — Appellant.

v.

Kamini Kumar Saha and *others*—Defendants—Respondents.

Appeal No. 214 of 1932, Decided on 13th December 1934, from appellate decree of Sub-Judge, 3rd Court, Mymensingh, D/- 31st July 1931.

Bengal Tenancy Act (1885), S. 76 (2) (f)—Occupancy raiyats — Place of worship in dwelling house intended for use of tenants and their family is appurtenant to house—Such structure in existence for long time and not found to diminish value of landlord's property is improvement.

The erection of a dwelling house suitable to the requirements of the tenants having rights of occupancy in them, has always been considered to be within their rights; and the erection of a dwelling house whether of masonry, bricks, stone or any other material whatsoever, for the tenant and his family together with all necessary out-offices, has been recognized as an 'improvement' as contemplated by the Bengal Tenancy Act, S. 76 (2) (f). A place of worship in a dwelling house, used and intended to be used by the tenants and their family, must be taken to be an appurtenance to the house itself and where it has been treated as such for a very long time, and has not been found to be a structure or work executed by the tenants which has in any way diminished the value of the landlord's property, it cannot but be considered to be an improvement. [P 460 C 1, 2]

Atul Chandra Gupta, *Bhagirath Chandra Das* and *Jnan Chandra Roy*—for Appellant.

Basak and *Jogesh Chandra Sinha*—for Respondents.

Guha, J.—The plaintiff in the suit in which this appeal has arisen, prayed for relief by way of permanent injunction in the matter of a masonry structure described as mantop, and for a declaration of his right to demolish the same in case the brick-built structure of a permanent nature were completed during the pendency of the litigation. The case of the plaintiff before the Court was that the defendants were tenants at will, and had no right to have a permanent pucca structure in their homestead. The claim of the plaintiffs in the suit was resisted by the defendants, who asserted that

they were raiyats with rights of occupancy, and were under the law entitled to build a permanent pucca mantop on their homestead, as a part of their dwelling house.

According to the finding arrived at by the Courts below, the defendants were occupancy raiyats, and a mantop in the defendants' house has existed for several generations. The mantop was formerly roofed with corrugated iron sheets and had pucca plinth. The defendants were now "after pulling down the old mantop erecting a pucca mantop with bricks on the old site." The question before the Court below, on the finding arrived at by it was whether the defendant had any right to erect a pucca structure like the building under construction ; could the structure be called an improvement within the meaning of S. 76 (2) (f) Ben. Ten. Act ?

There can be no question that the structure sought to be raised, and which had almost been completed at the time when the case was pending before the Court of appeal below, was an appurtenance of the dwelling house of the defendants. The mantop was in existence for a very long time, as a house for performing the annual pujas performed by orthodox Hindus having faith in the religion of their forefathers and in the forms of worship practised by them, and having also sufficient means and the inclination to perform them. The erection of a dwelling house suitable to the requirements of the tenants having rights of occupancy in them, has always been considered to be within their rights ; and the erection of a dwelling house whether of masonry, bricks, stone or any other material whatsoever, for the tenant and his family, together with all necessary out-offices, has now been recognised as an "improvement" as contemplated by the Bengal Tenancy Act: S. 76 (2) (f). The question then arises whether a particular structure or any work executed by the tenant of a holding substantially diminishes the value of his landlord's property : S. 76 (3). This latter provision contained in the Bengal Tenancy Act was recognised on the principle that every man who possessed a right to hold the land permanently, that is of a right of occupancy, can do what he likes with the land, so long as he does not injure it to the landlord's detriment (see in this connexion 6 W R (Act 10) 40 (1).

The word "out-offices" used in S. 76 (2) (f) is not sufficiently clear and comprehensive in the matter of the intention of the legislature ; and the clauses which specify what constitutes improvement within the meaning of S. 76, Ben. Ten. Act, cannot be taken to be exhaustive. On the footing that a place of worship in a dwelling house, used and intended to be used by the tenants and their family, must be taken to be an appurtenance to the house itself, that it has been treated as such for a very long time, and that it has not been found to be a structure or work executed by the tenants which has in any way diminished the value of the landlord's property, it cannot but be considered to be an improvement as contemplated by the statutory provisions referred to above. The position would no doubt have been different, if it could be established, which has not been done in the case before us, that the mantop was intended to be a temple for the defendants and their neighbours, and was not going to be treated as a part of their dwelling house, or that the mantop was being constructed for the purpose of worship of gods not by the defendants only, but by others as well. The result of the conclusion we have arrived at is that the decision of the Court of appeal below, must be upheld for the reasons stated above. The appeal is dismissed with costs.

Bartley, J.—I agree.

K.S. *Appeal dismissed.*

1. Nayamatoolah v. Gobind Churan, (1866) 6 W R (Act 10) 40.

A. I. R. 1935 Calcutta 460

GUHA AND BARTLEY, JJ.

Nrishinha Kumar Sinha— Appellant.

v.

Deb Prosanna Mukherjee and *others* —Respondents.

Appeal No. 169 of 1934, Decided on 13th December 1934, from original order of Sub-Judge, Burdwan, D/- 27th January 1934.

(a) Appeal — Application by Receiver in insolvency that certain mortgaged property in custody of Court through Receiver appointed by Court be made over to him rejected—No appeal lies—Insolvency.

No appeal lies from an order rejecting an application made by the Receiver in insolvency

praying that certain mortgaged properties which are in the custody of the Court, through a Receiver appointed by the Court, be made over to the Receiver in insolvency. [P 461 C 2]

(b) Provincial Insolvency Act (1920), Ss. 28 (6) and 56 (3) — Receiver appointed for benefit of mortgagee — Insolvency of mortgagor—Receiver cannot be removed by insolvency Court—Official Receiver can get himself impleaded—Receiver.

The right of a secured creditor to realise or otherwise deal with his security is unaffected by an order of adjudication, the equity of redemption only vesting in the Receiver in insolvency. Furthermore, the insolvency Court has no power under the law to remove a person from the possession or custody of property any person whom the insolvent has not the present right so to remove. Hence a Receiver appointed for the benefit of the mortgagee, and at his instance, cannot be removed by the insolvency Court on the insolvency of mortgagor, the Receiver being a person in possession whom the insolvent judgment-debtor, in whose favour a subsequent order of adjudication is passed by the insolvency Court has not the present right to remove. And it is to the interest of the mortgagee decree-holder to make the Receiver in insolvency a party to the pending proceedings, and it is also required of the Receiver in insolvency to have himself added as party to the same, as the person in whom the equity of redemption has vested by operation of law.

[P 462 C 1, 2]

Jogesh Chandra Ray, *Bireswar Bagchi*, *Gopendra Nath Das* and *Jajneswar Majumdar*—for Appellant.

Bijan Kumar Mukherjee, *Pravash Chandra Chatterjee*, *Muktipada Chatterjee* and *Bankim Chandra Mukherjee*—for Respondents.

Judgment.—This is an appeal by a Receiver in insolvency; there is also an application for revision made by him in the alternative, and they are directed against an order passed by the learned Subordinate Judge of Burdwan on 7th January 1934, rejecting an application made by the Receiver praying that certain mortgaged properties which are now in the custody of the Court, through a Receiver appointed by the Court, be made over to the Receiver in insolvency. It appears that in mortgage Suit No. 53 of 1922, a Receiver was appointed by the Subordinate Judge of Burdwan, at the instance of the mortgagee, plaintiff in the suit, on the ground that it was

"just and convenient that a Receiver should be appointed for protecting the mortgaged properties from being sold in auction for non-payment of Government demand and rent."

The order appointing a Receiver was made on 5th April 1924, and payments towards satisfaction of the mortgage-debt were being made by the Receiver under the direction of the Court, from time to time. The mortgagor was adjudicated an insolvent by the District Judge of Murshidabad, and the Receiver in insolvency was appointed by the learned Judge. Thereupon, on 2nd September 1933, the District Judge of Murshidabad addressed a letter to the Subordinate Judge of Burdwan, intimating that the Receiver in insolvency was in possession of the other properties of the insolvent, mortgagor, and that the Receiver appointed by the Subordinate Judge should make over charge of the mortgaged properties to the Receiver in insolvency. On the Subordinate Judge's expressing the view in his letter in reply to the District Judge of Murshidabad, that the Receiver in insolvency might be directed to appear before him to satisfy him that a direction as mentioned by the District Judge could be given as a matter of law and equity, the Receiver in insolvency made an application to the Subordinate Judge of Burdwan, praying the Court to direct the Receiver appointed in the mortgage suit to deliver possession of the properties committed to his charge to him (the Receiver in insolvency). The application thus made was rejected, and hence this appeal and the application for revision in the alternative. It may be mentioned at the outset that there is no appeal from the order passed by the Subordinate Judge in the case before us, on 27th January 1934, as there is no provision either in the Civil Procedure Code or in the Provincial Insolvency Act, which could confer a right to appeal; and nothing has been placed before us in support of the position that an appeal as preferred to this Court was maintainable under the law. The appeal must therefore be dismissed on the ground that no appeal lay to this Court from the order complained of. The case before us was allowed to be argued on the application for revision made in the alternative.

The facts relevant for the purpose of our decision are not in dispute, and we have no hesitation in stating that we are in agreement with the Court below, in the view expressed in its judgment, that the mortgaged properties belonging to the insolvent were in the custody of that Court not only for the benefit of

the mortgagor but also for the benefit of the mortgagee, and that it was more to the benefit of the mortgagee at whose instance a Receiver was appointed in the mortgage suit. The Receiver was in point of fact making payments to the mortgagee decree-holder in satisfaction of the mortgage, in compliance with the direction of the Court. The question then arises, was the Receiver appointed in the mortgage suit a person who could be removed by the insolvency Court?

The answer to that question is to be found in the provision contained in S. 28 (6) and S. 56 (3), Provincial Insolvency Act. The right of a secured creditor to realise or otherwise deal with his security is unaffected by an order of adjudication, the equity of redemption only vesting in the Receiver in insolvency. Furthermore, the insolvency Court has no power under the law to remove a person from the possession or custody of property any person whom the insolvent has not the present right so to remove. The conjoint effect of the two statutory provisions referred to above is that the Receiver appointed for the benefit of the mortgagee, and at his instance in the year 1924, cannot be removed by the insolvency Court, the Receiver being a person in possession whom the insolvent judgment-debtor, in whose favour an order of adjudication was passed by the insolvency Court in the year 1933, has not the present right to remove. It may be noticed in this connexion that as between the right of possession of a Receiver and of the assignee of the same estate under subsequent proceedings in bankruptcy, the doctrine of the English Chancery is that the appointment of the Receiver will not be superseded, nor his possession defeated by the bankruptcy proceedings. The Receiver first appointed by the Court is entitled to possession, and the assignee in bankruptcy is required to surrender possession to him: (see High on Receiver, Edn. 4, p. 184; and 3 Atk. 564 (1). As Lord Hardwicke observed in 3 Atk. 564 (1) a judgment creditor has no preference under commission of banksuptcy, though execution has been taken out if not actually executed; but then a commission of bankruptcy cannot supersede a decree of Court for a Receiver. In the above view of the case, the order passed by the Court below rejecting the application of the Receiver in insolvency for directing the Receiver appointed by the Burdwan Court, in 1924 in mortgage Suit No. 53 of 1922, to deliver possession of the mortgaged properties to him, must be upheld.

It is not necessary to discuss the rights of the Receiver in insolvency in the case before us any further; but as has been observed by their Lordships of the Judicial Committee in 1927 P. C. 108 (2), it is plain that the rights of a secured creditor over a property is not affected by the fact that the mortgagor has been adjudicated an insolvent; that does imply that an action against the insolvent may proceed in the absence of the person to whom the equity of redemption has been assigned by operation of law. To him must be given the opportunity of redeeming the property. It is therefore to the interest of the mortgagee decree-holder to make the Receiver in insolvency a party to the pending proceedings, and it is also required of the Receiver in insolvency to have himself added as party to the same, as the person in whom the equity of redemption has vested by operation of law. In the result, the appeal is dismissed, and the application for revision is rejected. There is no order as to costs in this case.

K.S. *Appeal and Revision rejected.*

1, Skip v. Harwood, 3 Atk 564.

2. Kala Chand Banerji v. Jagannath Marwari, 1927 P C 108=101 I C 442=54 I A 190=54 Cal 595 (P C).

A. I. R. 1935 Calcutta 462

NASIM ALI, J.

Sariatulla and *others*—Appellants.

v.

Joyenuddin Khan—Respondent.

Appeal No. 1368 of 1932, Decided on 12th December 1934, from appellate decree of Sub-Judge, Rangpore, D/- 17th February 1932

(a) Words and Phrases—Jote does not necessarily mean tenure.

The word "jote" does not necessarily mean that it is a tenure. "Jote" simply means a tenancy. [P 463 C 2]

(b) Words and Phrases—Chukani does not mean temporary interest—It implies permanent element.

The word "chukani" does not mean a temporary interest but it implies a permanent element which may develop into an occupancy right. [P 463 C 2]

(c) Landlord and Tenant — Lease called chukani—Interest of tenant only that of under-raiyat and not heritable — Held no occupancy right can be acquired by 12 years' occupation.

Where a lease was described as a chukani lease, but it was an under-raiyati lease for a term of years:

Held: that the under-raiyat could not acquire a right of occupancy by 12 years' occupation.

[P 464 C 1]

Hemendra Chandra Das—for Appellants.

Bireswar Chatterjee—for Deputy Registrar.

Judgment. — This is a defendant's appeal in a suit for ejectment. The plaintiff's case is that the predecessor of the defendants was an under-raiyat in respect of the plaint land, and that he died in the year 1332 leaving the defendants as his heirs. It is further alleged by the plaintiff that the under-raiyati not being heritable the defendants are trespassers and are liable to be ejected. Defendants 1 to 5 contested the suit. The main defence of the defendants was that the plaintiff was a tenure-holder and that the defendants' predecessor was a raiyat with a right of occupancy. The defendants further pleaded that after the death of their predecessor the plaintiff accepted rent from them and consequently the plaintiff was not entitled to eject them. The trial Court dismissed the suit. On appeal by the plaintiff the learned Judge has come to the following findings : (1) that the defendants are under-raiyats; (2) that no evidence was given by the defendants to prove that they were occupancy raiyats, and (3) that the under-raiyati was not heritable.

The learned Judge accordingly decreed the plaintiff' ssuit. In the present appeal the two points have been urged by the learned Advocate for the appellant, (1) that the learned Judge's finding about the defendants' status is bad in law, inasmuch as the learned Judge has not come to a specific finding about the plaintiff's status, and (2) that even if the defendants were under-raiyats, they are not liable to be ejected, inasmuch as their predecesssor was a Chukanidar and as such acquired occupancy right after occupation of the land for more than 12 years. As regards the first point it appears that the plaintiff in his evidence definitely stated that he was a raiyat and that the major part of his holding was in his khas cultivation. The plaintiff further stated that the defendants' predecessor was an under-raiyat and the under-raiyati interest was not heritable. These statements were not challenged in cross-examination by the defendants. The defendants also did not say that the status of the plaintiff was that of a tenure-holder. Under these circumstances it cannot be said that the learned Judge was wrong in holding that the defendants were under-raiyats which necessarily includes the finding that the plaintiff is a raiyat. It was however argued by the learned advocate for the appellant that the status of the plaintiff must be determined with reference to the kabuliyat which was executed by the defendants' predecessor in favour of the plaintiff in the year 1311 B. S. The kabuliyat however does not throw much light on the point. The plaintiff is there described as jotedar. The word "jote" does not necessarily mean that it is a tenure. Jote simply means a tenancy. Consequently the learned Judge was perfectly justified in looking into the evidence about the user and the other circumstances in the case to determine whether the plaintiff's status was that of a tenure-holder or a raiyat. There is therefore no force in this contention. As regards the second point, the line of reasoning adopted by the learned advocate was as follows:

In the kabuliyat which was executed by the defendants' predecessor in favour of the plaintiff, it is stated that the lease is a chukani lease. The word "chukani" does not mean a temporary interest but it implies a permanent element which may develop into an occupancy right. The defendants' predecessor being a chukanidar acquired occupancy right as he was in possession for more than 12 years and consequently the defendants cannot be ejected. The learned advocate's argument proceeded on the footing that the chukani of the defendants' predecessor was a chukani as defined by Dr. Field and as generally recognized in the Rangpore District. But in the view of the facts found in this case it appears that the word "chukani" used in the kabuliyat was only an under-raiyat which was not heritable. In fact it does not appear that there was any dispute about the meaning of this word in the Courts below. It

was also contended that even if the defendants' predecessor was a Chukani under-raiyat, still there was a permanent element in his interest which developed into a right of occupancy by 12 years' occupation. But the evidence in this case discloses that though the lease was described as a Chukani lease, it was an under-raiyati lease for a term of years. Consequently it cannot be said that the lease in the present case created such a Chukani right as is generally recognised in the Rangpore district. Reliance was placed by the learned advocate upon a decision of this Court in 1935 Cal. 149 (1); the decision in that case really proceeded on another decision of this Court, in 1914 Cal. 661 (2). It is doubtful whether the decision in 1914 Cal. 661 (2) really leads to the conclusion that an under-raiyat, though he is called a Chukanidar for a term of years, can really acquire occupancy right by 12 years' occupation. It however appears from the decision of McNair, J., in 1935 Cal. 149 (1) that the parties in that case did not dispute that the right of the under-raiyat in that case was a Chukani right as defined by Dr. Field and as is generally recognised in the Rangpore district. In the present case however the definite evidence of the plaintiff was that the defendants' interest was only the interest of an under-raiyat and that it was not heritable, though it was called Chukani. In view of the facts and circumstances of this case it cannot therefore be said that the under-raiyat, that is the defendants' predecessor, acquired a right of occupancy by 12 years' occupation of the disputed land. Even if this contention of the learned advocate on this point be correct, the position would be that the defendants' predecessor, who was an under-raiyat had acquired a right of occupancy, in view of the local custom which prevails in the Rangpore district. But even then the position of the defendants is not at all improved; for, in that event also the under-raiyati interest would not be heritable. It has been found that after the death of the under-raiyat his heirs, that is the present defendants were not recognised as tenants by the plaintiff. Consequently the defendants are trespassers even if their predecessor had a right of occupancy by custom. In any view of the case the appellants are not entitled to succeed.

The appeal accordingly is dismissed. The Deputy Registrar's costs have been deposited by the appellants in this Court. There will be therefore no order for costs as the other respondents have not appeared in this case.

K.S. *Appeal dismissed.*

1. Dabiruddin Sarkar v. Afarddi Mamud, 1935 Cal 149=154 I C 761.
2. Jogendra Nath v. Chandra Kumar, 1914 Cal 661=24 I C 193=42 Cal 28.

A. I. R. 1935 Calcutta 464

GUHA AND BARTLEY, JJ.

Wazuddin Gazi and *another* — Defendants—Appellants.

v.

Munshi Sayeb Ahamed and *another*—Plaintiffs—Respondents.

Appeals Nos. 1632 and 2335 of 1932, Decided on 19th February 1935, from appellate decrees of Addl. Dist. Judge, 24-Parganas, D/, 24th May 1932.

Landlord and Tenant—Landlord is bound to indemnify tenant against disturbance.

The landlord is bound by an implied obligation to indemnify the tenant against disturbance by his own act or by the acts of those who claim under him and he is liable for damages caused to the tenant. [P 465 C 2]

Bijan Kumar Mukherjee, *Brojo Lal Chakravarti* and *Khitindra Kumar Mitter*—for Appellant.

Sarat Chandra Basak and *Urukramdas Chakravarti*—for Respondents.

Judgment.—These are separate appeals by defendants in a suit. The plaintiffs in the suit in which these appeals have arisen, claimed damages and prayed for a perpetual injunction on the facts and in the circumstances stated below: According to the plaintiffs there were three separate tenancies created in favour of the plaintiffs or their predecessors in title, comprising 121 bighas odd, by defendants 2 to 4, the Sur defendants or their predecessors in intereet, described in schedule (ga) to the plaint. The lands in respect of which these tenancies were created were comprised in what is known as Chak Ghosalarabad. The tenancies had been in existence long before the year 1321 B. S., and the plaintiffs were in possession of the lands comprised in the same. In the year 1321 B. S., the Sur defendants leased out the whole chak to one

Tarak Nath Banerjee. Subsequently, the interest created in favour of Tarak Nath Banerjee was sold for arrears of rent, and was purchased by the lessors, the Sur defendants. In the year 1332 B. S., the Sur defendants inducted defendants 6 to 16 as Jalkar tenants in respect of the entire chak ; and the entire chak, including the lands settled with the plaintiffs, long before the tenancy in favour of the defendants was created in the year 1332 B. S., has been converted into a Jalkar. This has resulted in injury to the plaintiffs inasmuch as the lands on which the plaintiffs were entitled to grow paddy, have been converted into Jalkar, and the possibility of growing crops on the same, which was the purpose of the tenancies in favour of the plaintiffs has been destroyed by the action of the lessors, the Sur defendants and tenants under them. The plaintiffs claimed damages for the years 1333 and 1334 B. S., and prayed for permanent injunction to restrain their lessor defendants 2 to 4 and the tenant defendants 6 to 16, for letting in salt water within the chak in which their tenancies were situate.

The lessor defendants, the Surs, in their written statement asserted that the entire chak was a Jalkar, the existence of the three tenancies alleged by the plaintiffs was denied, and the plaintiffs were put to the strict proof of the same. It was further asserted that the plaintiffs had abandoned the lands comprised in the tenancies created in their favour. The claim for damages was resisted, as also the prayer of injunction as made by the plaintiffs in the suit. The other contesting defendants supported the Sur defendants. It may be noticed at the outset that the defence, that the entire chak was a Jalkar, that the denial on the part of the Sur defendants of the tenancies in favour of the plaintiffs, and their defence that the lands comprised in the tenancies had been abandoned, were all negatived by the findings arrived at by the trial Court. The findings arrived at by the trial Court on the question of the existence of the plaintiffs' tenancies, and on the question of abandonment as raised by the defendants were not even attempted to be challenged before the Court of appeal below, on appeal by the defendants. On those findings the position must be taken to be established that the plaintiffs in the suit had a pre-existing right to hold the lands comprised in the tenancies for the purpose of producing crops on the same, and the Sur defendants had no right to create an interest in derogation of the rights of tenants inducted on the lands. The lessors, defendants 2 to 4, were not entitled to interfere with the pre-existing rights of the plaintiffs who were tenants on the lands in suit, by creating an interest in favour of defendants 6 to 11, and they were bound to secure quiet possession of the plaintiffs, keeping in view the purpose of the tenancies created prior to the year 1332 B. S. which tenancies were in existence.

As has been observed by the Court of appeal below, the plaintiffs' lands were paddy producing lands, and if the Sur defendants allowed another set of tenants to inundate the plaintiffs' lands with salt water for the purpose of rearing fishes, the Sur defendants were liable for acts by those tenants. The landlord is bound by an implied obligation to indemnify the tenant against disturbance by his own act or by the acts of those who claim under him. The Judge in the Court of appeal below has held on materials before him, that the Sur defendants after the purchase of Tarak Chandra Banerjee's interest in the year 1330 B. S., first conceived the idea of allowing the tenant to rear fish in the chak by ingress of salt water forgetting the interests of those tenants who hold lands within the chak for the purpose of producing paddy. For the purpose of determining whether the decision of the Courts below is right, we have carefully gone through the documents Ex. 20 (a) and Ex. A as also the documents creating or evidencing tenancies in favour of the plaintiffs, and on close-examination of those documents, we have no hesitation in holding that on the documents and on the oral evidence in the case, the Courts below are right in holding that the contesting defendants in the suit against whom a decree for damages has been passed, interfered with the rights of the plaintiffs in such a way as made them liable in damages.

The quantum of damages was not in question in these appeals ; and the decision fixing the amount of damages must accordingly be affirmed. The relief claimed in the suit by way of per-

manent injunction was refused by the Court of first instance. The Court of appeal below, on appeal by the plaintiffs, granted injunction which, it cannot be disposed, amounts to a mandatory injunction, regard being had to the terms of the same. The question of granting injunction by the lower appellate Court was one of the points raised in Second Appeal No. 2335 ; and it was the only question raised in Second Appeal No. 1632. On the facts and in the circumstances of the case before us, we are decidedly of opinion that the view taken by the trial Court was right, and that the Court of appeal below was not right in granting an injunction, much less an injunction which is mandatory in its nature. The decree of the lower appellate Court so far as it relates to the grant of permanent injunction must be set aside.

The result of our decision on questions arising for consideration in these appeals, as indicated above, is that the decrees concurrently passed by the Courts below, in favour of the plaintiffs, respondents, for recovery of damages are upheld. The decree of the lower appellate Court granting permanent injunction to the plaintiffs, is set aside. The plaintiffs' claim for permanent injunction as made in the suit in which these appeals have arisen is dismissed. The order as to costs passed by the trial Court will stand ; the parties are to bear their own costs in the lower appellate Court and in this Court.

K.S. *Order accordingly.*

A. I. R. 1935 Calcutta 466

COSTELLO AND M. C. GHOSE, JJ.

M. A. Adams and *another*—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. Nos. 161 and 162 of 1935, Decided on 29th March 1935.

(a) Calcutta Police Act (1866), Ss. 44 and 45—Unless instruments of gaming are kept or used, place cannot be gaming house.

The essence of the definition of a 'common gaming house' is a place in which instruments of gaming are kept or used. No place can be a common gaming house unless instruments of gaming are kept or used in it, and kept or used for the profit or gain of the person or persons owning or occupying the place. [P 470 C 2]

Where slips of paper found in entrance hall and in the inner rooms were used for purpose of facilitating betting operation:

Held : they were, as such, instruments of gaming. [P 471 C 1]

(b) Calcutta Police Act (4 of 1866), S. 48—Money found upon person arrested in common gaming house cannot be confiscated.

Section 48 provides for the forfeiture of all instruments of gaming found in a common gaming house and for the forfeiture of all the money seized therein. But it does not in terms, at any rate, provide for the forfeiture of the money found upon the persons arrested in a common gaming house. [P 473 C 1]

Pugh, *S. C. Talukdar*, *Sachindra Nath Mukerjee*, *Sachindra Prasad Ghose*, *D. K. Das*, *Camel* and *Manindra Nath Mukerjee*—for Petitioners.

Khundkar—for the Crown.

Costello, J.—On 25th January 1935, acting under the authority of a warrant signed by the Deputy Commissioner of Police under the Provisions of S. 46, Calcutta Police Act, 1866, Sub-Inspector Syed Hossain of the Detective Department raided certain premises consisting of two rooms situated on the first floor of No. 15, Park Street. These rooms were said to be occupied by a club known as Harlequin Club. In the first room there was a billiard table, bench, and some sort of locker or cupboard, and from that room access could be had through a swing door, to the second room which was a card room containing a card table, chairs and a small side board. In the entrance hall, as it has been called, the Police party found seven persons, M. A. Adams, Jan Mohammad, Mr. and Mrs. Ellis, Ben Rose, Ismail Bham, and M. Morris. In the card room there were nine persons, F. Coelho, D. Coelho, T. Blake, H. Sukeas, O. K. Spanos, E. Peters, M. Echlin, L. Green, and Robin Neid. The last named jumped out of the window when the police arrived, but subsequently reported himself at the Park Street Police Station. The raid took place at 11 p. m., on the night of 25th January, and Robin Neid came to the police station about three hours later. All the persons found in the premises were placed under arrest and with the exception of one Mrs. Ellis, they were searched in the presence of a search witness.

All the persons whose names I have mentioned, were put upon their trial before the Chief Presidency Magistrate of Calcutta. All of them were charged with gambling on horse races at the Harlequin Club premises, No. 15 Park Street, and so committing an offence under S. 45, Calcutta Police Act, 1886,

and in addition M. A. Adams as the Secretary of the Club was further charged that he as the Secretary of the Harlequin Club was the occupier of 15 Park Street and was keeping and using that place as a common gambling house on the night of 25th January 1935 and so committed an offence under S. 44, Calcutta Police Act, 1866. In order to make plain what the position was, it is necessary that I should recapitulate the facts which were given in evidence before the learned Magistrate as to what was discovered at the time when the raid took place, in that part of the premises described as the entrance hall. Jan Mahammad and Ismail were found seated on a bench, and Mr. and Mrs. Ellis, Ben Rose, M. Morris, and M. A. Adams standing around in a body. On the floor close to where Jan Mohammad was seated were found two slips of paper which were Exs. 9 and 9 (1). According to the prosecution these slips of paper were betting slips. Jan Mohammad admitted that the slip Ex. 9 (1) which contained writing in the Guzrati language was in his handwriting, but he disowned the other slip Ex. 9. Another slip of paper which is Ex. 10 containing names of certain horses was also found in the entrance hall of the premises. M. A. Adams was found to have the sum of Rs. 2-10-0 on his person; Ben Rose had a pocket book in which there was the following entry: 'Bardley' 160-20 Adams, 160-20 Bose. He also had Rs. 1880 in cash. Jan Mahmmad had Rs 165 in cash; J. Ellis had Rs. 125-2-9. Mrs. Ellis, as I have already said, was not searched apparently because there was no female searcher available at the time. Ismail Bham had Rs. 66; M. Morris had no money at all.

The persons who were found in the card room were also searched. On the floor of that room there were found six small pieces of paper with the names of horses and apparently bets inscribed thereon. They were put in evidence as Ex. 11. There were also twenty-one pieces of torn paper which were put in as Ex. 12. The prosecution case was that all these pieces of paper, in all twenty-seven, had formed a single sheet of paper on which bets had been recorded immediately to or shortly before the raid. In a drawer of the side board was found a blank playing card Ex. 13, on which appear the names of horses and a bet. In a cash box there was a book of Irish Sweep Stake tickets, Ex. 14 out of which two had been removed. They were Exs. 15 (1) and 15 (2). On each of these tickets there was a list of members evidently forming some sort of syndicate. F. Coelho was found to be in possession of Rs. 110-11-0 in cash. D. Coelho had no money, nor had T. Blake. H. Sukeas had Rs. 116. O. K. Spanos had five annas and two programmes of the Calcutta races of 19th January 1935 and 26th January 1935. E. Peters had Rs. 2-6-0 and an acceptance paper of the Turf Club with pencil notes of sprint timings Ex. 5, also two programmes of the Calcutta and Bombay race meetings of 26th January 1935. M. Ecklin had Rs. 3-8-6 and an acceptance paper of the Calcutta Turf Club Ex. 4. L. Green had Rs. 250 in cash and a slip containing names of horses, Ex. 3.

All the accused persons put in written statements. Some of them denied that any betting had taken place; the gist of the defence of the accused persons was that they were members of a bona fide club and no gambling of any kind took place on the premises. Witnesses were called for the defence at the trial, in order to support the case that this was a bona fide club. The learned Chief Presidency Magistrate upon a careful consideration of the evidence came to the conclusion that the accused persons had assembled at the club on the night of 25th January last for the purpose of gaming, and he said that the race programmes, betting slips, some bearing the very date on which the raid took place, the note book showing odds laid on the horse Bardley, the betting account of Jan Mohammad, the sheet of paper on which bets were actually being recorded and which was hurriedly torn to pieces at the time of the raid, the large sums of money found on the persons assembled there, the conduct of one of them Robin Neid in jumping out of the window, the extra judicial confession made by Ben Rose on the following morning to Mr. Russel, all these things go to show conclusively that these persons were engaged in unlawful gaming.

The last piece of evidence refers to the fact that one Mr. G. W. Russel who is a registered bookmaker gave evidence

that early in the morning of 26th January 1935, that is to say the day after the raid, Ben Rose and T. Blake came to his house. Ben Rose spoke about the raid and he said that he had laid two bets of Rs. 160-2-0 each to Adams and Bose for Bardley to win the Civil Service Cup at Lucknow and he begged him (Russsel) to say that he had laid those bets on behalf of Russel. Mr. Russel refused to accede to this request. Then Mr. Russel was asked to give him advice about his defence. Mr. Russel very sensibly advised him to consult a lawyer. Ben Rose admitted that he had seen Mr. Russel but said that it was only for the purpose of asking advice. The learned Magistrate accepted the version given by Russel. Upon the evidence given in the case there can be no doubt whatever that the persons assembled in the club premises at that night had been making or arranging for the making of bets on horse races. Having come to the conclusion I have just mentioned, the learned Magistrate then said in his judgment:

> I therefore find the accused M. A. Adams guilty under S. 44, Calcutta Police Act, and sentence him to three months rigorous imprisonment. The accused Mrs. Ellis may reasonably be regarded as merely having accompanied her husband to the place. She is therefore acquitted. All the other accused persons are found guilty of being present at that place for the purpose of gaming.

The learned Chief Presidency Magistrate sentenced all the accused persons to pay a fine of Rs. 50 in default one month's rigorous imprisonment with the exception of Ben Rose whom he sentenced to one month's rigorous imprisonment under S. 45, Calcutta Police Act. The learned Magistrate then made an order the legality of which is more than doubtful. He directed that all the money which had been found on the persons of the accused should be confiscated to Government under S. 48, Calcutta Police Act. That S. 48 provides for the forfeiture of all instruments of gaming found in a common gaming house and for the forfeiture of all the money seized therein. But it does not in terms, at any rate, provide for the forfeiture of the money found upon the persons arrested in a common gaming house. I do not propose however to express any opinion on that point at this stage.

M. A. Adams, as I have stated, was convicted under S. 44, Calcutta Police Act. The rest of the accused were convicted under S. 45 of that Act. Both those sections have reference to premises which constitute a common gaming house. Under the first section a penalty is provided for owning or occupying or keeping a common gaming house and under the next section a penalty is provided for being found playing in a common gaming house. It was therefore necessary before all these persons could be rightly convicted that it should be established that the premises known as the Harlequin Club on the first floor of No. 15, Park Street, constituted a common gaming house. The learned Magistrate did not find in terms that those premises were a common gaming house. He enumerated the eight pieces of evidence which I have already recited, and then said that he convicted Adams under S. 44 and the others under S. 45.

Adams and Ben Rose moved this Court against their conviction on the ground that the elements necessary to constitute an offence under S. 44 or S. 45, Calcutta Police Act, were not proved in the case. It is a fact that there was no definite finding by the learned Chief Presidency Magistrate with regard to any of the elements which are the necessary ingredients of the offences with which these persons were respectively charged. Adams has set forth in his petition to this Court that there was no evidence on the record to show that gaming was taking place on that night. There was no evidence to show that the club was a common gaming house; that the articles seized by the police do constitute instruments of gaming. There was no evidence that the petitioner made any profit in managing the club, either as Secretary or otherwise, and there was no evidence that the club was occupied or used by the petitioner as the common gaming house at the time of the raid on 25th January 1935. The ground put forward by Mr. Ben Rose was very much the same, and the whole matter resolves itself into the question as to whether the premises were a common gaming house within the meaning of the Act. That is really the sole question which we have to determine in the proceedings now before us. In order to make quite plain how the point arises, it is necessary I think that I should

recite in full the actual words of S. 44. That section says:

Whoever, being the owner, occupier, or having the use of any house, room or place, opens, keeps or uses the same as a common gaming house and whoever, being the owner or occupier of any house or room, knowingly or wilfully permits the same to be opened, kept or used by any other person, as a common gaming house, and whoever has the care or management of, or in any manner assists in conducting, the business of any house, room or place so opened, kept or used, and whoever advances or furnishes money for the purpose of gaming with persons frequenting such house, room or place, shall be liable, on summary conviction before a Magistrate, to a fine not exceeding five hundred rupees, or to imprisonment, with or without hard labour, for any term not exceeding three months.

Incidentally it is to be observed that the learned Chief Presidency Magistrate thought fit to inflict upon M. A. Adams the maximum penalty provided by that section.

The first question to which consideration must be given in order to see whether M. A. Adams committed an offenee under S. 44 is the question whether he could properly be described as the owner or occupier, or a person having the use of any house, room, or place, and whether he opens, keeps or uses the same as a common gaming house. The case for the prosecution was that the club was merely a sham, to use the expression which was used in one of the English cases, and that in reality the premises were being run by M. A. Adams for his own benefit and for his own profit or gain. In support of that case it has been shown on behalf of the prosecution that the premises were rented in the name of M. A. Adams from Mr. Galstaun. It was also shown that the supply of electric current to the premises was under a contract between the Calcutta Electric Supply Corporation Ltd., and the wife of M. A. Adams. The account for the telephone was in the name of M. A. Adams. In his written statement M. A. Adams said that both the electric light and the telephone account were in the name of his wife. It was apparently not known at the trial, that is to say not known to the Magistrate, that Adams' wife has been dead for nearly two years. It, therefore, to say the least of it, was not a point in favour of the defence that Adams, when this club started in February 1934, allowed the Calcutta Electric Supply Corporation Ltd., to agree to supply electricity to the premises for the account of Mrs. Adams. There was, no doubt, before the learned ChiefPresidency Magistrate, ample evidence on which he could draw the inference that this club was something in the nature of a proprietary club which was really being run by M. A. Adams for his own profit, if in fact there was any profit from the members who resorted to these premises. Although the Chief Presidency Magistrate does not say so in his judgment, in his own mind he must have presumably come to conclusion that that was the real position, namely, that this Harlequin Club was not a club at all in the ordinary sense of the term but was a one man concern, if I may use the expression. Presumably also in his own mind the learned Chief Presidency Magistrate was satisfied that M. A. Adams knowingly and wilfully permitted the premises to be used by the other persons that is to say the persons resorting thereto for the purpose of making bets or arranging bets on horse races. One can only assume that the learned Chief Presidency Magistrate went through the necessary mental processes because he did in fact convict M. A. Adams of an offence under S. 44.

The learned Magistrate has not in terms found that M. A. Adams was the owner or occupier or the person having the use of the premises, but it is clear that the learned Magistrate was satisfied and rightly satisfied that gaming within the meaning of the definition given in S. 3 of the Act was going on in those premises on the night of 25th January because in S. 3, Calcutta Police Act, 1866, gaming is defined as including wagering or betting except wagering or betting upon a horse race, except when such wagering or betting takes place on the day on which such race is to be run, in an enclosure which the Stewards controlling such race have, with the sanction of the Local Government, set apart for the purpose. But it is not sufficient to hold that the person charged under S. 44 is the owner or the occupier or is a person having the use of any house, room, or place, unless it is also shown that the accused has opened, kept or used the same as a common gaming house. Now in order to ascertain what is a common gaming house one has once more to look back to S. 3 of the Act, and there we find that a common

gaming house means any house, or room, tent, or walled enclosure, or space or vehicle, or any place whatsoever, in which any instruments of gaming are kept or used for the profit or gain of the person owning, occupying, using or keeping such house, room, tent, enclosure, space, vehicle or place whether by way of charge for the use of such house, room tent, enclosure, space vehicles place or instruments or otherwise howsoever. These premises in Park Street are obviously room, certainly they were a place within the meaning of this definition.

Then the question arises whether in that place any instruments of gaming are kept or used for the profit or gain of the person owing, ocoupying or using or keeping that place. In the present instance it was for the profit or gain of M. A. Adams. Mr. Khundkar has argued and very cogently that one must pay great attention to the concluding words of this definition, because they indicate the manner in which profit or gain may accrue before the use of the instruments of gaming. The profit or gain may be by way of (1) charges for use of the place in question. It is said therefore that it may be that the position was that M. A. Adams was running this club himself and took the subscriptions of the members, or at any rate he took the profits accruing from the use of the billiard table or from the sale of refreshments or money coming in respect of bar account and so on. Having regard to the findings of fact to which I have already referred it is reasonably clear that that was the position. The second way in which a charge can be made is for the instruments themselves. That obviously is not the position here. Thirdly or otherwise howsoever; it has not been suggested by the prosecution that any profit or gain accrued to M. A. Adams otherwise than by reason of the fact that he was running this club as a one man concern.

Mr. Khundkar with considerable stress pointed out that in enacting this definition of "common gaming house" or at any rate in drafting it, the section, there must have been a change of attention or at any rate a change of mind on the part of the legislature. In my opinion the difficulty which faced the prosecution in this matter arises from the fact that the legislature in enacting the provision in the Calcutta Police Act dealing with gaming, have attempted to deal in one and the same piece of legislation, and indeed in one and the same section of the Act with two different classes of offence. It seems to me that the sections of the Calcutta Police Act with which we are now concerned represent an intention on the part of the legislature to incorporate in the same enactment provisions, or at any rate the gist of the provisions of two analogous English statutes, that is to say the Gaming Act of 1845 and the Betting Act of 1853. Under the English law a common gaming house is a place where an unlawful game is played, and in connexion with gaming the use of the word "instruments" is of course in every way appropriate. Under the Betting Act of England, it is an offence to keep a "betting house," that is to say to keep a house to which persons can resort for the purpose of betting. In that case the use of the word instruments is not so obviously appropriate. In the Calcutta Police Act as I have already mentioned gaming is said to include wagering and betting. Then lower down in S. 3 "instruments of gaming" includes any article used as a means or appurtenance of, or for the purpose of carrying on or facilitating gaming. By putting the definition of "gaming" and the definition of "instruments" together, the prosecution said that the articles which were found upon these premises, No. 15 Park Street, must be regarded as instruments of gaming. The prosecution is bound to say that because the essence of the definition of a "common gaming house," is a place in which instruments of gaming are kept or used. No place can be a common gaming house unless instruments of gaming are kept or used in it, and kept or used for the profit or gain of the person or persons owning or occupying the place.

Now, assuming all the facts in this case to be in favour of the prosecution, viz. that the room Harlequin Club is an one man concern room and M. A. Adams took such profit or gain as accrued from the working of the Club, and assuming the persons found on the premises on the night of 25th January were engaged in wagering or betting and therefore gaming; assuming all these things the premises do not become a common gaming house unless it can be

said that there were instruments of gaming kept or used therein. Mr. Khundkar has very properly, frankly, and in all fairness, conceded that this is the position and those convictions cannot be sustained unless we hold that the pieces of paper which were discovered in the entrance hall and in the card room of the premises can rightly be described as instruments of gaming within the meaning of the definition contained in S. 3, Calcutta Police Act, 1866.

We have given our very careful attention and consideration to that point. A large number of authorities were cited to us upon this point, but it became apparent towards the end of the proceedings that none of those authorities were really of any assistance to the Court, because they had all come into existence before the definition in the Calcutta Police Act of 1866 assumed its present shape. Both sides overlooked the fact that the definition of 'instruments of gaming' as it now stands as well as the definition of 'gaming' and the definition of common gaming house' were substituted for the former definitions by Act 4 of 1913. The definition of 'instruments of gaming' as it now stands is this: Instruments of gaming include any article as a means or appurtenance of or for the purpose of carrying on or facilitating gaming. Gaming includes wagering or betting except wagering or betting upon a horse-race when such wagering or betting takes place under certain conditions. The definition of gaming prior to 1913 was different and did not include betting in the general sense.

Now reading the two definitions together, the definition of 'gaming' and the definition of 'instruments of gaming' those definitions as they now appear, we feel ourselves bound to come to the conclusion that the slips of papers and the other articles relied upon in the present case must be taken to be instruments of gaming, that is to say articles used as a means or appurtenance of, or for the purpose of carrying on or facilitating gaming. I think it would be a misuse of language to come to any other conclusion than that these slips of papers which were found in the entrance hall and in the inner room of these premises, were used for the express purpose of facilitating the betting operations which were in progress at the time of the raid.

We therefore come to the conclusion after a careful and anxious consideration of this matter that this conviction must be upheld. At the same time however as it appears that this is the first occasion on which, as far as we know, Mr. Adams and Mr. Ben Rose have been prosecuted for an offence of this character, we think that justice will be done if we impose a lenient sentence. We think therefore that we should set aside the sentence of imprisonment, and that the justice of the case will be met if we sentence Adams to pay a fine of Rupees 500 and Ben Rose to pay a fine of Rs. 200. There is one other point which I have already touched upon, which I must now deal with. That is the question of the monies which were confiscated by the order of the learned Chief Presidency Magistrate. We are of opinion that there is no justification in law for any such order. Therefore the monies found upon the persons arrested must be restored. In default of the payment of the fines of Rs. 500 and Rs. 200 we sentence Adams to undergo rigorous imprison ment for three weeks and Ben Rose to undergo rigorous imprisonment for one week.

M. C. Ghose, J.—These are two petitions by M. A. Adams and Ben Rose, who have been convicted, one under S. 44 and the other under S. 45, Calcutta Police Act. The facts in short are that on the strength of a warrant issued by the Deputy Commissioner of Police, Detective Department, under the provisions of S. 46, Calcutta Police Act, Sub-Inspector Syed Hossain of the Detective Department at 11 p.m. on 25th January 1935 raided the premises of the Harlequin Club, which consists of two rooms on the first floor of No. 15 Park Street. In the first room was a Billiard table, a bench and a cup-board. In this room were found petitioners M. A. Adams and Ben Rose and 5 other persons. In the next room, which is the card room, were found 9 other persons. On the floor of the first room were found three slips of paper which appear to be betting slips and Ben Rose had a pocket book with the entry, "Bardle 160-20 Adams, 160-20 Bose." In the card room the officer found six small pieces of paper with names of horses and bets and 11

pieces of torn paper, it being the prosecution case that all these 17 pieces of paper formed a single sheet on which bets were taken. In a drawer was found a blank playing card containing the names of horses and a bet. In a cash box was found a book of Irish Sweepstake tickets out of which two had been removed and with these tickets was a list of members forming a Syndicate. Another of the accused had two programmes of the Calcutta Races of 19th January 1935 and 26th January 1935. Yet another had the acceptance paper of the Turf Club with pencilled notes of Sprint timings and two programmes of the Calcutta and Bombay Race meetings of 26th January 1935. Another accused had an acceptance paper of R. C. T. C. Yet another had a slip containing names of horses. Petitioner M. A. Adams was the secretary of Harlequin Club which as stated above consisted of two rooms. There were other rooms in the flat which were used by M. A. Adams as his private residence. The whole flat was rented by M. A. Adams from Mr. Galstaun at Rs. 200 a month. The telephone and elecrtic light were in the name of petitioner Adams or his deceased wife. The club apparently was limited to subscribers or members who paid a fee of one rupee a month. Cards and billiards were played and drinks and refreshments were sold. The learned Chief Presidency Magistrate who has tried the case has come to the finding on these facts that the place was a common gaming house and that petitioner Adams kept it. He therefore convicted petitioner Adams under S. 44, Calcutta Police Act, and sentenced him to rigorous imprisonment for three months. He found petitioner Ben Rose and 14 others guilty under S. 45, Calcutta Police Act. Petitioner Ben Rose was sentenced to rigorous imprisonment for one month and the others sentenced to fines of Rs. 50 each.

The first question is whether gaming was taking place in the club on the night in question. The word " gaming " is defined in S. 3, Calcutta Police Act, as amended in 1913. It includes wagering or betting, excepting betting in a racecourse within an enclosure provided by the Stewards. Here upon the facts there is no doubt that these accused persons were engaged in the act of betting on the Calcutta Races of the following day and of the Lucknow Races of the following week. According to the definition they were in the act of gaming, namely, wagering and betting.

The next question is whether the slips of paper and the marked card and the note book of Ben Rose were instruments of gaming within the definition in S. 3, Calcutta Police Act. " Instruments of Gaming " includes any article used for the purpose of facilitating gaming. Now it is possible that the accused persons might have wagered or betted with one another without making any record of the same, but such betting would be confined by their power of memory. There is no doubt that it facilitated their betting in that they recorded the bets on sheets or slips of paper. Therefore the slips of paper were instruments of gaming within the meaning of S. 3.

The strongest argument taken by Messrs. Pugh and Camell who represented the two pettitioners was that the learned Chief Presidency Magistrate did not come to a finding that the instruments of gaming were used for the profit or gain of petitioner M. A. Adams. It is true that there is no direct finding by the learned Magistrate that the petitioner Adams made profit or gain in managing the said club, although he came to the clear fiinding that he kept it as a common gaming-house. Under the definition in S. 3, a common gaming-house means any house kept or used for the profit or gain of the person keeping it, whether by way of charge of the use of such house, or otherwise howsoever. It was admitted at the Bar that petitioner M. A. Adams was secretary of the club at Rs. 300 a month and that he occupied the other rooms of the flat as his residence. It is therefore clear on the evidence that petitioner Adams made a profit by keeping the club. He ran the club for the purpose of attracting gamblers, and the club was used as a common gaming-house.

In our opinion therefore petitioner Adams has been rightly convicted under S. 44, Calcutta Police Act, and petitioner Ben Rose and other 14 persons were rightly convicted under S. 45 of the same Act. Having regard to the fact that this is the first conviction of the two petitioners we are of opinion

that the sentence of imprisonment is uncalled for. In lieu of imprisonment we sentence petitioner Adams to a fine of Rs. 500, in default rigorous imprisonment for three weeks and petitioner Ben Rose to a fine of Rs. 200, in default rigorous imprisonment for one week.

The Police on arresting the accused men searched their persons and took away all money found on their persons amounting in all to Rs. 2,770 odd. The learned Magistrate acting under S. 48 ordered that the whole of this money be confiscated and credited to Government. In our opinion the order of confiscation of the cash money found on the persons of the accused men is not warranted by S. 48. That section provides that on conviction under S. 44 or S. 45 all the instruments of gaming found in the house shall be destroyed by order of the Magistrate, who may also order all or any of the securities for money and other articles seized, not being instruments of gaming to be sold and converted into money, and the proceeds thereof, with all money seized therein, to be forfeited or in his discretion, may order any part thereof to be returned to the persons appearing to have been severally thereunto entitled. It appears that the money seized were currency notes and coins in the pockets of the accused persons. It does not seem right in the circumstances that this should be confiscated. Mr. Camell has quoted the case of Maturwa reported in 1918 All. 390 (1) were Banerji, J., held that although instruments of gambling, etc., may be seized by the Police, there is no authority for the confiscation of the money found with the persons arrested. We order therefore that the money seized from the different accused persons be returned to them.

K.S. *Order accordingly.*

1. Maturwa v. Emperor, 1918 All 390=46 I C 156=40 All 517.

A. I. R. 1935 Calcutta 473

LORT-WILLIAMS AND JACK, JJ.

Abdul Majid and *others* — Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 568 of 1934, Decided on 27th March 1935.

(a) Criminal P. C. (1898), S. 494 — Withdrawal of prosecution must be with consent of Court—Section is not intended to be used by prosecution to get evidence of accused against co-accused.

The withdrawal of the prosecution under S. 494 must be with the consent of the Court, and in exercising his discretion, the Judge must act judicially. The section is only intended to be applied in cases where either the evidence is insufficient to secure a conviction or in cases of compromise and similar circumstances. It is not intended to be used by the prosecution to get the evidence of an accused against his co-accused and so escape the safeguards laid down in the Code with regard to such evidence under S. 337 : 1929 *Cal* 319, *Diss from.* [P 474 C 2]

(b) Criminal Trial — Evidence of accomplice should be received with greatest caution.

The evidence of an accomplice must always be received with the greatest possible caution, and if there is any fear in the witness's mind that failure to establish the case for the prosecution will result in his own prosecution, it is not likely to lead to truthful evidence being given by such a witness. [P 475 C 1]

(c) Criminal P. C. (1898), Ss. 494 and 337 —Prosecution withdrawn—Fresh complaint — Evidence of accused in original prosecution is admissible but is not entitled to weight without corroboration — Criminal Trial.

Where a prosecution is withdrawn before charge under S. 494 and subsequently another is launched, the evidence of co-accused in the original prosecution is, no doubt, admissible as against accused, but in practice no weight should be given to it without corroboration. [P 477 C 1]

Sadullah and Sudhansu Sekhar Mukerji for *Nalini Kumar Mukerji*—for Appellants.

Proboth Chandra Chatterji and *Bireswar Chatterji*—for the Crown.

Lort-Williams, J.—In this case nine persons were charged with offences under Ss. 401, 328/120-B and 394/120-B, I.P.C. With regard to the charges under S. 401, they were tried with the aid of assessors, and with regard to the charges under the other sections they were tried by the Additional Sessions Judge and a jury. Biren, Majid, Chitta, Nilu and Ramani were convicted and the other four acquitted. A Rule for enhancement of sentence was issued by this Court. Biren was sentenced to four years' rigorous imprisonment and Nilu and Ramani to six months each. None of these have appealed. The sentences of Nilu and Ramani have already expired. Majid and Chitta were sentenced to two years' rigorous imprisonment each, of which sentence they have already served about 12 months each.

The case for the prosecution was that Biren was the brain of the movement alleged by the prosecution. He got to

know Majid, Chitta, Pulin, Naresh and Deben and probably others, and about the end of 1931 or the beginning of 1932, he invited Pulin to Beadon Square, where Chitta and Majid were already present by appointment, and described a plan of making money by doping prostitutes and stripping them of their ornaments. Since then the plan had been put into operation by Pulin and Biren visiting several prostitutes in pursuance of this conspiracy, while Chitta and Majid supplied money, and got a share of the spoil. Drugs were procured at first from Naresh Mitra, who, though at first he knew nothing about the purposes for which the drugs were to be used, eventually became aware of the plan and subsequently shared in the profit; later on, Sailen, Nilu and Bhulu were introduced and joined the conspiracy. These men used to meet in one or other of the parts of Calcutta to arrange plans for carrying out the objects of the conspiracy and for raising funds. Later on, operations were extended outside Calcutta, to Dinajpur and Rangpur. Later on, Aswani, Ramani and Jadu joined and operations were extended to Kustia. Still later a plan was proposed to be carried out at Navadwip, by Biren, Chitta, Nilu and Bhulu, which involved the picking of the lock of a safe. This failed because nobody could pick the lock. It was alleged that Majid introduced Sukhani as an expert who could do that.

Later on, the plans became more daring and it was arranged to make raids upon houses. These, however, came to nothing for one reason or another and, eventually, the police got some knowledge about the gang, and various persons were arrested on suspicion and were subsequently discharged. Eventually, however, Pulin was arrested on 13th June 1933 and made a confession implicating the whole of these persons and they were re-arrested. It is obvious therefore that the case depends largely upon the confession made by Pulin. With regard to Biren, Pulin's statements have been corroborated by the evidence of the victims of some of these plots. The rest of the evidence depends upon one or two documents, and evidence of association between the accused.

As Biren, Nilu and Ramani have not appealed we are only concerned in this case with the evidence against Majid and Chitta. It is not necessary therefore for me to mention at any great length the rest of the evidence in the case. The documents mostly affected Biren, though one document was alleged to refer to Majid and I will deal with that later. The learned Judge pointed out at the beginning that the case depended mostly upon the evidence of Pulin, and suggested for the consideration of the jury that a statement containing such a complex mass of details could hardly have been the result of tutoring by the police. But he pointed out various aspects of this statement which ought to lead the jury to view it with some suspicion so far as its details were concerned.

Pulin gave evidence in this case and was corroborated to some extent by the evidence of three other accused who were called as witnesses Debendra, Naresh and Mukherji. The learned Judge quite rightly drew the attention of the jury to the necessity of scrutinising very strictly the evidence of all these witnesses. The procedure adopted with regard to these 4 accused is unwarranted by any provision of the Code. As I understand the position, the Public Prosecutor asked leave to withdraw the prosecution against each of them and this was allowed by the Court. Thereupon, they were called as witnesses against their co-accused. In the case of Deben, Naresh and Mukherji possibly this course was justified, because it may be that there was not sufficient evidence of a prima facie case against them. But in Pulin's case there was overwhelming evidence upon which he could have been convicted.

The withdrawal of the prosecution under S. 494, must be with the consent of the Court, and in exercising his discretion, the Judge must act judicially. The section is only intended to be applied in cases where either the evidence is insufficient to secure a conviction, or in cases of compromise and similar circumstances. It is not intended to be used by the prosecution to get the evidence of an accused against his co-accused and so escape the safeguards laid down in the Code with regard to such evidence under S. 337. The Code provides in the latter section various safeguards to ensure that the use of an

accomplice's evidence in a trial shall not be liable to abuse. In the first place, it provides that he shall be granted a conditional pardon. Thus it ensures to that extent that he will give his evidence knowing that if he speaks the truth he will not suffer subsequent prosecution for the offence with which he has been charged. He knows that, to that extent, he need not feel that he is under the necessity of strengthening his evidence against his co-accused in order to satisfy the prosecution, and thus escape subsequent prosecution for the offence of which he has been pardoned.

It is true that this is only a provisional release and if he does not speak the truth, the pardon may be withdrawn and he may be prosecuted. This amendment was introduced in the year 1898, and is a blemish upon the provisions of the Code, because it has the witness to some extent in jeopardy. The evidence of an accomplice must always be received with the greatest possible caution, and if there is any fear in the witness's mind that failure to establish the case for the prosecution will result in his own prosecution, it is not likely to lead to truthful evidence being given by such a witness. However, the danger is comparatively remote, because such a witness could not be prosecuted subsequently unless the Public Prosecutor certified that, in his opinion, the witness has either by wilfully concealing or by giving false evidence, not complied with the conditions upon which the tender was made. If this certificate is given, then such a person may be tried for the offence in respect of which the pardon was tendered. But he cannot be tried jointly with any of the other accused, and at his trial he is entitled to plead that he has complied with the conditions upon which such tender was made, in which case the prosecution must prove that such conditions have not been complied with. There is a further safeguard provided in sub-S. 2(a), which makes it obligatory upon the Magistrate tendering pardon to commit the accused, against whom the accomplice's evidence is to to be given, for trial at the Court of Sessions, or the High Court as the case may be.

In S. 494 no such safeguards are provided so far as sub-para. (a) is concerned. That is to say, where the case as in the present instance is withdrawn before a charge has been framed. In such a case the accused is discharged, that is to say he is liable to further prosecution for the same offence, and consequently he gives his evidence well knowing that he may be prosecuted for that offence if he does not give satisfaction to the prosecution at whose instance he has been called as a witness. The position is different under sub-para. (b) where the prosecution is withdrawn after the the charge has been framed against the accused. In such a case he must be acquitted and, consequently, can give his evidence without fear of any further prosecution. I am aware that there is one decision of this Court in 1929 Cal. 319 (1) in which the Court held that the trial Court did not exercise its discretion wrongly in relying on the discretion of the Public Prosecutor agaist one of the accused, in order that his evidence might be available after his discharge against his co-accused who was being jointly tried with him, and that the procedure laid down in S. 337, Criminal P. C., namely, by tendering an accused person pardon under that section with all the safeguards mentioned therein, is not the only method of obtaining the evidence of a co-accused against another. S. 337, Criminal P. C., does not control S. 494. The learned Judge who gave the first judgment in that case seems, with all respect, to have missed the point of the objections to the suggested procedure under S. 494, which I have already stated, because he based his decision entirely upon English cases, and text book writers, all of which deal with a position in which proposed witness is no longer in jeopardy—either he has been acquitted or a nolle prosequi has been entered against him by the Crown.

It is clear therefore that the authorities cited by the learned Judge are no authority for the proposition that it is proper to apply S. 494, and by withdrawal of the case against the accused before a charge has been framed, enable the prosecution to call him as a witness. In such circumstances the witness is in jeopardy all the time. Consequently he has the greatest possible temptation to improve his evidence so as to give satisfaction to the prosecution.

1. G. V. Raman v. Emperor, 1929 Cal 319=121 I C 678=56 Cal 1023.

In view of the fact that the evidence of such witnesses is always open to grave suspicion, the Code has laid down stringent safeguards to provide as far as possible, that the evidence of such witnesses shall be true. Those safeguards are contained in S. 337. If the decision in 1929 Cal. 319 (1), be correct then a way has been provided for the prosecution to obtain the evidence of an accomplice without any of the safeguards provided by S. 337, and so far as that section is concerned it would be reduced to a nullity. I regret to say that I profoundly disagree with the judgment to which I have just referred and I am not surprised that the prosecution, in several recent instances which have come to our notice, have employed the method approved by that judgment, and have applied the provisions of S. 494 rather than follow the procedure laid down by the Code under S. 337.

In my opinion therefore the evidence of Pulin ought to be rejected, with the result that the convictions and sentences imposed against Majid and Chitta must be set aside. We are not concerned with the rest of the accused, who have not appealed. That however will not dispose of the case, because we have to consider whether it is worth while sending the case against these two appellants, Majid and Chitta, back for retrial. As I have already said, the evidence against them depends almost solely upon the evidence of the accomplice, Pulin. The learned Judge warned the jury quite properly that it is dangerous to convict any person upon the uncorroborated testimony of an accomplice. There is nothing in law against doing so, an accomplice being a competent witness under S. 133, Evidence Act but in prudency, as is shown by S. 114, Illus. (b), Evidence Act, the jury should require corroboration of such evidence. Further he pointed out that one accomplice cannot corroborate another, and that although it is not necessary to have corroboration of every detail of the confessional statement, there must be corroboration in material particulars. The learned Judge in order to make the position clear ought to have said, in material particulars which implicate the accused in the crime. He then quoted from a judgment of Rankin, C.J., in 1931 Cal. 697 (2), in which the principle is correctly and clearly laid down. It is useful to refer to the following paragraph in that judgment:

> " A man who has been guilty of a crime himself will always be able to relate the facts of the case and, if the confirmation be only of the truth of that history without identifying the person, that is no corroboration at all. We have always to be careful lest ths names of the individual accused are introduced into the texture of a story the outline of which is true enough.

Now the corroborative evidence against these two accused seems to me to fall within the terms of that warning. (His Lordship then considered the corroborative evidence and held that there was no corroborative evidence within the correct legal meaning of the term against either of these two accused. The judgment then proceeded.) The Judge ought to have told this to the jury, and I think that he misdirected them when he summed up the evidence against Majid and Chitta by mentioning these facts without saying either one way or the other whether they amounted to corroboration in law or not. Thus the jury may easily have been led to believe that the Judge mentioned this part of the evidence in order to remind them of evidence which was corroborative in law of the evidence given by the accomplice. For these reasons, these convictions and sentences must be set aside and these two appellants acquitted. We see no reason to enhance the sentences of the other accused. The Rule is discharged.

Jack, J.—I agree. I would like to add that the use which has been made of S. 494 in this case was entirely unjustified. As stated by my learned brother, an approver is a competent witness under the provisions of S. 337 under which there are various precautions taken as laid down in the statute, which are omitted in the case of withdrawal of a prosecution under S. 494. It is true that in a number of cases such a witness has been held to be a competent witness. But I respectfully agree with the judgment of Witworth, J., in 25 Bom. 422 (3), where he says that

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2. Ambica Charan Roy v. Emperor, 1931 Cal 697=1931 Cr C 977=134 I C 1121=33 Cr L J 19 (SB).
3. Queen-Empress v. Hussein Haji, (1901) 25 Bom 422=2 Bom L R 1095.

It is necessary to reconcile the provisions of Ss. 337 and 494 and that can I think only be done by taking the consent of the Court in S. 494 as meaning consent based solely upon a judicial consideration of the case against tho person from whose prosecution the Public Prosecutor desires to withdraw, and not upon any consideration of the uses to which that person may be put in a case other than his own. And indeed apart from any conflict with S. 337, I should think that to be the most natural interpretation of the section.

He therefore held in that case that the witness discharged under the provisions of S. 494 was not a competent witness. In my view the witness can only be considered a competent witness in the sense that his evidence is not inadmissible in respect of the facts to which it relates. I find that the view that he is a competent witness has been held in this Court in 1920 Cal. 87 (4). But in that case there is no discussion of the previous cases and it is merely stated by Shamsul Huda, J., that upon the reported decision

it is enough that the accused person had been discharged before he gave his evidence and was not on his trial when such evidence was given. This is quite sufficient to make his evidence admissible.

The learned Judge in that case altogether left out of view the fact that such evidence is not safeguarded by the provisions of S. 337. The evidence is no doubt admissible but in practice no weight should be given to it without corroboration.

K.S. *Convictions set aside.*

4. asem Ali v. Emperor, 1920 Cal 87=55 I C 994=21 Cr L J 386=47 Cal 154.

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LORT-WILLIAMS AND JACK, JJ.

R. C. Curtis—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Misc. Case No. 194 of 1934, Decided on 14th November 1934, for leave to appeal to His Majesty in Privy Council.

(a) Letters Patent (Cal.), Cl. 41—Judgment made by High Court in criminal case on appellate side—High Court cannot grant leave to appeal to Privy Council.

Where on a revision from the order of conviction and sentence passed by the Chief Presidency Magistrate, the High Court confirms that conviction and sentence, the High Court has no jurisdiction to entertain a petition for leave to appeal to the Privy Council from its judgment: 21 *I C* 470 and 912 and 1924 *Cal* 338, *Rel on.*

[P 478 C 1]

(b) Letters Patent (Cal.), Cls. 25 and 41—'By any Court' in Cl. 41 has reference only to original criminal jurisdiction of High Court.

The words 'By any Court' in Cl. 41 have reference only to the Original Criminal Jurisdiction of the High Court. Cl. 25 refers to criminal trials before Court of Original Criminal Jurisdiction which may be constituted by one or more Judges of the High Court, and it proceeds to state that it shall be at the discretion of any such Court to reserve any point or points of law for the opinion of the High Court. The words in Cl. 41 'by any Court which has exercised Original Jurisdiction' have reference only to the words in Cl. 25 'Courts constituted by one or more Judges of the High Court.'

[P 478 C 2]

Brahmachari, Surendra Nath Bose II and *Bibhuti Bhusan Lahiri*—for Petitioner.

Anil Chandra Roy Choudhury—for the Crown.

Lort-Williams, J.—This is an application for leave to appeal to the Privy Council, made on behalf of Mr. R. C. Curtis, who desires to complain against a decision of Guha, J. who discharged a rule which had been issued to the Chief Presidency Magistrate to show cause why the order of conviction and sentence passed by him against the present applicant should not be set aside. Guha, J. confirmed and upheld the conviction and sentence.

The learned Advocate who has appeared on behalf of the petitioner was invited to point to any authority to the effect that this Court has jurisdiction to entertain such a petition and, he has been unable to do so. This is not a new point. It was considered so far back as the year 1913 in 21 I. C. 470 (1), in which it was decided that no appeal lies under Cl. 41, Letters Patent, to His Majesty in Council against an order made by the High Court on its Appellate Side under S. 118, Criminal P. C. In the same volume, in 21 I. C. 912 (2) it was decided that leave to appeal to the Privy Council from a decision of a third Judge in a criminal case, on a reference arising out of a difference of opinion between two Judges of the High Court, could not be granted because the matter did not come within the ambit of Cl. 41, Letters Patent. That was a reference for confirmation of a death sentence. The two Judges, who heard the reference, disagreed and the matter

1. Chintamon Singh v. Emperor, (1913) 21 I C 470=14 Cr L J 598.
2. Ataur Singh v. Emperor, (1913) 21 I C 912=14 Cr L J 672.

was referred to a third Judge. In 1924 Cal. 338 (3) it was decided that an accused person cannot invite the High Court to grant him leave to appeal to His Majesty in Council from its appellate judgment, either under Cl. 41, Letters Patent, or under any other provision of the law.

In that case the whole of the previous cases were reviewed and a number of unreported cases were considered. One of these, *Madho Singh* v. *Emperor*, which was tried in 1916, was a case in which an application for leave to appeal to His Majesty in Council was presented against an order made on a Criminal Reference. The application was rejected for the same reason, that the matter did not come within Cl. 41, Letters Patent. The learned Advocate for the petitioner, therefore is not correct in his contention that none of the previous cases are on all fours with the present petition because none of the previous cases dealt with matters of revision such as we are concerned with in the present petition. But assuming for the sake of argument that he had been correct in his contention, even so it appears to us that Cl. 41 cannot possibly be held to cover such a case as this. That clause provides that from any judgment, order or sentence of the High Court made in the exercise of the Original Criminal Jurisdiction, or in any criminal case where any point or points of law have been reserved for the opinion of the High Court in manner thereinbefore provided, by any Court which has exercised Original Jurisdiction, it shall be lawful for the person aggrieved to appeal to His Majesty in Council. The order made by Guha, J. was not made in the exercise of the original criminal jurisdiction, nor was it made in any criminal case where any point or points of law had been reserved for the opinion of the High Court by any Court which had exercised original jurisdiction. The words in manner hereinbefore provided in Cl. 41 refer to the provisions made in Cl. 25, Letters Patent. In that clause it is provided that

> There shall be no appeal to the High Court from any sentence or order passed or made in any criminal trial before the Courts of Original Criminal Jurisdiction which may be constituted by one or more Judges of the High Court. But it shall be at the discretion of any such Court to reserve any point or points of law for the opinion of the High Court.

It is clear, therefore, that the present case does not come within the provision made in that clause, because no such Court, referred to in that clause, has reserved any point or points of law for the opinion of the High Court. The learned Advocate has argued that the phrase 'in manner hereinbefore provided' cannot be intended to refer only to Cl. 25, because Cl. 25 deals only with the Original Criminal Jurisdiction of the High Court; whereas Cl. 41 refers also to orders made by any Court which has exercised original jurisdiction. His contention has been that the words 'by any Court' must have reference to Courts other than the High Court and, therefore the provisions of Cl. 41 cannot have reference only to the provisions made under Cl. 25. I think that he has misconceived the meaning of the word 'by any Court' in Cl. 41. Those words have reference only to the Original Criminal Jurisdiction of the High Court. Cl. 25 refers to

> 'criminal trials before Courts of Original Criminal Jurisdiction which may be constituted by one or more Judges of the High Court'

and it proceeds to state that it shall be at the discretion of any such Court to reserve any point or points of law for the opinion of the High Court. In my opinion, the words in Cl. 41 'by any Court which has exercised Original Jurisdiction' have reference only to the words in Cl. 25 'Courts constituted by one or more Judges of the High Court.' Consequently, the learned Advocate has not been able to distinguish the present case from cases which have been decided previously, which decisions are binding upon this Court. This petition therefore must be rejected.

Jack, J.—I agree.

K.S. *Petition dismissed.*

3. Phillip E. Billinghurst v. Emperor, 1924 Cal 338=82 I C 763=25 Cr L J 1371.

A. I. R. 1935 Calcutta 478

MUKERJI AND M. C. GHOSE, JJ.

Nathuram Agarwalla—Plaintiff—Appellant.

v.

Abdul Latif and *others*—Respondents.

Appeal No. 10 of 1930, Decided on 18th December 1934, from original decree of Sub-Judge, Jalpaiguri, D/- 14th September 1929.

(a) Registration Act (1908), S. 17 (1)—Compromise decree—Transaction by which rights of one party are extinguished and rights are created in favour of another party in property in dispute—Decree is not hit by S. 17 (1).

If by a decree of a Court made on a compromise a transaction is had which has the effect of extinguishing the right of a party and declaring or creating a right in favour of another party in any property which is the subject matter of the suit or proceedings, Sub-S. (1), S. 17 of the Act would not hit that decree. [P 480 C 2]

(b) Partition — Suit — Some of cosharers not made parties—Suit cannot be proceeded with.

A suit for partition cannot go on when some of the cosharers have not been made parties. [P 481 C 1]

(c) Cosharer—Cosharer not taking steps to take possession from other cosharers—He is not entitled to mesne profits.

It is not right that a party who does not take any steps to take possession of lands from others who are his cosharers should be allowed a decree for mesne profits. [P 481 C 1]

Nirmal Chandra Chakravarti — for Appellant.

Hemendra Nath Bose and *Surjya Kumar Aich*—for Respondent.

Surjya Kumar Aich — for Deputy Registrar.

Mukerji, J.—The plaintiff is the appellant in this appeal. He instituted the suit out of which this appeal has arisen for declaration of his title to a certain share in some lands and for recovery of possession thereof with mesne profits after partition. The facts necessary to be stated for purposes of the points which have arisen in the present appeal are very few. One Bengu Mahomed had a four annas share of a tenure which previously bore a rental of Rs. 54-8-0 but now bears a rental of Rs. 75. He died leaving behind him 3 sons and a predeceased son's son. The predeceased son's son was amicably given a 1/8 of the share which Bengoo Mahomed owned and the remaining 7/8 of the share came to be owned and possessed by the 3 sons of Bengoo Mahomed who divided the same in three equal shares amongst themselves. One of these three sons was Kohordi Mahomed. Some of the sons of Kohordi Mahomed mortgaged the entire share of their father in the properties, viz. 4 annas 13 gandas and odd karas out of the one fourth share of Bengoo in favour of the plaintiff and the plaintiff in execution of the decree which he obtained on the mortgage purchased the entire share of the said Kohordi Mahomed and took delivery of possession through Court. The mortgagors had really no title to the entire share mortgaged and were only entitled to a share of 2 annas 6 gandas odd karas out of the one-fourth share of Bengoo. The plaintiff after his purchase sold off the share which he had purchased viz. the entire share of Kohordi to defendant 10 under a Kobala on 10th March 1924. Defendant 10 as plaintiff thereupon instituted a suit for possession on eviction of the other heirs of Bengu and made the plaintiff a pro-forma defendant numbered as defendant 10 in that suit. The suit ended in a compromise under which it was dismissed. But one of the terms of the compromise was as follows :

> Plaintiff gets from defendant 10 a sum of Rs. 460 in all and in consideration thereof relinquishes in his favour all his claims arising under the Kobala executed by the said defendant 10. The title of defendant 10 to the lands in dispute to which he is in fact entitled under his auction purchased right remains unimpaired and the plaintiff's claim thereto will be rejected.

Thereafter, the plaintiff instituted the present suit claiming the share which had really passed to him under his auction purchase (i. e. 2as. 6g. odd in Bengoo's one fourth) and for recovery of mesne profits after partition of that share. Defendants 1 to 4 had not appeared to challenge the plaintiff's title to the share that he claimed, but put forward a defence as against the plaintiff's claim for mesne profits. Defendants 5 to 9, while supporting the pleas which defendants 1 to 4 took, pleaded, in addition, that the plaintiff had acquired no title to the share under the compromise decree which was passed in the suit, which defendant 10 had instituted and to which reference has already been made. They also resisted the plaintiff's claim for partition. Amongst the issues that were framed there were three which were pressed and so were dealt with by the learned Subordinate Judge, namely Issues 4, 6 and 11. The findings of the learned Judge on Issue 6 are to the effect that the plaintiff had, under the auction purchase, acquired the share which he has claimed in the present suit, but that he had parted with that share in favour of defendant 10 by a registered Kobala Ex. 2. It was found also that the compromise decree on which the plaintiff relied for the

purpose of showing that the right, title and interest of defendant 10 to that share was extinguished and his own title to the share was revived, was one which could not be admitted in evidence for want of registration. Being of that opinion, the learned Subordinate Judge held that the compromise decree had not conferred any title to the plaintiff and that therefore the plaintiff's prayer for declaration of title should be dismissed.

As regards issue 4 the Judge, upon the evidence of plaintiff's witness 3, Amiruddin, held that there were certain lands in the jote which were in the ejmali possession of all the cosharers of the entire jote of Rs. 75 and that although the cosharers who were the heirs of Bengu Mahomed and were entitled to the four annas share in the bigger jote were made parties to the suit; the remaining 12 annas cosharers had not been impleaded as parties thereto. On this finding the Judge held that the claim for partition could not be proceeded with. As regards the mesne profits which is the subject-matter of issue 11, the learned Judge was of opinion that the plaintiff was not entitled to any mesne profits in view of certain circumstances to which the learned Judge has referred in this connexion. But he has observed that if on any ground it was thought proper to award mesne profits, such profits should not in his opinion, exceed Rs. 100. In this appeal which the plaintiff has preferred, his principal argument is directed against the conclusions of the learned Subordinate Judge on issue 6. The reason upon which the learned Judge has proceeded in holding that the compromise decree required registration before it could be admitted in evidence seems to be the following: that the suit in which that decree was passed was for possession of the share of Kohordi by ejecting certain persons who were the principal defendants, that is to say defendants 1 to 9 in that suit, and that defendant 10 in that suit, the transferor, was only a pro forma defendant. The learned Judge evidently thought that in deciding the question as to whether the decree should be regarded as admissible or not under the provisions of S. 17, Registration Act, the Court can go behind the terms of the decree itself and find out what the contentions of the respective parties were in the suit or, in other words, whether some relief was actually claimed against the particular defendant with whom the compromise was effected. S. 17, Registration Act, in sub-S. (1), specifies the different kinds of documents that shall be registered or in other words of which the registration is compulsory. Cl. (b) of that sub-section speaks of other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish whether in present or in future, any right, title or interest whether vested or contingent of the value of one hundred rupees or upwards etc. Leaving aside the question of value for the moment, a document which purports or operates to create or declare right in favour of another, if it is to be operative at all, must be registered under the provisions of S. 17, sub-S. (1), Cl. (b). But Cl. (4) of sub-S. (2), S. 17 says:

> Nothing in Cls. (b) and (c), sub-S. (1) applies to any decree or order of a Court except a decree or order expressed to be made on a compromise and comprising immovable property other than that which is the subject-matter of the suit or proceeding.

Upon the plain terms of the provisions to which I have just referred it is clear that if by a decree of a Court made on a compromise a transaction is had which has the effect of extinguishing the right of a party and declaring or creating a right in favour of another party in any property which is the subject-matter of the suit or proceeding, sub-S. (1), S. 17 of the Act would not hit that decree. It is difficult to see how upon the plain terms of the compromise decree in the present suit it can be regarded as falling outside the provisions of Cl. (4), sub-S. (2), S. 17, Registration Act. The decree was therefore admissible notwithstanding that it was not registered. Once it is held to be admissible, the result is that it is binding between the plaintiff and defendant 10. Defendant 10 has been examined as a witness on behalf of the plaintiff in the present suit. He has not laid any claim to the share which is covered by the declaration contained in the decree. And defendants 1 to 4 who were the original owners of that share and were the plaintiffs mortgagors have not laid any claim thereto. Apart from anything else, it is highly doubtful if it is at all open to defendants 5 to 9 who

had no title to that share, to take the defence that the plaintiff has no title to the share which he has claimed. But whatever that may be the decree which was passed in the previous suit expressly provided that any right which defendant 10 had acquired under his purchase from the plaintiff was extinguished and the plaintiff's title to the share which he had previously sold to defendant 10 remained unaffected. Plaintiff therefore is clearly entitled to the declaration of the title that he has asked for in this suit in respect of the share stated by him in his plaint.

The next question is as to whether the suit as a suit for partition can go on in view of that fact that some of the cosharers of the bigger jote of Rs. 75 have not been made parties to it. We think the learned Judge has taken the right view of this matter and it is not possible, having regard to the frame of the suit such as it is to proceed with it for the purpose of making a decree for partition. As regards mesne profits, which form the subject-matter of issue 11 the learned Judge has given very good reasons for holding as to why the plaintiff should not be awarded any mesne profits at all. Looking at the facts from the right angle of vision it would seem that the defendants who were in possession of the lands had no alternative but to be in such possession. It has not been proved that the plaintiff at any time made any attempt to take possession and it is not right that a party who does not take any steps to take possession of lands from others who are his cosharers should be allowed a decree for mesne profits. The claim for mesne profits has been rightly refused.

The result is that the appeal succeeds in part, the decree from which it has been preferred is set aside and it is ordered that the plaintiff's title to the share claimed by him in the plaint be declared. Plaintiff will be entitled to joint possession with the defendants. The appellant will have his costs of this appeal from respondents 10 to 14 hearing fee being assessed at three gold mohurs.

M. C. Ghose, J.—I agree.

K.S. *Order accordingly.*

1935 C/61 & 62

A. I. R. 1935 Calcutta 481

R. C. MITTER, J.

Mohini Mohan Mitra and *another*

v.

Radha Sundari Dasi and *others*

Civil Rule No. 1140 of 1934, Decided on 9th April 1935.

(a) Bengal Tenancy Act (1882), S. 26-F—Enquiry is not limited to matters mentioned in sub-Ss. (2) and (3).

It cannot be asserted broadly that the enquiry in proceedings under S. 26-F is limited only to matters mentioned in sub-Ss. (2) and (3): *Cases referred.* [P 483 C 1]

(b) Evidence Act (1872), S. 115—Doctrine of estoppel—Essentials pointed out—Held on facts there was estoppel.

In order to attract the doctrine of estoppel there must be representation of a fact and on the faith of that representation an act must be done. These two factors prima facie attract that doctrine. It would not be applied if the real state of facts, which is at variance with the facts represented, be known by the party pleading estoppel. It would not be applied also to defeat a statutory enactment on the principle that there is no estoppel against statute.

Where representation of a fact was made by the transferee that the tenancy was an occupancy holding, and the petitioners acted on the faith of that representation by making the application for pre-emption and it was not pleaded, nor was there any proof or a finding that the said applicants knew that the tenancy was not an occupancy holding, and there was no statutory provision which would be defeated by allowing estoppel to operate:

Held: that it was not open to the opposite party to plead or prove in these proceedings that the tenancy was governed by the Transfer of Property Act: 1931 *Cal* 483; 1935 *Cal* 153 and 1924 *Cal* 830, *Rel. on.* [P 483 C 1,2]

Gopendra Nath Das—for Petitioners.

Bankim Chandra Mukherjee & *Muktipada Chatterjee*—for Opposite Parties.

Upendra Kumar Roy and *Surajit Chandra Lahiri*—for Deputy Registrar.

Order.—This rule has been obtained by two out of many cosharer landlords whose application for pre-emption made under S. 26-F, Ben. Ten. Act, has been dismissed by the learned Munsiff of Dubrajpur. Opposite parties 2 to 5 had a tenancy under the petitioners and opposite parties 6 to 41. On 7th April 1933 they sold to opposite party 1.13 acres of land out of the said tenancy. In the conveyance the description of the property sold was given as a ryoti holding. A notice of transfer under the provisions of S. 26-C was given to the landlords and the landlord's transfer fee prescribed by S. 26-D, Ben. Ten. Act was also deposited. On 8th August 1933 the petitioners received the said notice of transfer and on the reopening of the

civil Courts on 23rd October 1933 they made the application for pre-emption. It does not appear whether the notice of transfer was served upon Sasadhar Mitra, one of the cosharer landlords who had been made a proforma defendant to the application for pre-emption. At least there is no specific finding of the learned Munsiff on the point. The cosharer landlords who had been made defendants also applied for pre-emption but their claims have been dismissed by the learned Munsiff on the ground of limitation. It will be necessary to consider the claim of opposite party 16, who is the legal representative of Sasadhar Mitter who died on 10th November 1933.

The main defence of opposite party 1 was that S. 26-F was not applicable at all as the lands transferred according to him do not form part of an agricultural tenancy. She contends that the tenancy of opposite parties 2 to 5 was taken for residential purposes, and is not governed by the provisions of the Bengal Tenancy Act at all. The learned Munsiff has found as a fact that the said tenancy is governed by the provisions of the Transfer of Property Act and has on that ground dismissed the application for pre-emption. It was contended before him, as it is before me, that the opposite party 1 was not entitled to raise in these proceedings the question of the nature and character of the tenancy. Mr. Dass who has appeared in support of the rule has placed his contentions on two grounds, namely that (1) in proceedings under S. 26-F, Ben. Ten. Act, the inquiry is limited to the matters mentioned in sub-Ss. 2 and 3, S. 26-F and the Court cannot travel beyond the matters specified therein. His contention comes to this, that when an application for pre-emption has been made, the Court has to determine the following questions only: (a) as to whether the money deposited by the applicant falls short of the price stated in the notice and the compensation, (b) what amount of rent has been paid by the transferee after the date of the transfer, (c) what amount has been paid for annulling encumbrances and (d) the rate of interest that the applicant for pre-emption will have to pay on items (b) and (c). Although the view I am taking on the second contention of Mr. Dass renders it unnecessary for me to decide the said question, I am of opinion that this contention of Mr. Dass cannot be given effect to. The reported cases show that various other questions have been allowed to be raised in proceedings arising under S. 26-F. For instance, questions of defect of parties, and as to whether the sale was one taken in benami for the benefit of a cosharer tenant, have been allowed to be raised in such proceedings. In Civil Rule No. 1324 of 1934 (1) I have myself held that the last mentioned question could be raised and the benami being proved, the application for pre-emption was dismissed. No doubt Henderson, J., has by his judgment delivered on 14th March 1935 held in Civil Rule No. 1700 of 1934 (2) that in proceedings for pre-emption under Section 26-F, the Court can only go into the matters specified in S. 26-F sub-Ss. (2) and (3). There, an application for pre-emption was made. Both the transferor and transferee pleaded that the sale was a fictitious one and no title was intended to pass or had passed. Henderson, J., held that the transfer had no locus standi in those proceedings which he said was of a summary nature and remarked that the aforesaid question falls beyond the scope of the inquiry. He however remarked that the order for pre-emption would not give the successful applicant possession and that the said question can be raised in a subsequent suit for possession. I do not see why a landlord who has obtained an order for pre emption will have to bring a suit for possession He would obtain possession in execution of the order for pre-emption under the provisions of sub-S. 6, Cl. (3), S. 26-F. The executing Court in executing the order for pre-emption would not be able to go behind the order. I do not see how after the landlord has been put in possession in execution of the order for pre-emption a suit to recover possession from him would lie or be successful. The pre-emption order will have to be vacated or got round in order that such a suit may be successful. The right of pre-emption has been created by statute which has also defined the procedure for

1. Nabendra Kishore Roy v Abdul Majid, Civil Rule No. 1324 of 1934 Decided on 19th February 1934.
2. Nibaran Chandra Bhattacharya v. Hem Nalini Debi, Civil Rule No. 1700 of 1934 Decided on 14th March 1935.

enforcing the right. According to well established principles the jurisdiction conferred on the Court by S. 26-F would be exclusive and its decision would be final. The decision given by Henderson, J., in the said rule may be supported on different principles and will have to be carefully considered if the question, as to whether such a plea as was taken by the transferee in the case that came up before him would be admissible in pre-emption proceedings, again comes up for consideration before this Court. But it is not necessary to consider the matter further as I have stated before that this rule can be decided on the second point raised by Mr. Dass. However I hold that it cannot be asserted broadly that the inquiry in the proceedings under S. 26-F is to be limited only to the matters mentioned in sub-Ss. (2) and (3) of the said section.

The second ground urged by Mr. Dass is based on estoppel. He says that the transferee cannot go back upon the statements made in the notice of transfer as to the nature of the tenancy and having purchased a property with the specific description that it is an occupancy holding cannot turn round and defeat the application for pre-emption by stating and proving that the tenancy purchased was of a different nature. In order to attract the doctrine of estoppel there must be representation of a fact and on the faith of that representation an act must be done. These two factors prima facie attract that doctrine. It would not be applied if the real state of facts, which is at variance with the facts represented, be known by the party pleading estoppel. It would not be applied also to defeat a statutory enactment on the principle that there is no estoppel against statute. It is on these principles the decision given in 1934 Cal 830 (3) and 1935 Cal 153 (4) can be supported, for if the transferee had been held bound by the statements in the notice of transfer as to the number and names of the landlords on the principle of estoppel, S. 188, Bengal Tenancy Act, would have been made nugatory in such cases. In one of these cases also, the facts indicate that the applicant for pre-emption knew who his cosharer landlords were, and that the persons mentioned as landlords in the notice of transfer were not all the landlords of the holding. It is also on the principle that there cannot be estoppel against statute that I based my decision in Civil Rule No. 1324 of 1934 (1). In the case before me representation of a fact was made by the transferee that the tenancy was an occupancy holding; the petitioners acted on the faith of that representation by making the application for pre-emption. It is not pleaded, nor is there any proof or a finding that the said applicants knew that the tenancy was not an occupancy holding, and there is no statutory provision which would be defeated by allowing estoppel to operate. I hold accordingly that it was not open to the opposite party 1 to plead or prove in these proceedings that the tenancy was governed by the Transfer of Property Act. The case before me comes within the principle enunciated by Suhrawardy and Costello, JJ., in 1931 Cal 483 (5). I accordingly hold that the learned Munsif was wrong in dismissing the application for pre-emption made by the petitioners.

The opposite party 16, who is a minor, contends before me that his claim for pre-emption has been wrongly dismissed on the ground of limitation. He says that there is no finding that the notice of transfer had been served on his father, Sasadhar Mitra, and as such he could have applied for pre-emption within a reasonable time. Sasadhar died on the very date on which the notice of the application for pre-emption was served on him. Opposite party 16 was brought on the record in the place of his father on 6th January 1934. A Court guardian was appointed, who communicated with the mother of this opposite party only on 22nd March 1934 and on 18th April 1934 an application on his behalf to become co-applicant for pre-emption was filed. If no notice of transfer had been served on Sasadhar, the argument placed before me would no doubt be forceful, but I cannot accede to the prayer of the opposite party 16 to allow him pre-emption along with the petitioners before me. He did not move this Court against the order passed by

3. Brajendra Kumar Banerjee v. Symannessa Bibi, 1934 Cal 830=154 I C 576.
4. Adhar Chandra Shaha v. Gour Chandra Shaha 1935 Cal 153=154 I C 823.
5. Surendra Nath Laik v. Notan Behary Mandal, 1931 Cal 483=131 I C 856.

the learned Munsif and if his prayer be acceded to, the matter cannot be finally disposed of here, for the Munsif has not recorded any finding as to whether Sasadhar Mitter had been served with the notice of transfer. If I am to accede to his prayer I would have to remand the case to the Munsif, which I am not willing to do, seeing that he has not moved this Court against the Munsif's order. The result is that I set aside the Munsif's order and grant the application of the petitioners before me for pre-emption. The Rule is accordingly made absolute with costs against opposite party 1. Hearing fee one gold mohur.

K.S. *Rule made absolute.*

A. I. R. 1935 Calcutta 484

(Special Bench)

COSTELLO, LORT-WILLIAMS AND HENDERSON, JJ.

In the matter of *An Advocate.*

Disciplinary Case No. 1 of 1934, Decided on 30th July 1934.

Legal Practitioners Act (1879), S. 12—Mere negligence however gross cannot amount to misconduct—But if accompanied by suppression of truth or deliberate misrepresentation, it is misconduct.

Per *Costello, J.*—If a professional man does not tell the truth in connexion with a matter which he has undertaken to carry through on behalf of a client, that is conduct which might easily be said to involve moral delinquency. It is not in the best interests of the legal profession as a whole or of any member of it (other than the person accused) that there should be any lax or loose standard of professional conduct, [P 487 C 1]

Per *Lort-Williams, J.*—Mere negligence however gross cannot amount to misconduct, professional or otherwise. [P 488 C 1]

Per *Henderson, J.*—Negligence accompanied by suppression of truth or by deliberate misrepresentation would be misconduct: 1926 *Mad* 568, *Rel. on.*; *English cases referred.* [P 488 C 2]

H. C. Mazumdar—for Bar Council.

A. K. Roy, P. N. Banerjee, Bejoy Kumar Bhattacharjee, Panchanon Ghose and *Mohendra Nath Mitter* — for the Advocate.

J. C. Galstaun—in person.

Costello, J. — On 29th December 1933, a complaint was made to the Court under S. 10, Bar Councils Act, by Mr. J. C. Galstaun concerning the conduct of an advocate whom he had instructed to file an appeal against a decision of the Additional District Judge, Alipore, which had been given on 10th September 1932, in an appeal in a suit brought by Raja Janaki Nath Roy against Mr. Galstaun, in the Court of the first Subordinate Judge, 24-Parganas at Alipore, the suit having terminated on 13th December 1930, in favour of the plaintiff. The matter of the complaint was referred to by this Court for inquiry to the Bar Council under the provisions of S. 10, sub-S. (2), Bar Councils Act, 1926, and the case was duly inquired into by a committee of the Bar Council, that is to say, by a tribunal constituted under the provisions of S. 11, sub-S. (2), Bar Councils Act. The findings of the tribunal were forwarded to the Court through the Bar Council in accordance with the provisions of S. 12, sub-S. (2). The matter has now come before us under the provisions of sub-S. (3), S. 12.

It is to be observed at the outset that by sub-S. (1), S. 10, the High Court may reprimand, suspend, or remove from practice any advocate of the High Court whom it finds guilty of professional or other misconduct. The question which we have to determine, therefore is whether upon the the findings of the tribunal there was any such professional or other misconduct on the part of the advocate against whom the complaint was made as would require us to take action under S. 10, sub-S. (1). It is necessary, I think, that I should refer to the facts which constituted the complaint made by Mr. Galstaun against the advocate concerned. It appears that Mr. Galstaun obtained certified copies of the judgment of the Additional Judge at Alipore and the decree made by him on 27th September 1932, and that the last date for presenting an appeal from that judgment was 30th January 1933 or thereabout. Mr. Galstaun handed over the certified copies of the judgment and decree and all other relevant papers in connexion with his case to the advocate whose conduct we are now considering, and instructed that advocate to draw up grounds of appeal without delay. On 19th October 1932, Mr. Galstaun wrote to the advocate saying that if he had the grounds of appeal made out, he would like to see them. Subsequently the advocate did show the grounds of appeal to Mr. Galstaun, and thereupon he received from Mr. Galstaun on 21st October 1932, a sum

of Rs. 20 and on 2nd November 1932, a further sum of Rs. 220, and at the same time Mr. Galstaun executed a proper form of vakalatnama empowering the advocate to act on his behalf. According to Mr. Galstaun's statement, and no doubt it is perfectly accurate, the advocate thereupon undertook to file the appeal in due time.

Nothing more was heard by Mr. Galstaun in the matter prior to 24th January 1933, on which date whilst writing to the advocate with regard to other legal matters which Mr. Galstaun had entrusted to his charge, he inquired about the appeal in the following words: "What about the appeal in Janakinath Roy's case?" He seems to have underlined the words "about the appeal." To that question no reply was received, and on 2nd March 1933, Mr. Galstaun wrote to the advocate a letter at the end of which he said again: "When is Janakinath Roy's appeal coming up?" On 9th March 1933, the advocate wrote a letter to Mr. Galstaun referring by implication to the various other legal matters but remaining silent as to the question of Mr. Galstaun's appeal in Janakinath Roy's case. Accordingly on 20th April 1933, Mr. Galstaun again wrote to the advocate and in that letter he put the heading Myself v. Janakinath Roy, and said:

Are you arranging to put this appeal on the board? Please see that this is done immediately after the vacation.

But again no reply was forthcoming. Mr. Galstaun wrote again on the 1st May a letter in which he once more said "When is Janakinath Roy's appeal going on." At long last in reply to that letter the advocate did condescend to give an answer to Mr. Galstaun's repeated enquiries. The reply was in these words:

I shall let you know about the position of Janakinath Roy's appeal case as soon as I shall be able to attend Court after recovery.

Apparently nothing more was heard from the advocate in the course of the next ten days; so on the 12th May Mr. Galstaun again wrote to the advocate a letter which was headed "Re. Janakinath," and in that letter he said:

I met Charu a few days ago in the High Court and I asked him about the appeal. Will you kindly let me know if it has been filed and what proceedings you are taking in the matter? This thing has been lying in your hands for a very long time and evidently neglected.

Now, that was a perfectly definite letter, and it contained inferentially a charge of neglect against the advocate. Even to that he did not reply. So Mr. Galstaun wrote a further letter on the 17th May which was also headed "Re Janakinath Roy" and said:

I wrote to you on the 12th but have had no reply. I understand Charu is leaving for England tomorrow. Will you please meet me tomorrow morning at 8-30 to discuss the matter?

That letter produced a reply in the shape of a letter dated 17th May 1933, in which the advocate said that he would see Mr. Galstaun on the Saturday ensuing, that is to say on 20th May 1933. That appointment was kept, and the advocate saw Mr. Galstaun on 20th May. Then for the first time the advocate disclosed the fact that the appeal had never been filed at all, and that the moneys which the advocate had received for the necessary charges together with the papers were still in the hands of the advocate. Thereupon Mr. Galstaun demanded of the advocate that he should return all the papers and the money. Apparently he only got back certain of the papers in answer to that request but none of the money. Thereupon Mr. Galstaun applied to this Court for an extension of time for the filing of the appeal which had become barred so long before in the month of January. In para. 7 of his complaint which is really the indictment against the advocate, he said:

I have been very materially prejudiced and I shall have to suffer considerable loss and damage by my appeal not having been filed in time by the said advocate on account of his grossly negligent conduct in not filing the appeal in time and fraudulently suppressing the fact for about six months in spite of the repeated inquiries by me till a very distant date when the appeal was time-barred by limitation even though he was furnished with costs and all necessary papers.

Then in para. 8 the complainant said:

The aforesaid advocate is guilty of unprofessional conduct and gross misconduct and is also liable for the damages that I have sustained.

It is to be seen therefore that the form of complaint which was lodged against this advocate contained in effect four charges: (1) that he was grossly negligent, (2) that he fraudulently suppressed the facts, (3) that he had been guilty of unprofessional conduct, (I suppose this is really comprehended within the other two) and (4) that he was guilty of gross misconduct. Evidence was given

before the tribunal by the complainant and also by the advocate concerned. But prior thereto or rather in connexion with the enquiry the advocate had put in a written statement in which, to all intents and purposes, he admitted the facts of the case as to the chronological history of the matter. But he put forward the excuses by way of defence that he had omitted to attend to Mr. Galstaun's business or to file this particular appeal in time by reason of the illness of his children, they having suffered from typhoid fever for about three months from the month of January 1932 onwards and also by reason of his own ill health in the month of December and January and again from the month of April onwards. He denied that he had any intention to defraud or to cause any loss or damage. Then at the end of para. 9 of his written statement he said:

> He was and is always ready to return to Mr. Galstaun the money he had received from him on account of costs.

The tribunal in its findings says that the broad facts are not in dispute, and those facts are set out in some detail. The actual findings are contained in para. 5 and subsequent paragraphs. In para. 5 the tribunal said:

> We have not the slightest hesitation in finding that the advocate concerned was guilty of gross negligence in the performance of his duties as an advocate and that he had no justification for not filing the appeal within time. We are not at all satisfied with the excuses put forward by the advocate and do not accept them.

That means that the tribunal found that the advocate was guilty of the first of the four charges which I have enumerated. There is also, it is to be observed, an addendum put forward by the tribunal itself which is not directly referable to any of these specific charges made by the complainant, because the tribunal says that it was not satisfied with the explanation put forward by the advocate, and that is, in my opinion, tantamount to saying that the advocate himself had put forward excuses which were false in order to account for the negligence of which he admitted that he was guilty. Then in para. 6 the tribunal says:

> As regards the charge of misappropriation, we find that such charge has not been established.

The comment one would make upon that is that there is no direct charge of misappropriation in the original complaint lodged by Mr. Galstaun, and it can only be extracted from that complaint by reference to the paragraph in which Mr. Galstaun said that he asked or demanded for the return of the money but he had not recovered it. It is to be emphasized for our present purpose that the tribunal did nevertheless say that there was no misappropriation. As regards what I have called the second charge 'fraudulently suppressing the facts', the tribunal said :

> The charge of fraudulent suppression was made against the advocate but has not been persisted in.

Then in the final pragraph the tribunal said :

> Although we find that the advocate concerned was guilty of gross negligence, we are by no means satisfied that the complainant himself was not to blame partially for his appeal having become time-barred, as all the correspondence and the activities of the complainant seems to have come into existence after the appeal had become time-barred.

I feel impelled to remark in connexion with that comment of the tribunal that I am entirely at a loss to understand what the members of the tribunal had in their minds in making such a comment, because in my opinion it is no part of the duty of a client to frequent the office of his solicitor, or the residence of his advocate, if the advocate has no office, for the purpose of keeping him up to the mark, or if I may use the commonplace expression, i. e. for the purpose of seeing that he is doing the work which he has undertaken to do and for which necessary funds have been provided. In my opinion Mr. Galstaun had a right to expect when he had given the Vakalatnama, necessary instructions and papers, and had provided the advocate with funds for the purpose, that he could put the matter out of his mind and to rest content that he could rely on the advocate to do what he was instructed to do. The tribunal had not in terms dealt with the charges which I have described as the third and fourth charges, that is to say, the charges of professional misconduct and gross misconduct. Presumably however they were disposing of those charges by saying that there had been no misappropriation. To sum up the whole matter, the finding of the tribunal comes to this : that there was gross negligence on the part of the advocate, but there was no misappropriation of the funds entrusted to him for the purpose of the work he

had been instructed to do. In these circumstances it would be difficult if not impossible for us on the material at present before us to take any action under S. (10), sub-S. (1). The learned advocate who has appeared on behalf of the respondent in these proceedings has drawn our attention to 49 Mad 523 (1), the headnote of which is that mere negligence unaccompanied by any moral delinquency on the part of a legal practitioner in the exercise of his profession does not amount to professional misconduct. The decision in that case was based upon the decision in England in a matter which is reported in 33 Sol. J. 397 (2). In the Madras case, the learned Chief Justice said that

> Negligence by itself is not professional misconduct: into that offence there must enter the element of moral delinquency. Of that there is no suggestion here, and we are therefore able to say that there is no case to investigate, and that no reflexion adverse to his professional honour rests upon Mr. M.

With that decision I entirely agree. But I would point out in the present case that it is not at all certain that it could be said with strict accuracy that there is really a finding that there was no moral delinquency seeing that the tribunal had said that they were not at all satisfied with the excuses put forward by the advocate and did not accept them. To say that one does not accept excuses put forward may be merely an euphemistic method of saying that they were of opinion that the person concerned was not telling the truth. One would have thought that if a professional man does not tell the truth in connexion with a matter which he has undertaken to carry through on behalf of a client, that is conduct which might easily be said to involve moral delinquency. In my opinion it is not in the best interest of the legal profession as a whole or of any member of it (other than the person accused) that there should be any lax or loose standard of professional conduct. I hope it is the case that advocates of this Court who are not members of the English Bar desire to set for themselves and adhere to the same standards of professional conduct as those which a member of the Bar ought to set for himself. What that standard should be was indicated by the Lord Chief Justice of England in 3 F & F 372 (3) at p. 381, where the learned Lord Chief Justice says:

> Mr. Seymour did not occupy the position of a private individual, nor was it as a private individual that his conduct was made the matter of inquiry. Mr. Seymour was a barrister, and, as such, was subject to the domestic forum of the benchers. It was beyond dispute that if the conduct of a member of an Inn of Court was such as to be unworthy of a gentleman, he was within the jurisdiction of the benchers of his Inn. In the same way as officers of the army were subject to investigation when charges were made against them of conduct unbecoming officers and gentlemen, barristers were subject to the jurisdiction of the benchers if their conduct was unbecoming the profession and unbecoming gentlemen.

That indicates a high standard of conduct and professional ethics but it is one which we should wish, and I am sure every one would wish, members of all branches of the legal profession to endeavour to conform to. We are however not now dealing with the matter upon that basis because as I have stated the Tribunal has gone no further than to find gross negligence on the part of this particular advocate. There is no finding of misappropriation. Since these proceedings opened, however, we have had put before us by Mr. Galstaun, the complainant, what purports to be the copy of a letter dated 28th July 1933, delivered to the advocate for which he holds a receipt signed by the advocate's own hand in the peon book which was used at the time this letter was sent. Now, in this letter Mr. Galstaun says:

> Referring to my previous correspondence, will you kindly refund me the Rs. 240 which was paid to you as costs and stamp duty for filing the appeal against Raja Janakinath Roy and others and which you failed to do. Unless I receive the amount in the course of three days, I shall bring the matter to the notice of the Chief Justice.

To that letter no reply was received, so we are told. The importance of it is that had this letter been put in evidence before the Tribunal at the time of the proceedings before them on 29th May 1934, it might have had some influence upon their decision on the question as to whether or not it could rightly be said that there had been no misappropriation and professional misconduct on the part of the advocate. Mr. Bhattacharyya has said all that was possible

1. In re A Vakil, 1926 Mad 568=96 I C 685=49 Mad 523 (SB).
2. In re G. Mayor Cooke (a solicitor), (1889) 33 Sol J 397.
3. Seymour v. Butterworth, (1862) 3 F & F 372.

to be said on behalf of the advocate. He has told us that the advocate actually tendered to Mr. Galstaun the money received from him and that Mr. Galstaun declined to take it back. Apparently there was some evidence to that effect before the Tribunal. One cannot overlook the fact however that in the written statement which this advocate put forward there is no suggestion at all that he had ever tendered the money to Mr. Galstaun. On the contrary, he merely says in the passage to which I have already referred that he was and is always ready to return to Mr. Galstaun the money which he had received on account of costs. To be "ready to return" is quite different thing from tendering a sum of money. It is not quite clear why the complainant did not put before the Tribunal the letter of 28th July 1933, referred to above, and give evidence concerning the circumstances in which it was sent. Mr. Galstaun said that the reason why he did not is because the question was never raised as to whether or not the money had been returned or was likely to be returned. We are of opinion that this letter if it was sent in the manner described by Mr. Galstaun was of such material importance that we think the Tribunal ought to hold a further inquiry into this case. We shall, accordingly, refer the case back to the Tribunal through the Bar Council under the provisions of S. 12, sub-S. 4, Bar Councils Act of 1926, with a direction that the Tribunal shall hold a further enquiry in the light of the observations which I have made.

Lort-Williams, J.—I agree that this matter should be sent back to the Tribunal for further enquiry. But, mere negligence, however gross, cannot amount to misconduct, professional or otherwise. As was stated by Lord Esher, M. R., in 33 Sol. J. 397 (2):

> The motion was made against a Solicitor for such misconduct in his profession as would call upon the Court either to strike him off the rolls or deal with him by way of punishment in some other manner .... But when such a motion was made asking the Court to exercise penal jurisdiction over a Solicitor, it was not sufficient to show that his conduct was such as to support an action for negligence or want of skill. In order to support such a motion as the present it must be shewn that he had done something dishonourable to him as a man and dishonourable in his profession. A Solicitor was bound to act with the utmost honour on behalf of his client.

In view of the fact that the Tribunal seem to have given as their reason for finding the charge of misappropriation not established, that they did not believe that the complainant ever asked for the return of his monies, the letter produced by Mr. Galstaun to-day is material and important, and ought to be considered by the Tribunal.

Henderson, J.—I also agree that this case should be sent back for further enquiry. The Tribunal have found that the advocate was guilty of negligence. It is not very clear whether they have considered that he has been guilty of suppressing the truth, although that was practically admitted before us. I will merely say that I am clearly of opinion that negligence accompanied by the suppression of truth or by deliberate misrepresentation would be misconduct.

K.S. *Case sent back.*

A. I. R. 1935 Calcutta 488

NASIM ALI, J.

Hemanta Kumar Banerjee—Petitioner.

v.

Monorama Debi—Opposite Party.

Criminal Revn. No. 1100 of 1934, Decided on 2nd January 1935.

Criminal P. C. (1898), S. 488—"Child" means person who is incompetent to enter into any contract—Person below 18 is child.

The word "child" has not been defined in the Criminal P. C. In the absence of any statutory definition or anything to the contrary to the Act, "child" is a person who is incompetent to enter into any contract or to enforce any claim under the law. Under the Majority Act, a person who has not attained the age of majority, that is 18, is incompetent to contract and is therefore a child within the meaning of S. 488, Criminal P. C. [P 489 C 1]

Sudhansu Kumar Mukerjee—for Petitioner.

Jitendra Kumar Sen Gupta—for Opposite Party.

Order.—This Rule was issued upon the District Magistrate of 24 Parganas and the Opposite Party Monorama Debi to show cause why the order of the Police Magistrate of Alipore, dated 21st August 1934, refusing the petitioner's prayer for exempting him from further payment of the monthly allowance for the maintenance of the opposite party's child, Sambhu Nath, under S. 488, Criminal P. C., should not be set aside. The first ground urged in support of the

rule is that Sambhu Nath is no longer a child within the meaning of S. 488, Criminal P. C., inasmuch as he is now 17 years old and is quite competent to earn his livelihood. It is argued by the learned Advocate on behalf of the petitioner that the child, as contemplated by S. 488, is an infant who has not yet attained puberty. The word "child" has not been defined in the Criminal Procedure Code. In the absence of any statutory definition or anything to the contrary in the Act, I am inclined to hold that "child" is a person who is not competent to enter into any contract or to enforce any claim under the law. Under the Majority Act, a person who has not attained the age of majority, that is 18, is incompetent to contract and is therefore a child within the meaning of the section : see 1914 Mad 594 (1) and 1933 Lah 1026 (2). I am therefore unable to accept this contention. The second point that was urged by the Advocate was that the child is not now unable to maintain himself and consequently the petitioner is no longer bound under the law to maintain him. The Advocate argues that though the boy is now reading in the school, the petitioner is not bound to keep him in the school as S. 488, Criminal P. C., does not confer upon the child the right to better his prospects by staying in the school at the expense of the father. It was also argued that he is now sufficiently grown up to earn his own livelihood by working in some factory. It appears that the boy was examined as a Court witness. In his deposition he stated as follows :

I read in the 2nd Class of an English High School. It is out of the question for me to get an employment suitable to my status in life, as I am only a student of the 2nd class of a High School.

This statement was not challenged in cross-examination by the petitioner. The petitioner was also examined as a Court witness. He did not in his evidence contradict the statement of the boy. Under these circumstances I am not in a position to say that the boy is now able to maintain himself. The Advocate also contended that there is no evidence in this case that the boy ever made any attempt to get any employment and consequently it could not be said that he failed to get any employment. The petitioner as well as the boy belong to Bhadraloke class. It cannot be expected that he would make an attempt to earn his livelihood by working as a cooly. As he is now in the school the petitioner did not suggest either in his evidence or during the cross-examination of the boy that regard being had to the social position of the petitioner as well as of the boy it could be expected that at this age the boy would be able to find a suitable employment, even if he made any attempt in that direction. This contention has therefore no force. The Rule is accordingly discharged.

K.S. *Rule discharged.*

1. Krishna Swami Iyer v. Chandra Vadana, 1914 Mad 594=20 I C 1005=37 Mad 565.
2. Mt. Shanoo Devi v. Daya Ram, 1933 Lah 1026 =1934 Cr C 12=147 I C 719.

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LORT-WILLIAMS AND JACK, JJ.

Sailabala Dasi—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 801 of 1934, Decided on 4th April 1935.

(a) Criminal P. C. (1898), S. 342 — Statement of accused amounting to plea of guilty —Court should record exact words used by accused.

In cases where an accused person makes some statement during the course of the trial, which is interpreted as a plea of guilty, the Court should record the exact words used, especially when a statement is made in answer to questions put by the Court under S. 342. [P 490 C 1,2]

(b) Penal Code (1860), S. 318—Dead body must be found and identified as that of child which accused is alleged to have been delivered of.

In order to convict a woman of attempting to conceal the birth of her child, the dead body must be found and identified as that of the child of which she is alleged to have been delivered : *Reg* v. *Mary Ann Williams*, 11 *Cox C C* 684, *Rel on.* [P 490 C 2]

(c) Penal Code (1860), S. 318—Birth taking place in Hospital and known to several persons — No evidence regarding death of child—Held case did not come under S. 318.

Where the birth took place in the Medical School and Hospital and was attended by nurses and others in the Hospital who were well aware that she had given birth to twins and it was known to the two women whom the nurses endeavoured to persuade to adopt the children and further, it was known to the third accused and there was no evidence that the twins died :

Held: that there was no concealment of the birth and that the case did not come within S. 318. [P 490 C 2]

Hira Lal Ganguly—for Appellant.

A. Lahiri—for the Crown.

Lort-Williams, J.—In this case, the appellant was charged with and convicted of concealment of birth under S. 318, I. P. C., and sentenced to rigorous imprisonment for nine months and a fine of Rs. 300 or, in default, three months' rigorous imprisonment. She was tried with two other accused who were acquitted. The first accused Usha Bala was the daughter of the second accused Sailabala and the third accused Birendra was the grandson of the second accused Sailabala. On 4th July 1934 Ushabala gave birth to male twins in the Calcutta Medical School and Hospital. Apparently a nurse of the Hospital knew some women who desired to adopt a newly born child and on 8th July she took all three accused with the twins to 69/3, Corporation Street, in a car. The nurse got out of the car and took the twins into these premises to show them to the women, who she hoped, might adopt them. While she was inside, all the accused went off in the car.

For various reasons the women were not willing to adopt the twins. The nurse came out and, finding that the accused had disappeared, went back to the Hospital and from information given by another patient, traced the accused. Eventually the twins were given back to Sailabala, Sailabala went off with the twins, saying that she was going to the Talla Bridge at Shambazar, and she asked the women to tell her grandson that she had gone there. That was the last that was seen of the twins.

When Sailbala was examined under S. 342, Criminal P. C., it is alleged that she said in the vernacular "What has happened has happened." The Magistrate interpreted this as a plea of guilty. We enquired from him whether he had recorded the exact words in the vernacular which this woman used, and in his answer he says that he never keeps any note of the exact words in the vernacular used by accused persons, and it is impossible for him to remember them, but that the accused pleaded guilty, and that the pleader asked for mercy. In cases where an accused person makes some statement during the course of the trial which is interpreted as a plea of guilty, the Court should record the exact words used, especially is this the case, when a statement is made in answer to questions put by the Court under S. 342, Criminal P. C.

There was no evidence that either of the twins died, other than the statement to the Magistrate which was produced by him as witness and which was an exhibit in the case. This exhibit has not been translated; but apparently there is something in the statement to show that either one or both of the twins died and that Sailabala tried to get some man to take the bodies to the burning ghat and dispose of them. There is an English case, 11 Cox C. C. 684 (1), in which Montague Smith, J., decided that in order to convict a woman of attempting to conceal the birth of her child, the dead body must be found and identified as that of the child of which she is alleged to have been delivered. Such evidence is not available in this case.

But a much more important point is that S. 318, Penal Code, punishes a person for secretly burying or otherwise disposing of the dead body of a child, and so intentionally concealing or endeavouring to conceal the birth of such child. In this case, there was no concealment of the birth. The birth took place in the Calcutta Medical School and Hospital and was attended by nurses and others in the Hospital who were well aware that Ushabala had given birth to twins. It was known to the two women, Pankajini Venchura and Ghasia Methrani, whom the nurse endeavoured to persuade to adopt the children. Further, it was known to the grandson, accused 3, and if we are to accept the woman's statement as true, she made known the fact of the birth and death to some other persons mentioned in the statement. Thus for at least 24 hours the birth had been known to a number of persons.

In 2 Cox C. C. 489 (2), Coltman, J., decided that the concealment sought to be checked by this type of legislation is that which would keep the world at large in ignorance of the birth of a child. While therefore the offence may on the one hand be committed, even though the pregnancy and delivery be made known to a confidante, so on the other hand, it is not an offence within the section if the endeavour to conceal pro-

1. Reg. v. Mary Ann Williams, 11 Cox C C 684.
2. Queen v. Morris, 2 Cox C C 489.

ceeds from a desire to escape individual observation or anger. It is clear from the evidence that this birth was not concealed from the world at large, and as stated in Mayne's Criminal Law of India, Edn. 4, p. 545, a woman is not bound to announce that she is going to have a child, and if the child lives she is quite at liberty to keep its existence secret. Similarly there was no legal obligation upon this accused nor upon Ushabala to spread broadcast the fact that Ushabala had given birth to a child. S. 318 is designed to punish such a person for intentionally concealing the birth of the child from all and sundry; though, as is stated in the case to which I have just referred, she will not escape the consequences of her act if she merely discloses the fact of the birth to some confidant.

For these reasons we are of opinion that the facts in this case do not come within the provisions of S. 318, Penal Code. The conviction and sentence are, accordingly, set aside and the accused is acquitted. The appellant who is on bail will be discharged from the bail bond and the fine, if already paid, must be refunded to her.

Jack, J.—I agree that the conviction and sentence should be set aside. It has been held that a previous announcement of the birth to some persons does not render a subsequent secret disposal innocent : 1 Mood C. C. 480 (3). But where to conceal its birth a woman left a baby in the corner of a field to die of exposure and the dead body was subsequently found there it was held that she could not be convicted of secretly disposing of the dead body of a child: 10 Cox 448 (4). In this case there is no evidence that the babies were dead when they were secretly disposed of.

K.S. *Conviction set aside.*

3. R. v. Douglas, 1 Mood C C 480.
4. Jane May, (1867) 10 Cox 448.

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LORT-WILLIAMS AND JACK, JJ.

Bhupati Bhusan Mukerji — Complainant.

v.

Amio Bhusan Mukerji and *others* — Accused.

Criminal Ref. No. 205 of 1934, Decided on 3rd April 1935, from order of Sub-Divisional Magistrate, Meherpur.

*** Criminal P. C. (1898), Ss. 247 and 403 —Summons case — Summons issued to accused—Complainant absent on hearing date —Acquittal of accused — Subsequent complaint is barred by S. 403—Trial commences when Magistrate takes cognizance under S. 190.**

It cannot be said that the trial of a summons case cannot be said to begin until the particulars of the offence are stated to the accused: 1918 *Mad* 212, *not F'oll.* [P 492 C 2]

Where a summons has been issued to the accused and the complainant does not appear on the day appointed for the appearance of the accused and the Court acquits the accused, then he must be deemed to have been tried within the meaning of S. 403, though the summons may not have been served and the accused may not have appeared. Hence a fresh complaint is barred by S. 403. The trial in a summons case commences when the Magistrate takes cognizance under S. 190: *Case law referred.* [P 493 C 2]

R. Brahmachari and *Bibhuti Bhusan Lahiri*—for Complainant.

Subodh Chandra Dutt and *Upendra Nath Neogi*—for Accused.

Lort-Williams, J.—This is a Reference under S. 438, Criminal P. C., recommending that the order of the Sub-Divisional Magistrate of Meherpur, summoning the accused upon complaint of an offence under S. 426, Penal Code, be set aside. The facts are that on 17th May 1934, the Magistrate summoned the accused and two others to appear on the 31st. The accused duly appeared and warrants were issued against the other two. The case was adjourned to 14th June. On the 5th the second accused appeared and his case also was adjourned to the 14th. On that day accused 3 had not appeared and the Magistrate ordered the case to go on against the other two, and adjourned it to the 29th for evidence on both sides. On that day the complainant asked for time and the case was adjourned to 12th July, when witnesses were present on both sides, but both sides asked for time in order to compromise the case which was one between relatives. It was adjourned to the 23rd when the inquiry officer asked for time and the case was fixed for the 2nd August. Meanwhile, on 30th July, a report was received in the absence of the parties showing that the case had been compromised out of Court.

On 2nd August, the complainant had not appeared at 12 o'clock, and no step had been taken, and the Magistrate acquitted the accused under S. 247, Criminal P. C. On the following day, the

complainant filed a fresh petition of complaint upon the same facts, saying that he had been present in the Court precincts on the previous day, but had not heard the Court crier calling the case. Thereupon the Magistrate again summoned the accused, who filed an application to quash the order, inasmuch as the previous order of acquittal was, under S. 403, Criminal P. C., a bar to further proceedings. The Sessions Judge upheld that contention, and has recommended that the Magistrate's order be set aside. S. 247, Criminal P. C., provides that if a summons has been issued on complaint, and upon the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall, notwithstanding anything thereinbefore contained, acquit the accused, unless for some reason he thinks proper to adjourn the hearing of the case to some other day.

This section does not contain any bar to a second trial. Such bar (if any) depends upon S. 403, Criminal P. C. That section provides inter alia that a person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence. The explanation provides that the dismissal of a complaint, the stopping of proceedings under S. 249, the discharge of the accused or any entry made upon a charge under S. 273, is not an acquittal for the purposes of this section. It is to be observed that S. 247 is not mentioned in this explanation and the maxim *expressio unius est exclusio alterius* should apply. Moreover, in the Code of 1872, "trial" was defined to mean

> the proceedings taken in Court after a charge has been drawn up, and includes the punishment of the offender.

But S. 460, thereof, corresponding to S. 403 of the present Code, contained no "explanation" as in the present Code, and in the latter "trial" has not been defined. Obviously, a summons case may be a trial, though no formal charge may have been framed : S. 242, Criminal P. C. Moreover, in sub-Ss. 2 and 4, S. 403 the word "tried" does not appear, though it is obvious that they are intended to refer to such persons as are mentioned in the first sub-section, namely persons who have been tried and acquitted or convicted. In 1918 Mad. 212 (1). Ayling and Napier, JJ., decided that since the word "tried" has been inserted in S. 403, due weight must be given to it, and it cannot be treated merely as surplusage. They held further that the trial of a summons case cannot be said to begin until the particulars of the offence are stated to the accused under S. 242, Criminal P. C. I agree with those learned Judges that due weight must be given to the word "tried," but I do not agree that the trial of a summons case cannot be said to begin until the particulars of the offence are stated to the accused under the section referred to. As was said by Rankin, C. J., in the case of 37 C. W. N. 312 (2), at 313 :

> It is very difficult to say at what stage, apart from the very earliest stage, trial does begin before a Magistrate. There is some ground for arguing that the moment the Magistrate takes cognizance of the offence, the trial commences. On the other hand, people may argue that in a warrant case not until the charge is framed can the trial be said to have begun.

In 25 Cal. 863 (3), Maclean, C. J., held that "trial" meant the proceeding which commences when the case is called on with the Magistrate on the Bench, the accused in the dock, and the representatives of the prosecution and for the defence, if the accused be defended are present in Court for the hearing of the case. In the present case the Magistrate, this accused, and the complainant, were all present in Court on the first day, namely 31st May. In 1929 Bom. 408 (4), all the decisions upon the present point were ably reviewed by Patkar, J., and Baker, J., observed that S. 247 does not refer to the day upon which the accused appears, but to the day appointed for the appearance of the accused, showing that it is not necessary even that the accused should appear in order to attract the provisions of the section. In

1. Kotayya v. Venkayya, 1918 Mad 212=45 I C 257=19 Cr L J 497=40 Mad 977n.
2. Sudhindra Kumar Roy v. Emperor, 1933 Cal 354=1933 Cr C 490=143 I C 593=34 Cr L J 611=60 Cal 643=37 C W N 312.
3. Gomer Sirda v. Queen-Empress, (1898) 25 Cal 863=2 C W N 465.
4. Shankar Dattatraya Vaze v Dattatraya Sadashiv, 1929 Bom 408=1929 Cr C 436=53 Bom 693=126 I C 321.

1929 Cal. 189 (5), Mukerji, J., said that he was clearly of opinion that the word "tried" used in S. 403 does not necessarily import a decision of the case on the merits, but only refers to the nature of the proceedings that were had ; or in other words, means that the proceedings in which the acquittal was passed were in the nature of a trial.

I find myself in complete agreement with these decisions. The provisions of the Code of Criminal Procedure upon the question of previous acquittal are, different from the principles underlying the English doctrine of autre fois acquit. Chap. XX of the Code deals with the procedure on the trial of summons cases by a Magistrate. S. 242 provides that when the accused appears or is brought before the Magistrate, the particulars of the offence of which he is accused shall be stated to him, and he shall be asked if he has any cause to show why he should not be convicted ; but it shall not be necessary to frame a formal charge. S. 243 provides that if the accused admits that he has committed the offence of which he is accused, his admission shall be recorded as nearly as possible in the words used by him; and, if he shows no sufficient cause why he should not be convicted, the Magistrate may convict him accordingly. Ss. 244 and 245 provide the procedure when no such admission is made or when the Magistrate does not convict under S. 243.

But S. 247 provides that if the summons has been issued on complaint, and upon the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall, notwithstanding anything thereinbefore contained, acquit the accused, unless for some reason he thinks proper to adjourn the hearing of the case to some other day. This section therefore overrides the previous provisions of the Chapter, and these sections and S. 403 must be read together. The result of doing so is to show that the intention of the legislature was that the procedure under S. 247 should be deemed to be a trial within the meaning of S. 403. The Magistrate ought to have stated the particulars of the offence to the accused under S. 242 when he first appeared on 31st May, and to have proceeded as laid down in that and the following sections. If he had done so, no argument could have been raised that the accused was never on trial. But his omission to do so makes no difference to the point under discussion, when once section S. 247 has become applicable. That section applies if a summons has been issued on complaint and the complainant does not appear upon the day appointed for the appearance of the accused or any day subsequent thereto to which the hearing may be adjourned, and applies notwithstanding anything thereinbefore contained. What is thereinbefore contained becomes no longer of any importance or relevance, and if the Magistrate decides to acquit the accused then he must be deemed to have been tried within the meaning of S. 403, though the summons may not have been served and the accused may not have appeared. A clear distinction is drawn in the Code between "discharge" and "acquittal," as will be seen by reference to S. 494 to the Explanation to S. 403 and to other sections. In my opinion the trial in a summons case commences when the Magistrate takes cognizance under S. 190 which comes under the heading "conditions requisite for initiation of proceedings." The result is that the Reference must be accepted and the order set aside.

Jack, J.—I agree with this view of the effect of an acquittal under S. 247, Criminal P. C. It is already laid down in 1929 Cal 189 (5), and has been adopted in the Bombay, Madras and Allahabad High Courts in the cases already referred to by my learned brother. It is possible that one reason for omitting the definition of "trial" contained in the Code of 1882 from subsequent Codes was because it would not fit and with the meaning of the word as used in S. 403, Criminal P. C. On the other hand, instead of straining the meaning of the word "trial" in S. 403, Criminal P. C., to make it include merely taking cognizance, it would seem simpler to adopt the view taken by Sir John Wallis, C. J., in 1918 Mad 231 (6), that the rule of English Law, requiring the accused to have been tried as well as

5. Sukum Ram v. Krishna Deb, 1929 Cal 189=116 I C 174=30 Cr L J 585.

. In re Dudebula Lal Saheb, 1918 Mad 231=45 I C 261=19 Cr L J 501=40 Mad 976.

acquitted in order to bar further proceedings, and embodied in S. 403 of the present Code is inapplicable to the statutory acquittals introduced into the Code in Ss. 494, 247 and 345, Criminal P. C., which are intended to bar further proceedings whether the accused can be said to have been tried or not. As he points out it was only in the Code of 1882 that on non-appearance of the complainant the Magistrate might acquit the accused unless he chose to adjourn. Up to that time he could merely dismiss the complaint. Inspite of the objection to treating anything in the language of the Code as mere surplusage, it seems to me that, on the present interpretation of the law, S. 403, Cl. (1), might have read simply :

a person who has since been acquitted or convicted by a Court of competent jurisdiction of an offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, etc.

This is confirmed by the wording of Cls. (2) and (4), S. 403. In prescribing the ways in which orders of acquittal can be set aside, while assuming that orders of discharge need not be set aside, and in differentiating generally between the terms "discharge" and acquittal, the Code makes it clear, apart from S. 403, Criminal P. C., that ordinarily an order of acquittal bars the trial of an accused for an offence of which he has been acquitted. The only cases in which there may still be some doubt as to the effect of an acquittal is where the accused is acquitted owing to the absence of the complainant on a date not fixed for hearing. It has been held that in these circumstances the order of acquittal is a nullity, and the case can proceed as though it had not been passed : 1915 Cal 119 (7). It has also been held that where the complainant had no notice of an adjourned date and was therefore necessarily absent an order of acquittal was not valid : 1928 Mad 1158 (8). In such cases however the order of acquittal should be set aside before the case can proceed.

K.S. *Reference accepted.*

7. Achambid Mandal v. Mahatab Singh, 1915 Cal 119=27 I C 212=16 Cr L J 148=42 Cal 365.
8. Numra Panakulu v. Rawlala Suppa Row, 1928 Mad 1158=113 I C 625.

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GUHA AND BARTLEY, JJ.

Haripado Mazumdar and *others*—Petitioners.

v.

Dhani Ahamad Sarkar and *others*—Opposite Parties.

Criminal Revn. No. 693 of 1934, Decided on 24th July 1934.

Criminal P. C. (1898), S. 145 — Court should take into consideration present possession—Order in previous proceeding under S. 145 will not bar initiation of fresh proceeding.

The question to be taken into consideration by a criminal Court under S. 145, Criminal P. C., is the question as to the present possession of the parties concerned. Hence an order made in the previous proceeding under S. 145, Criminal P. C., does not and cannot legally bar the initiation of a fresh proceeding, if there be reasonable grounds for such initiation, as contemplated by law.

[P 494 C 2]

Pugh and *Nirmal Chandra Chakravarti*—for Petitioners.

A. K. Fazlul Huq and *A. S. M. Akram*—for Opposite Parties.

Order.—This rule is directed against an order passed by the Sub-Divisional Magistrate of Mainckgunge, in the District of Dacca on 11th of June, 1934 restraining the petitioners from entering upon the lands which were the subject matter of a proceeding under S. 144, Criminal P.C., started by the Magistrate. It appears that on the facts and in the circumstances appearing from the Magistrate's order, to which reference has been made above, the proceeding under S. 144, Criminal P. C., was somewhat misconceived and was not an appropriate proceeding under the law. The Magistrate thought that a previous order of the year 1919, made under S. 145 of the Code, stood in his way so far as the initiation of fresh proceeding under S. 145 Criminal P. C., was concerned. With this view of the case we are not in agreement as the question to be taken into consideration by a Criminal Court under S. 145, Criminal P. C., is the question as to the present possession of the parties concerned. In this view of the matter, we are not at one with the Magistrate when he observes in his order that the decision of the Court in 1919 precluded him from starting a fresh proceeding under S. 145, Criminal P. C.

The order passed under S. 144 Criminal P. C., by the Magistrate, is set aside and it would be quite legal and com-

petent for a Magistrate to initiate a proceeding under S. 145 Criminal P. C., in view of the position that the order made in the previous proceeding under S. 145, Criminal P. C., did not and could not legally bar the initiation of a fresh proceeding, if there be reasonable grounds for such initiation, as contemplated by law. The rule is made absolute and the order passed by the Magistrate on 11th June 1934 is set aside.

K.S. *Rule made absolute.*

A. I. R. 1935 Calcutta 495

R. C. MITTER, J.

Kunja Behari Basu—Plaintiff — Appellant.

v.

Rasik Lal Sen and *others* — Respondents.

Appeal No. 38 of 1932, Decided on 14th August 1934, from appellate decree of Sub Judge, Jessore, D/- 16th September 1931.

(a) Pardanashin Lady—Person relying on deed executed by such lady must show that she comprehended nature and effect of deed.

He who relies on a deed executed by a Pardanashin lady must show that the lady comprehended the nature and effect of the deed. The dispositions made must be substantially understood by her and must really be her mental act as its execution, her physical act. It is not enough that the deed should simply be read over to her, but that depends upon circumstances, amongst which the simplicity or complexity of the deed and the transaction would not be unimportant factors: 14 *All* 120 (*P C*) and 1925 *P C* 204, *Ref.* [P 497 C 1]

(b) Hindu Law—Widow—Alienation by—Consent given when widow is alive by presumptive reversioner who becomes owner on widow s death can be regarded as effective election.

The consent given by the presumptive reversioner, who actually becomes the owner on the death of the widow, at a time when the widow is alive, can be regarded as effective election. Its effect is not merely to raise presumption of legal necessity: *Case law referred.* [P 497 C 2; P 498 C 1]

Jogesh Chandra Roy and *Satindra Nath Roy Choudhury*—for Appellant.

Sanat Kumar Chatterjee for *Bijan Kumar Mukerji*—for Respondents.

Judgment.—This appeal is on behalf of the plaintiff for declaration of his title to 4 annas share in the lands of Dag No. 836 and to 8 annas share in the lands of Dags Nos. 161, 175, 283 and 316 of the settlement map of Mouza Basur Dhuljuri and for joint possession of the first plot with defendants 3 and 4, and of the other plots with defendant 3 who according to him are respectively the owners of the remaining shares. The plaintiff's case is that 8 annas share of the first plot and 4 annas share of the remaining plots belonged to one Parbati Charan Roy who died in 1327 B. S. intestate, leaving behind him surviving his widow Sukhada Sundari and two daughters Pramada and Giribala. On his death his widow Sukhada Sundari inherited his properties and possessed the same till her death which occurred in the year 1334. On Sukhada Sundari's death Promada and Giribala inherited the properties and on 22nd November 1929 sold the same to him for legal necessity by the Kobala Ex. 3. Giribala executed the kobala both on her own behalf and also on behalf of her minor son Haripada Dutt and Narendra, the son of Promada, also joined in the document. In the said conveyance a property at Goalanda owned by Narendra was also included, but this fact is no longer of importance, because the question of the validity of the registration of Ex. 3 at Goalundo which was mooted in the lower Courts is not ultimately pressed before me.

In the plaint the plaintiff admits that Sukhada Sundari had executed a conveyance (Ex. A) in respect of the lands in suit in favour of defendants 1 and 2 on 23rd January 1924, but the plaintiff challenged the same as being without consideration and further stated that in any event, the said sale was not for legal necessity, and therefore not binding on his vendors. Defendants 1 and 2 who are the contesting defendants stated inter alia in their written statement that the conveyance Ex. A (which was taken in the name of defendant 1 for the benefit of both of them) was for consideration and for legal necessity, that Promada and Giribala were brought to their mother's place by Narendra and had at the time of execution of Ex. A consented to the sale. They maintained that in any view of the matter the plaintiff who has derived his title from the said ladies cannot maintain his suit against them. On Ex. A, there is an endorsement in these words:

"I, Sm. Promada Sundari Das Roy, and I, Sm. Giribala Dutta both having consented to this sale, become witness to the deed.

Writer of the Consent
Narendra Nath Das Roy.
Promada Sundari Das Roy of Ratandia,
(Finger mark) Giribala Dutta of Balichar,
Written by Narendra Nath Das Roy."

The learned Munsif in an elaborate judgment doubted the payment of consideration and found that there was no legal necessity for the sale by Sukhada Sundari to defendant 1. He also found that Pramada Sundari and Giribala did not come over to the house of Sukhada at the time of execution of Ex. A, did not consent to the said sale, and that the contesting defendants had failed to prove that the signature and thumb impression on the Kobala Ex. A purporting to be of Promada Sundari and Giribala respectively were not theirs. He also found that Narendra was barely 14 years old at the time and could not have taken the part assigned to him by the defendants. At p. 7 of his judgment the Munsif however makes a remark that the Kobala Ex. A would not be binding on the daughters of Parbati unless it was proved that they consented to the sale. I notice this observation because it gives an indication of the defendants' case as made in the Munsif's Court. Their case is based on two grounds namely ; (i) that the plaintiff cannot recover possession from them as the sale to them by Sukhada was for legal necessity ; (ii) assuming that no legal necessity was established for the said sale, the sale was voidable at the instance of the daughters who cannot avoid it as they had consented to it. The plaintiff, they say, having a derivative title from the daughters, stands on the same plane as the said daughters. On the basis of the findings which I have indicated above the learned Munsif decreed the plaintiff's suit. Defendants 1 and 2 preferred an appeal which was heard by the Subordinate Judge of Jessore. The said Judge after summarising the case of the respective parties and the material findings of the learned Munsif proposed to himself the points that he had to decide. The first is formulated by him in these words :

(1) Did Promada Sundari Das Roy and Giribala Dutt give their written consent to the sale by Sukhada Sundari to defendant 1 ? If so are they estopped to raise the question of legal necessity for the sale by Sukhada Sundari and to question the validity of the sale ? If the case of consent be true whether Promada Sundari and Giribala had any right to sell the same properties again to the plaintiff and whether the plaintiff has got any right in the disputed land."

The learned Subordinale Judge did not expressly formulate the question of legal necessity as one of the points to be considered by him, but in his judgment he makes some observations which indicate that he did not fully agree with Munsif's view on the question of legal necessity for the sale to defendant 1. He observes in the first place that Sukhada had incurred small debts and that there was some necessity for her maintenance. But from the manner in which the Subordinate Judge approached the case I would proceed on the basis that he has not properly reversed the findings of the Munsif on the question of legal necessity for the sale by Sukhada Sundari to defendant 1, that is, that defendants 1 and 2 have not established that the sale to them was for legal necessity. The Subordinate Judge however considered the question as to whether Promada and Giribala consented to the sale evidenced by Ex. A and whether there was consideration for it. On both these points he has arrived at definite findings which are in favour of the contesting defendants. He has held however that the suit was barred by estoppel.

Mr. Roy who appears for the plaintiff appellant has placed before me the following contentions : (1) the finding of the learned Munsif that there was no legal necessity for the sale evidenced by Ex. A being not reversed by the Subordinate Judge the dismissal of the plaintiffs' suit is bad in law. (2) That consent by reversioners to a sale of a portion of the estate inherited by a Hindu female raises only a presumption of legal necessity; it cannot create estoppel against them and that there is no scope for the said presumption in this case as the only finding of the Court which holds the field is that there was in fact no legal necessity. (3) The alleged consent of the two ladies is no consent at all because there is no evidence to show that they understood the nature and effect of their act in signing the endorsed consent on Ex. A.

As I have stated above I agree that there is considerable force in the argument of Mr. Roy that the Subordinate

Judge did not find that there was legal necessity for the sale evidenced by A. The Subordinate Judge has only some incidental remarks to make on the said point, but where he summarises his findings he does not mention anything about legal necessity. If I had come to the conclusion that the suit cannot be disposed of either way without a definite finding on the question of legal necessity I would have remanded the case but on careful consideration of the matter, I am of opinion that in the circumstances of this case the said question is immaterial and the suit has been rightly dismissed by the Subordinate Judge, though I do not agree with all his reasons. Before I deal with the questions of law raised in this case I would take up the last point formulated by Mr. Roy. It is no doubt true as a general proposition that he who relies on a deed executed by a Purdanashin lady must show that the lady comprehended the nature and effect of the deed. The dispositions made must be substantially understood by her and must really be her mental act as its execution her physical act. It is not enough that the deed should simply be read over to her, but that depends upon circumstances, amongst which the simplicity or complexity of the deed and the transaction would not be unimportant factors: 14 All 420 (1) and 1925 PC 204 (2). But in this case the said considerations do not arise and I cannot give effect to this point which is raised for the first time in the argument before me. The plaintiff had all along proceeded upon the footing that Promada and Giribala were not at all present at the execution of Ex. A and that the signature and thumb impression on it are forged. The defendants met that case successfully. There is no suggestion in the lower appellate Court of the ground now urged before me and I do not even find the said ground taken in the memorandum of appeal. I accordingly overrule it.

Mr. Roy contends that an alienation made by a Hindu widow is valid and binding on the reversioner on three grounds and three grounds only, namely: (1) if the act of the widow amounts to a surrender of her estate ; (2) if there is legal necessity for the alienation ; (3) and even if there is in fact no legal necessity, if the transferree made bona-fide inquiries and was satisfied as to its existence. He contends further that the consent of the next reversioners to the sale cannot amount to estoppel which can either bind him or any other person who gets the estate on the widow's death. Its only effect, says he, is to raise a presumption of legal necessity. For these propositions he cites 30 All 1 (3), 40 Cal 721 (4) and the passage at p. 84 in the judgment of the Judicial Committee of the Privy Council in 46 I A 72 (5). He further contends that a presumptive reversioner who has only a spes successionis can neither alienate or enter into a valid contract to alienate his spes successionis 1923 P C 189 (6), and therefore the consent of the said two ladies to the sale of their mother at a time when the mother was alive can have no effect on their rights which they acquired only on the death of their mother.

An examination of the principles and the cases does not support any of these propositions. In the first place it is not correct to say that an alienation by a Hindu widow can be binding on the reversions only in the three cases specified by Mr. Roy, nor can the only effect of consent of the presumptive reversioner be to raise a presumption of legal necessity. An important distinction must be made between the case where the actual reversioner, i. e., he who becomes entitled to the estate on the death of the widow, is or is not the reversioner who gave his consent at the time of the questioned sale or thereafter. If he was not the reversioner who gave his consent it is quite true that the alienation would be effective against him only in the three cases specified by Mr. Roy. But if he was, the case has to be decided on a different principle altogether. It is the principle of election which is indicated in the judgment of Lord Dunedin in

1. Amarnath v. Achan Koer, (1892) 14 All 420=19 I A 196 (PC).
2. Farid-un-nisa v. Muktar Ahmed, 1925 P C 204=89 I C 649=52 I A 342=47 All 703 (P C).
3. Bajrangji v. Mano Karnika, (1908) 30 All 1=11 O C 78=35 I A 1 (PC).
4. Debi Prosad v. Golap Bhagat, (1913) 40 Cal 721=19 I C 273 (FB).
5. Rangasami Gounden v. Nachiappa Gounden, 1918 P C 196=50 I C 498=46 I A 72=42 Mad 523 (P C).
6. Annada Mohan v. Gour Mohan, 1923 P C 189=74 I C 499=50 I A 239=50 Cal 929 (P C).

1918 P C 196 (5), cited by Mr. Roy in support of his contention. An alienation by Hindu widow is not void but voidable. This was pointed out by Lord Davey in 34 Cal 329 (7), when considering the application of Art. 91, Lim. Act, to a suit brought by the reversioner after the death of the Hindu widow to recover possession from the transferee of the widow. No doubt Lord Davey remarked in the said case that the institution of the suit by him was an election to avoid the voidable Ijara, but in that case the Ijara had not been granted by the widow with the consent of the plaintiff. This leads to the consideration of the question as to whether the consent given by the presumptive reversioner, who actually becomes the owner on the death of the widow, at a time when the widow is alive, can be regarded as effective election. In 1918 P C 196 (5), Lord Dunedin made an observation to the following effect on which Mr. Roy relies. It runs thus:

> If therefore a reversioner, after he became in titulo to reduce the estate to possession and knew of the alienation, did something which showed the alienation as good, he would lose his right of complaint.

Mr. Roy rests his contention apparently on this passage when he says that consent of the daughters during the lifetime of Sukha Sundari had no effect at all. An examination of the facts of 1918 P C 196 (5) would show that the transaction which had been set up as amounting to ratification or election had occurred in the year 1896 when Morakammal, the lady who executed the deed of gift was alive, she having died in 1907. If His Lordship meant to lay down the proposition as contended for by Mr. Roy there would have been no necessity to consider the exact nature of the transaction of 1896. A presumptive reversioner can bring an action during the life-time of the widow challenging her alienation. If he has that right, I do not see why he can have no power to elect during the life-time of the widow, and treat the alienation as valid. The matter has been considered by a Full Bench of the Bombay High Court in 1927 Bom 260 (8), and by the Judicial Committee of the Privy Council in 1927 P C 227 (9), where Annagouda, who became actually entitled to the property on the death of the female owners, had consented to the alienation by putting his signature to the deed itself. Lord Sinha in holding that the plaintiffs who claimed through Annagouda could not recover, observed that the principle formulated in 1923 P C 189 (6) had no application inasmuch as Annagouda did not either sell or agree to sell his reversionary interest but had simply consented to the alienation. No doubt in the case last mentioned Annagouda received some benefit because there was an alienation also to him by the widow at the time of the challenged alienation which His Lordship considered to be part of the same transaction, but I consider that the said circumstance was considered as an additional reason by Lord Sinha for dismissing the suit. I accordingly hold that the plaintiff's suit has been rightly dismissed, and I affirm the decree made. But I must at the same time make it quite clear that after the death of the ladies, Promada and Giribala, the defendants will not be entitled to retain possession if their rights be challenged by the then reversioner unless they can prove that there was either legal necessity or that they bought the property in 1924 after due enquiry about the existence of legal necessity. These questions are accordingly left open.

The appeal is dismissed with costs. Leave to appeal is asked for and granted.

K.S. *Appeal dismissed.*

7. Bejoy Gopai v. Krishna Mahishi, (1907) 34 Cal 329=34 I A 87 (P C).
8. Akkawa v. Sayankhan, 1927 Bom 260=102 I C 232=51 Bom 475 (F B).
9. Ramgouda v. Bhau Saheb, 1927 P C 227=105 I C 708=54 I A 396=52 Bom 1 (P C).

A. I. R. 1935 Calcutta 498

R. C. MITTER, J.

Bepin Chandra Mukhopadhya— Defendant 2—Appellant.

v.

Taraprasanna Chakrabarty—Plaintiff and *others* --Respondents.

Appeal No. 726 of 1932, Decided on 3rd January 1935, from appellate decree of Addl. Sub-Judge, Bakarganj, D/- 1st October 1931.

(a) Landlord and Tenant—Tenant having lower status cannot acquire higher status by asserting to landlord's knowledge for more than 12 years.

A tenant having a lower status cannot, by asserting to his landlord's knowledge for more

than 12 years that he has a higher status, acquire the higher status : 1923 *P C* 118 ; 1923 *P C* 205 and 1924 *P C* 65, *Rel on.* [P 500 C 1]

(b) Landlord and Tenant— Non-transferable holding—Transfer—Landlord can sue recorded tenant.

In spite of a transfer, a landlord is undoubtedly entitled to sue his recorded tenant of a non-transferable holding for rent. [P 500 C 1]

(c) Bengal Tenancy Act (1885), S. 167— Rent sale — Stranger purchaser — Suit for possession—No notice under S. 167 is necessary to unrecognized purchaser.

If at the rent sale a stranger purchased the holding, his suit for possession would be in time if brought within 12 years of his purchase. It would not have been necessary for him to give any notice under S. 167 of the Act to an unrecognized purchaser of a non-transferable holding, as his interest is not an encumbrance within the meaning of S. 161. [P 500 C 1]

Brojendranath Chatterjee and *Satindranath Roy Chowdhury* — for Appellants.

Krishna Kamal Moitra—for Respondents.

Judgment.—This appeal is on behalf of defendant 2 in a suit for recovery of khas possession instituted by the plaintiffs who are admittedly cosharer landlords. Defendant 1 was admittedly the tenant, holding a non-transferable occupancy holding. On 24th March 1915 he sold the holding to defendant 2, who went into possession after his purchase. Notwithstanding the sale to defendant 2 by defendant 1 the plaintiffs sued defendant 1 for the arrears of rent of the years 1319 to 1322 (i. e., for rent due up to 13th April 1916), making their cosharer landlords parties defendants. This suit was numbered Rent Suit No. 2001 of 1916. To the said suit defendant 2 was not made a party defendant as the plaintiffs refuse to recognize him as a tenant. Defendant 1 appeared in the suit, pleaded that he held a transferable holding and had transferred the same to defendant 2. Thereafter he did not take any further part in the suit with the result that Rent Suit No. 2001 of 1916 was decreed ex-parte. It has been found however in this suit that the holding is a non-transferable one and that finding has not been challenged and cannot be challenged now.

The plaintiffs put the decree passed in Rent Suit No. 2001 of 1916 in execution and purchased the same on 15th March 1919 at the auction sale and took symbolical possession on 15th November 1919. They brought this suit on 19th March 1929, that is within 12 years of their auction purchase. The suit has been brought in their character of auction-purchasers. In para. 6 of the plaint they recite the purchase of the holding on 15th March 1919 at the rent sale and make it the foundation of their suit. They recite the sale of defendant 1 to defendant 2 and characterise it as fraudulent and without consideration. They do not base their case on abandonment and claim sixteen annas right in the property in suit which they could not have done if their case had been based on abandonment. Defendant 2 filed a written statement stating that the holding was a Kaem Karsha transferable holding, that he ought to have been joined as a party defendant in Rent Suit No. 2001 of 1916 and not having been impleaded therein he says that the decree obtained therein is a money decree. He pleaded further that the suit was barred by limitation and that by asserting a Kaem Karsha right for more than 12 years to the knowledge of the landlords he had acquired such a right.

The Munsif found that the holding was in fact a Kaem Karsh transferable holding. In that view he held that the plaintiffs were bound to make defendant 2 a party defendant to Rent Suit No. 2001 of 1916 and they not having done so the decree passed in that suit was a money decree and the auction sale at which the plaintiffs purchased vested in them only the right, title and interest of defendant 1 and he had none at the date of the said sale. The suit was accordingly dismissed by the trial Court. On appeal the Subordinate Judge held that the holding was a non-transferable one and that the decree in Rent Suit No. 2001 of 1916 had the force of a rent decree under the Bengal Tenancy Act and in that view he has decreed the suit holding at the same time that though defendant 2 had possession since March 1915 the suit was not barred by limitation.

Before me three points are urged, namely : (1) that by assertions for more than 12 years made to the knowledge of the landlord a transferable Kaem Karsha interest has been acquired by adverse possession; (2) that the decree passed in Suit No. 2001 of 1916 is a money decree, and (3) that the suit is barred by limitation, time having com-

menced to run from 24th March 1915, the date of defendant 2's purchase.

I am unable to give effect to any of these contentions. It is well settled that a tenant having a lower status cannot by asserting to his landlord's knowledge for more than 12 years that he has a higher status acquire the higher status : 1923 P. C. 118 (1), 1923 P. C. 205 (2) and 1924 P. C. 65 (3). It must be taken therefore that defendant 1 had only a non-transferable occupancy holding. The plaintiffs were not bound to recognize defendant 2 as their tenant and could proceed to realize arrears of rent by a suit against the recorded tenant. The decree passed in Rent Suit No. 2001 of 1916 which was framed under S. 148-A, Ben. Ten. Act, is therefore a rent decree and the holding passed to the plaintiffs at the auction sale held on 15th March 1919, and defendant 2 cannot resist their claim for Khas possession unless their claim is barred by limitation. It is therefore necessary to consider the question of limitation. In the plaint the plaintiffs claim sixteen annas of the land on the basis of their purchase at the rent sale. They pray for a declaration of their title as purchasers at the rent sale. If they had based their claim on abandonment they being cosharer landlords, could have claimed qua landlords only a share and could have only claimed joint possession with their cosharer landlords who have been made proforma defendants in the suit. In spite of a transfer a landlord is undoubtedly entitled to sue his recorded tenant of a non-transferable holding for rent. If at the rent sale a stranger purchased the holding his suit for possession would have been in time if brought within 12 years of his purchase. It would not have been necessary for him to give any notice under S. 167, Ben. Ten. Act, to defendant 2, for he being an unrecognized purchaser of a non-transferable holding, his interest is not an encumbrance within the meaning of S. 161 of the said Act. A cosharer landlord purchaser cannot be in a worse position.

In this view of the matter I hold that the suit is not barred by limitation, which commenced to run from 15th March 1919. The appeal is accordingly dismissed with costs. Leave to appeal under the Letters Patent asked for is refused.

K.S. *Appeal dismissed.*

1. Mohammad Mumtaz Ali Khan v. Mohan Singh, 1923 P C 118=74 I C 476=50 I A 202=45 All 419 (P C).
2. Madhavrao Waman v. Raghunath Venkatesh, 1923 P C 205=74 I C 362=50 I A 255=47 Bom 798 (P C).
3. Naina Pillai v. Rama Nathan, 1924 P C 65=82 I C 226=51 I A 83=47 Mad 337 (P C).

A. I. R. 1935 Calcutta 500

GUHA AND BARTLEY, JJ.

Abdul Latif Laskar and *another*—Appellants.

v.

Aklu Mia Laskar—Plaintiff—Respondent.

Appeal No. 863 of 1932, Decided on 7th December 1934, from appellate decree of Dist. Judge, Cachar, D/- 14th December 1931.

Civil P. C. (1908), O. 21, Rr. 58 and 63—Application under R. 58 dismissed with or without investigation—Regular suit must be filed within one year—Failure to do so—Applicant cannot assert his title against auction-purchaser whether as plaintiff or as defendant.

An order refusing to investigate a claim is one under O. 21, R. 63, Civil P. C., and is conclusive, if not set aside by a suit within the period of time prescribed by Art. 11, Lim. Act, and if the claimant fails to bring a suit as contemplated by O. 21, R. 63, he is precluded from asserting his title against the auction-purchaser, whether as plaintiff or as defendant: 1919 *Mad* 788; 1923 *All* 435; 1933 *Bom* 190; 1919 *Cal* 835, *Ref.* [P 501 C 2; P 502 C 1]

Satyendra Kisor Ghose — for Appellants.

Priya Nath Dutt—for Respondents.

Guha, J.—The plaintiff in the suit out of which this appeal has arisen, as the purchaser at a sale held in execution of a decree, prayed for declaration of his title to the property in suit, and for possession of the same. The plaintiff's claim was resisted by defendants 1, 2, 3, 4 and 9. It appears that defendants 1 and 2 objected to the attachment of the property in execution and claimed the property as their own; the claim thus made under O. 21, R. 58, Civil P. C., and the objection to attachment of property were not investigated for the reason that the Court before which they were made considered that they had been unnecessarily delayed. The order recorded by the Court was to the effect:

The claims have been filed. The land was attached a long time ago by beat of drum and

sale proclamation was also issued. It appears to me that the claims have been unnecessarily delayed. No order for investigation of the claims will accordingly be raised.

The case of defendants 1 and 2, the appellants in this Court, was similar to their claim in the execution proceedings to which reference has been made above; they denied the title of the plaintiff as purchaser at execution sale and asserted their own title to the property in litigation. The Court of first instance gave its decision partially in favour of the plaintiff; the title of the plaintiff was declared to the property in suit, with the exception of the items covered by Ex. A and A (4), to which defendants 1 and 9 had asserted their title. On appeal, the learned District Judge affirmed the decision of the trial Court; but the Courts below have differed on a question of law. That question was decided in favour of defendants 1 and 2, appellants in this Court, by the Court of first instance, and against them by the Court of appeal below. The question arose for decision on the order of the Court of execution refusing to investigate the claim and objections preferred by defendants 1 and 2, passed on 3rd November 1924, to which reference has been made already. The Court of first instance was not prepared to take the aforesaid order as one rejecting a claim under O. 21, R. 58, Civil P. C. In its opinion the order passed on the petition of objection to attachment filed by the defendant could not "silence them," and could not stand in their way in the matter of bona fides of the purchases by virtue of which they asserted their title and wanted to defeat the title of the plaintiff as a purchaser at an execution sale. It may be mentioned here that although the primary Court held against the defendants on evidence so far as the merits of their claim were concerned, the Judge in the Court of appeal below came to the conclusion on evidence, that he would ordinarily have been inclined to hold that the appellants have succeeded in establishing their case in respect of transfers covered by Exs. A (1) and A (2). According to the Court of appeal however the appellants were not entitled to rely for their defence on the same considerations which were put forward by them, with reference to their claim which were not investigated, for reason stated in the order of the execution Court passed on 3rd November 1924.

In support of the appeal to this Court it was argued that the order of 3rd November 1924 was not an order rejecting the claims preferred by the defendants under O. 21, R. 58, Civil P. C., and the said order could not therefore attract the operation of Arts. 11, Lim. Act. It was urged that the order refusing to investigate the claims could not be treated as an order against a party on a claim preferred, within the meaning of Art. 11, Lim. Act, and was not also order against a party as contemplated by O. 21, R. 63, Civil P. C. The contentions thus advanced are covered by the authority of decisions of the different High Courts in the country. Of these, special mention may be made of the decision in 1919 Mad 738 (1), 1923 All 435 (2), 1933 Bom 190 (3) and 1919 Cal 835 (4). In the decision of a Full Bench of the Madras High Court in 1919 Mad 738 (1), referred to above, the questions arising for consideration in the case before us were exhaustively reviewed, and it held that an order refusing to investigate a claim is one under O. 21, R. 63, Civil P. C., and was conclusive, if not set aside by a suit within the period of time prescribed by Art. 11, Lim. Act. So far as this Court is concerned, it was definitely laid down in 1919 Cal. 835 (4) mentioned above, in consonance with the observations of Mookerji, J., in 15 I C 683 (5), that there was a weighty authority in support of the view that where an application had been dismissed with or without investigation, a regular suit, if instituted, must be commenced within one year from the date of such order. On a careful consideration of the question raised before us, we see no reason to differ from the decisions to which reference has been made, and we give effect to the same.

It was incumbent on defendants 1 and 2, appellants in this Court, to institute a suit as contemplated by O. 21, R. 63,

1. Venkataratnam v. Ranganayakamma, 1919 Mad 738=48 I C 270=41 Mad 985 (F B).
2. Gobardhan Das v. Makundi Lal, 1923 All 435 =74 I C 1024=45 All 438.
3. Trimbak Tumudu Shet v. Ziparu Chaturdas, 1933 Bom 190=144 I C 993=57 Bom 213.
4. Nogendra Lal v. Fani Bhusan, 1919 Cal 835 =44 I C 265=45 Cal 785.
5. Jugal Kishor v. Ambica Debi, (1912) 15 I C 683.

Civil P. C., and Art. 11, Lim Act. This was not done; and it was not open to the appellants now to defeat the claim of the plaintiff in the suit giving rise to this appeal, by agitating matters which should have been urged by them in a suit as provided by the provisions of the statute to which reference has been made above. It has also to be stated in this connexion that there can be no question that where there is an order tantamount to a refusal of a claim made by a party under O. 21, R. 58, Civil P. C., if that party fails to bring a suit as contemplated by O. 21, R. 63, he is precluded from asserting his title against the auction-purchaser, whether plaintiff or defendant; and the parties in the position of defendants 1 and 2 in the suit out of which this appeal has arisen, could not be allowed to raise again their claim to the property, even though they might come to occupy the position of the defendants in a suit for possession by the auction-purchasers. In the above view of the case regard being had to the trend of decisions by the High Courts in this country, from which we do not see any reason to differ, the decisions given by the Court of appeal below, on the question of law arising for consideration in this case, must be affirmed. In the result, the appeal is dismissed. There is no order as to costs in this appeal.

Bartley, J.—I agree.

K S. *Appeal dismissed.*

A. I. R. 1935 Calcutta 502

NASIM ALI AND KHUNDKAR, JJ.

Radha Kisson Mahesri and *others*—Petitioners.

v.

Tansuk Mahesri and *others*—Opposite Parties.

Civil Rule No. 939 of 1934, Decided on 9th August 1934, from order of Dist. Judge, Jalpaiguri, D/- 14th December 1933.

Civil P. C. (1908), O. 21, Rr. 90 and 92—Application to set aside sale — Parties who would be affected by sale being set aside need not be formally described as parties in application—Application is not bad if notice is not served on any such person who may be thereby affected.

The Code does not say that the parties who would be affected by the order setting aside the sale should be formally described as parties in the application for setting aside the sale, and the application is not bad in form if notice has not been served on any person who may be affected by the order setting aside the sale. The Court has power to issue any such notice as the law does not impose any period of limitation for the said purpose: 1919 *Cal* 510 and 1923 *Cal* 394, *Ref.* [P 502 C 2; P 503 C 1]

Rajendra Chandra Guha — for Petitioner.

Atul Chandra Gupta and *Satish Chandra Singh*—for Opposite Parties.

Order.—This Rule is directed against an order of the District Judge of Jalpaiguri dated 4th May 1934 confirming in appeal an order of the Subordinate Judge of the same District in a proceeding under O. 21, R. 90, Civil P. C. The Courts below have dismissed the petitioners' application under O. 21, R. 90 not on the merits but on a preliminary ground that another decree-holder, who had applied for rateable distribution of the sale proceeds and had got part of them had not been made a party within the period of limitation for such an application and consequently the Court had no jurisdiction to entertain such an application. The only point for determination therefore is whether the Courts below were wrong in dismissing the petitioners' application under O. 21, R. 90 on this preliminary ground. O. 21, R. 92, Cl. (2) Civil P. C., is in these terms:

> Where such an application is made and allowed, and where, in the case of an application under R. 89, the deposit required by that rule is made within 30 days from the date of sale, the Court shall make an order setting aside the sale: Provided that no order shall be made unless notice of the application has been given to all persons affected thereby.

The Code does not say that the parties who would be affected by the order setting aside the sale should be formally described as parties in the application for setting aside the sale. The names of the parties in the present case who will be affected by such an order are already on the record of the execution case. It would be therefore sufficient if before the sale is set aside, notice is given to the persons who would be affected thereby inasmuch as the proviso to Cl. (2), R. 92 simply lays down that no order setting aside the sale should be made unless notice of the application for setting aside the sale has been given by the Court to the persons affected thereby. The learned advocate for the opposite party however relied upon a decision of this Court in

1919 Cal. 510 (1). It is not however clear from the judgment in that case what the learned Judges meant when they observed that the auction purchaser should be made a party.

If by the expression is understood that the parties to the application should be arrayed in the corresponding categories of plaintiffs and defendants, there is no provision to that effect within the four corners of the Civil P. C. To hold otherwise would necessitate reading into proviso to O. 21, R. 92 a mandatory provision which could have been expressly mentioned had the legislature so intended: see 1923 Cal. 394 (2).

We are therefore of opinion that the application is not bad in form if notice has not been served on any person who may be affected by the order setting aside the sale. The Court has power to issue any such notice as the law does not impose any period of limitation for the said purpose. The learned Judge was therefore not right in holding that as the decree-holder who is entitled to rateable distribution was not mentioned as a party to the application for setting aside the sale within the period of limitation prescribed for such application, the application was bad and the Court had no jurisdiction to entertain such an application. We therefore make the rule absolute, set aside the order of the Courts below dismissing the petitioners' application for setting aside the sale and direct that the said application be heard according to law by the learned Subordinate Judge. Costs of this Rule will abide the result, hearing fee being assessed at one gold mohur.

K.S. *Rule made absolute.*

1. Ajiuddin Ahamad v. L. Khoda Bux, 1919 Cal 510=50 I C 5.
2. Raj Chandra Das v. Kali Kanta Das, 1923 Cal 394=82 I C 776.

A. I. R. 1935 Calcutta 503

GUHA AND BARTLEY, JJ.

Dinesh Chandra Roy Choudhury—Appellant.

v.

Jahan Ali Biswas and *others*—Respondents.

Appeal No. 523 of 1933, Decided on 5th December 1934, from appellate order of Dist. Judge, Khulna.

(a) Civil P. C. (1908), S. 47—Sale of insolvent's property in execution of decree—Application by Receiver to have sale set aside can be treated as one under S. 47—Second appeal is competent.

The Receiver, in whom the property of the insolvent vested after the passing of the order of adjudication under S. 28, sub-S. (2), Provincial Insolvency Act, does represent both the insolvent and the creditors of the insolvent; and if any application is made to the Court which on the face of it was an application made in the interest of the insolvent judgment-debtor, the application could, under the law, be treated as an application under S. 47, Civil P. C., made by the Receiver in insolvency, as representative of the insolvent judgment-debtor. The creditors of the insolvent are, no doubt, interested in the application; but that does not take away anything from the legal position of the Receiver representing both the insolvent judgment-debtor whose property has vested in him, and the creditors. Hence a second appeal is competent.

[P 504 C 2]

(b) Provincial Insolvency Act (1920), Ss. 28 (2) and 51—Sale in execution of decree—Purchaser of insolvent's property in good faith without notice of insolvency acquires good title against Receiver—Sale is not nullity for want of notice under Civil P. C., O. 21, R. 22.

Where the purchase of the insolvent's property is made in good faith without any knowledge of the insolvency proceedings, the sale is not a nullity on account of the fact that no notice under O. 21, R. 22, Civil P. C., has been served: 1914 *P C* 129, *Dist.* [P 505 C 2]

(c) Provincial Insolvency Act (1920), Ss. 28 (2) and 51 (3)—S. 28 (2) is controlled by S. 51 (3).

A purchaser, of an insolvent's property, at a sale in execution of a decree, even with notice of the insolvency, who purchased the property in good faith, acquires a good title to it, against the Receiver, in whom the insolvent's property has vested under S. 28, sub-S. (2). The provision contained in sub-S. (2), is controlled by the later provision contained in S. 51, sub-S. (3) and effectively secures the title of a purchaser of an insolvent's property at a sale in execution in case of good faith being established on the part of the purchaser and the Receiver in insolvency cannot be allowed to have the sale declared null and void, so as to defeat the title of the purchaser: 1917 *Cal* 606, *Ref.*

[P 505 C 2; P 506 C 1]

Bijon Kumar Mukherjee and *Jogesh Chandra Sinha*—for Appellant.

Radha Binode Pal and *Abul Hossain*—for Respondents.

Judgment.—This is an appeal by a Receiver in insolvency, arising out of an application made by him as the legal representative of the judgment-debtors in whose favour an order of adjudication had been passed under the Provincial Insolvency Act, on 19th September 1932. The application made by the Receiver was to have a sale in execution of a decree declared null and void; and there was a prayer in the application that the aforesaid sale held on 22nd September 1932, in execution might not be confirmed. The decree-holders purchasers at the sale held in execution of

their decree, opposed the application of the Receiver, on the ground that they were bona fide purchasers in good faith at the sale in execution, who were not aware of the insolvency proceedings; and their title could not be called in question by the Receiver.

The Courts below have concurrently held, on materials before them, that the decree-holders purchasers were not at all aware of the insolvency proceedings, or of the order of adjudication. It was also held by the Courts below that the decree-holders were purchasers at the sale in execution of decree in good faith. On the above conclusion on facts, the decision given by the Courts below was that the sale held in execution of decree could not be vacated and the confirmation of the sale could not be withheld for the reason that the properties of the insolvent judgment-debtors had vested in the Receiver in insolvency under S. 28, sub-S. (2), Provincial Insolvency Act. The learned District Judge in the Court of appeal below had further come to the conclusion that in view of the provision contained in S. 51, sub-S. (3), Provincial Insolvency Act, 1920, the operation of S. 28, sub-S. (2) of the Act will be suspended in the case of bona fide purchasers, and protection given to such purchasers.

A preliminary objection was raised on behalf of the respondents in this appeal, relating to the maintainability of a second appeal to this Court, as preferred by the Receiver in insolvency, on the ground that the application before the Court of execution could not be treated as one under S. 47, Civil P. C., and there could not be any second appeal in a case arising out of an application for setting aside a sale, on an application praying that a sale held in execution of a decree, might not be confirmed. The question for consideration on the preliminary objection as raised, is whether or not the application in which the appeal has arisen was one under S. 47, Civil P. C., there being no question that a second appeal would otherwise be barred under the law. For determination of that question, the position of the Receiver in insolvency making the application before the Court has to be taken into account. Was the Receiver a "representative" of the judgment-debtors, and could he be treated as such, in the matter of the application before the Court? and on this point the observation of Sir George Rankin, C. J., in 1932 Cal. 203 (1), is entitled to great weight. As observed by the learned Chief Justice:

> Any general statement to the effect that a Receiver is or is not representative for the purposes of S. 47 of the Code is merely misleading. It all depends on the purpose and nature of the application made by the Receiver, whether he is a representative of the judgment-debtor or not. For some purposes, he would be entitled as representing the judgment-debtor to litigate matters under S. 47 of the Code.

The most important factor to be considered in this connexion is whether the Receiver in the matter of the application before the Court, represented the judgment-debtor, for the purpose of having the property escape execution. The Receiver in whom the property of the insolvent vested after the passing of the order of adjudication under S. 28, sub-S. (2), Provincial Insolvency Act, does represent both the insolvent and the creditors of the insolvent; and if any application is made to the Court which on the face of it was an application made in the interest of the insolvent judgment-debtor, the application, could, under the law, be treated as an application under S. 47, Civil P. C., made by the Receiver in Insolvency, as representative of the insolvent judgment-debtor. The creditors of the insolvent were no doubt interested in the application; but that did not take away anything from the legal position of the Receiver representing both the insolvent judgment-debtor whose property has vested in him, and the creditors.

In the case before us, as it appears from the order recorded by the Munsif, on 22nd December 1933, the Receiver had made the application under S. 47, Civil P. C., purporting to act as the legal representative of the judgment-debtors declared insolvents; and on the application before the Court as made, we have no hesitation in coming to the conclusion that in the matter of that application, the Receiver in Insolvency took the attitude that he would represent the judgment-debtors for the purpose of having the property escape execution, was well within S. 47, Civil P. C.; and a second appeal in the case before us was therefore maintainable under the

1. Mohitosh Dutta v. Rai Satish Chandra, 1932 Cal 203=136 I C 593.

law. In support of the appeal to this Court it was urged that the sale sought to be avoided by the Receiver was a nullity in view of the non-compliance with the provision of O. 21, R. 22, Civil P. C.; it was contended that the property having been sold on 22nd September 1932, after the judgment-debtor was adjudicated insolvent, and no notices having been served on the legal representative of the judgment-debtor as required by O. 21, R. 22, Civil P. C., the sale was void ab initio. It was also urged in support of the appeal that the provision contained in S. 51, sub-S. (3), Provincial Insolvency Act, was controlled by O. 21, R. 22 of the Code, and that the fact that the purchasers purchased the property in good faith could not give them protection seeing that the sale itself was a nullity. There can be no doubt that the property of the judgment-debtor vested in the Receiver in Insolvency before it was sold in execution; but the fact remains as it has been found by the Courts below, that the decree-holders were not at all aware of the insolvency proceedings. In the circumstances of the case therefore it could not be said that proper steps had not been taken to bring the Receiver before the Court to enable him to take up the position that he was not bound by anything that was done in the course of the execution proceedings culminating in the sale of the judgment-debtor's property on 22nd September 1932. The decree-holders having no notice of the insolvency proceedings, and having been wholly unaware of the same, were not responsible for the irregularities of procedure adopted in the matter of non-service of notice under O. 21, R. 22, Civil P. C. The sale of the property in the present case cannot be held to be a nullity as it was contended before us, on the ground that the Court had no jurisdiction to sell, in view of the non-service of notice under O. 21, R. 22 of the Code, as such non-service was attributable to the fact that the decree-holders had not been notified about the insolvency proceedings at any time before the application out of which this appeal has arisen, was made by the Receiver in Insolvency, on 16th November 1932.

In our judgment therefore the decision of the Judicial Committee and the observations of Lord Parker in 1914 P. C. 129 (2) on which very strong reliance was placed on the side of the appellant, have no application on the facts and in the circumstances of the case before us; and we are unable to hold that the sale in the present case was a nullity, and that O. 21, R. 22, Civil P. C., controlled the provisions of S. 51, sub-S. (3), Provincial Insolvency Act, even in a case in which the decree-holder purchaser at the sale in execution of his decree purchased the property of an insolvent at a sale in execution, in good faith, after an order of adjudication has been passed by the Insolvency Court, and after the property of the insolvent has vested in the Receiver in Insolvency. The purchase was made in good faith, without any knowledge whatsoever of the insolvency proceedings, and the sale was not a nullity on account of the fact that no notice under O. 21, R. 22, Civil P. C., was served, seeing that the decree-holder purchaser was not aware of the insolvency proceedings, the order of adjudication passed in those proceedings, and of the vesting of the insolvent's property in the Receiver in Insolvency.

On the scope and operation of S. 51, sub-S. (3), Provincial Insolvency Act, the decision of this Court in 1917 Cal. 606 (3) is an authority in support of the position apparent on the face of the statutory provision, that a purchaser of an insolvent's property, at a sale in execution of a decree, even with notice of the insolvency, who purchased the property in good faith, acquires a good title to it, against the Receiver, in whom the insolvent's property had vested under S. 28, sub-S. (2), Provincial Insolvency Act. In the case before us, we do not see any difficulty in the application of the rule laid down in the above case, on the definite finding arrived at by the Courts below, that the purchase at the sale in execution of the decree made by the decree-holders themselves was made in good faith. In our judgment, the provision contained in S. 28, sub-S. (2), Provincial Insolvency Act, is controlled by the later provision contained in S. 51, sub-S. (3) of the Act and effec-

2. Raghunath Das v. Sundar Das, 1914 P C 129 =24 I C 304=41 I A 251=42 Cal 72 (PC).
3. Madhu Sudan Pal v. Parbati Sundari Dasya 1917 Cal 606=35 I C 643.

tively secures the title of a purchaser of an insolvent's property at a sale in execution in case of good faith being established on the part of the purchaser. On the finding arrived at by them, the Courts below were right in the conclusion that the Receiver in Insolvency could not be allowed to have the sale held in Execution Case No. 390 of 1932 in the 2nd Court of the Munsif at Bagerhat, to be declared null and void, so as to defeat the title of the decree-holder purchasers, the respondents in this appeal. The result of the conclusions we have arrived at as mentioned above is that this appeal is dismissed with costs. The hearing fee in this Court is assessed at two gold mohurs.

K.S. *Appeal dismissed.*

A. I. R. 1935 Calcutta 506

R. C. MITTER, J.

Dulal Chandra Chowdhury — Petitioner.

v.

Atul Krishna Roy and *others*—Opposite Parties.

Civil Rule No. 47 of 1935, Decided on 6th February 1935, from order of 1st Munsif, Hooghly, D/- 29th September 1934.

(a) Civil P. C. (1908), O. 22, R. 6—Ex parte decree—Decree to be set aside if opposite party deposited money in Court—Death of one of plaintiffs subsequent to passing of decree but before deposit of money—Decree set aside on deposit but legal representative not brought on record—That does not make order bad.

Where an ex parte decree is passed when both plaintiffs are alive and it is ordered that the decree will be set aside if the opposite party deposits certain amount in Court but one of the plaintiffs dies subsequent to the passing of the decree but before the deposit is made and the decree is set aside without bringing on record the legal representative of the deceased plaintiff, O. 22, R. 6 applies and the order setting aside the decree is not bad. [P 507 C 1]

(b) Civil P. C. (1908), O. 9, Rr. 13 and 14—Application to set aside ex parte decree—Opposite party need not be named as parties in application—It is enough if applicant deposits process fees and causes service of notice.

There is no provision in the Code for naming persons in whose favour ex parte decree is passed, as parties in the application to set aside such decree. All that is necessary is that an indication should be given in the application of the particulars of the suit in which the ex parte decree had been passed; if the suit is so indicated, there is no difficulty in finding out from the records of the case on whom the notice of the application has to be given. It would be then the duty of the Court to direct the issue of notice on such persons and the duty of applicant would only be to deposit the process fees and to cause service of the notices. [P 507 C 2]

Nanda Gopal Banerji—for Petitioner.

Bijan Behari Gupta—for Opposite Party.

Order.—This rule has been obtained by plaintiff 2 in a suit for damages for malicious prosecution instituted against the opposite party 1. It appears that opposite party 1 launched unsuccessfully a criminal prosecution against the petitioner and his father, Upendra Nath Chowdhury. On the termination of the criminal proceedings Upendra Nath Chowdhury, as plaintiff 1, and the petitioner, as plaintiff 2, instituted the said suit for damages. Opposite party 1 filed his written statement but on the date fixed for hearing (22nd May 1934) he failed to appear with the result that an ex parte decree was passed against him on the same date. On 26th May 1934, opposite party 1 made an application under O. 9, R. 13, Civil P. C., to set aside the ex parte decree. He mentioned in his application the number of the suit but in naming his opponents he mentioned the name of Upendra Nath Chowdhury only and omitted to put in the petitioner's name. Notice of the application was served on Upendra Nath Chowdhury alone who appeared and contested the said application. On 11th August 1934 it was discovered that the notice of the application had not been issued to the petitioner. On the said fact being pointed out to the Court, the Court directed the notice of the application under O. 9, R. 13 to be served upon the petitioner. The application under O. 9, R. 13 was allowed to stand in its original form. On the said notice being served on the petitioner the Court took up the hearing of the application and allowed it by an order dated 19th September 1934. The Court held that on 22nd May 1934, the date of the ex parte decree, the opposite party 1 was very ill and that there was sufficient cause for his non-appearance on that date, but inasmuch as he failed to inform his pleader about the fact and nature of his illness, the Court made an order vacating the ex parte decree on terms. It directed the opposite party 1 to put in Court within ten days a sum of Rs. 15 as compensation to the plaintiffs. On

the date of the order Upendra Nath was alive but he died between that date and 29th September 1934, when the said sum of Rs. 15 was deposited in Court by the opposite party 1. On 29th September before the heirs of Upendra Nath were brought on the record the Court recorded the final order setting aside the ex parte order. The petitioner has taken before me two points, namely: (i) that the application to set aside the ex parte decree as made on 26th May 1934 was defective inasmuch as the petitioner had not been named therein as an opposite party, and assuming that he was made an opposite party on 11th August 1934, when the Court directed the issue of the notice of the application to him, the bar of limitation was then an insurmountable bar, and (ii) that the order of 29th September 1934 is bad, as it was passed in the absence of the legal representatives of Upendra Nath who was dead shortly before that date.

I do not see any substance whatsoever in the second point. Evidence had been led, arguments heard and judgment was pronounced on 19th September 1934 when Upendra Nath was alive. The order was then passed in a conditional form requiring the opposite party 1 to put in Rs. 15 within ten days. The order stated that if the money was put in within the said time the ex parte decree would be set aside, otherwise it will stand. The order of 19th September was a self-contained and complete order. In these circumstances the fact that Upendra Nath died just before the formal and consequential order of 29th September and his legal representatives were not then brought on the record at that time would not in my judgment derogate from the force of the said order. The matter is covered in my judgment, by the principles underlying O. 22, R. 6 of the Code. I accordingly overrule the said point. Regarding the first point also, I do not think that there is much substance in it, although the case seems to be of first impression. O. 9, R. 13 requires an application for setting aside an ex parte decree and R. 14 provides that no such application is to be granted without notice of the application being given to the opposite party, that is to the person or persons in whose favour the ex parte decree has been passed. The necessity of making such persons as parties to an appeal against the order refusing to set aside the ex parte decree stands on a different footing. They must be named respondents in the memorandum of appeal; but so far as the first Court is concerned there is no provision in the Code for naming them as parties in the application. All that is necessary is that an indication should be given in the application of the particulars of the suit in which the ex parte decree had been passed. If the suit is so indicated there is no difficulty in finding out from the records of the case on whom the notice of the application has to be given. It would be then the duty of the Court to direct the issue of notice on such persons and the duty of the applicant would only be to deposit the process fees and to cause service of the notices.

In this respect the cases dealing with this point in connection with applications made for setting aside Court sales under O. 21, Rr. 89 and 90, are helpful. The proviso to O. 21, R. 92 is pari materia with the provisions of O. 9, R. 9 and O. 9, R. 14. It has been held that the parties who would be affected by an eventual order under O. 21, R. 92 need not be named as parties in the application to set aside the sale, and as there is no time limit for the issue and service of the notice of the application, except that it must be before the final order is passed, the application would be regarded as a good application if no persons are named in the application as opposite parties, and the order passed would be a good order even if the notice is served beyond 30 days of the date of the sale: 1929 All. 593 (1); 1932 Pat. 255 (2) and 1935 Cal. 502 (3). I accordingly overrule the first point also and discharge the rule with costs; hearing fee one gold mohur.

K.S. *Rule discharged.*

1. Dip Chand v. Sheo Prasad, 1929 All 593=119 I C 103=51 All 910.
2. Nitai Dutta v. Bishun Lal, 1932 Pat 255=139 I C 810=11 Pat 504.
3. Radha Kisson v. Tansuk Mahesri, 1935 Cal 502=62 Cal 286.

A. I. R. 1935 Calcutta 508

REMFRY, J.

Kamala Book Depot, Ltd.—Plaintiff.

v.

Sourendranath Mukherji and *another* —Defendants 1 and 2.

Original Suit No. 2497 of 1932, Decided on 4th July 1934.

Copyright —Sale of first edition of book amounts to assignment of interest in copyright until the last copy is sold.

Where a first edition of a novel was sold to plaintiff but the defendant, before all the books were sold, published the novel in another form:

Held: that the sale of the first edition amounted to an assignment of an interest in the copyright until the last copy of that edition was sold. Until then the purchaser has the exclusive right to the copyright, at any rate, as far as the right to publish the novel in any form is concerned, and that the defendant's action amounted to an infringement of plaintiff's rights: *Sweet* v. *Cater*, (1841) 11 *Sim* 572, *Rel on.* [P 508 C 2; P 509 C 1]

Sudhin Ray and *S. C. Mitter* —for Plaintiff.

Saroj Ghose—for Defendant 1.

S. R. Das Gupta—for Defendant 2.

Judgment.—In this case the plaintiff seeks an injunction restraining the defendants from publishing or selling a work called "Sourendra Granthabali" containing a novel called "Naree or Nishetta Dip". It appears that on 16th April 1930 defendant 1, an author, sold to the plaintiff the first edition of his new novel, Nishetta Dip, which was to consist of 1,100 copies in twelve forms in double crown size, and to be priced at Re. 1-8-0 or Rs. 2 for Rs. 200 or Rs. 225 if the price was Rs. 2. Thereafter, on 15th August 1932, defendant 1 arranged with defendant 2 to publish the same novel as part of a collection of his novels, and he did publish it. The plaintiff has only sold about 250 copies of the first edition which was priced at Rs. 2 and the collection which contained 11 or 12 novels was published at Rs. 2. The only contested point was the legal effect of the first agreement. The plaintiff claims that the collection is an infringement of his rights and that the author could not publish the novel in any form at all until the whole of the first edition was sold. The defendants contend that the author only sold a right to print and sell 1,100 copies in a particular form and did not assign the copyright, and that the author was entitled to publish the novel alone or in a collection, provided he did not publish it in twelve forms in double crown size.

It was admitted that whether defendant 2 knew of the first agreement or not, the question of infringement depended on the effect of the agreement. For the somewhat startling proposition that the plaintiff only purchased a right to publish in a particular form the defendants cited (1906) 2 Ch 595 (1). There the question was whether the publisher was entitled to enter his name in the register as the assignee of the copyright. The agreement gave the publisher the right to publish and sell a collection of hymns on a royalty. Some of the learned Judges certainly described his right as a right to publish these hymns in a particular form, and it was held that he was not the assignee of the copyright. The Court however did not decide what would constitute an infringement of the publisher's rights, and as I read the judgment, it was not suggested that a publication in a different form would not be an infringement of his rights. Reliance was also placed on the decision of Jessel, M. R. in 18 Eq 497 (2). There a lady arranged with a publisher that he should publish a novel on a royalty. The decision was that it was a partnership and that as the lady had ended the partnership, and that as there were no terms as to the number of copies which the publisher could sell, or as to the time in which he had an exclusive right to sell, therefore, as in any other partnership, no terms could be implied, and once the partnership ended, the authoress could publish her novel through another firm. The publisher had not a contract which entitled him to claim that no publication could be allowed until he had sold the last copy of the novel which he had printed.

The plaintiff relied on 11 Sim 572 (3). In that case, the tenth edition of Sugden's Vendors and Purchasers was sold to the plaintiff, the edition to consist of 10,000 copies, the book to be published in a particular form and at an arranged price. The publisher brought an action for

1. *In re* Jude's Manual Compositions, (1906) 2 Ch 595 and on appeal (1907) 1 Ch 651=76 L J Ch 542=51 S J 426=23 T L R 461=96 L T 766.
2. Warne v. Routledge, (1874) 18 Eq 497=43 L J Ch 604=22 W R 750=30 L T 857.
3. Sweet v. Cater, (1841) 11 Sim 572=5 Jur 38.

infringement against a third party and the question was what was the plaintiff's exact position. It was held that he was the assignee of an interest in the copyright which lasted until the last of the 10,000 copies was sold, and entitled him to the exclusive right to the copyright for that period. In my opinion, a sale of the first edition of 1,100 copies amounts to an assignment of an interest in the copyright until the last copy is sold. Until then the purchaser has the exclusive right to the copyright, at any rate, as far as the right to publish the novel in any form is concerned. I need not consider whether his right extends any further, e g. the right to dramatize the novel. As a right to property was sold, defendant 2 is not entitled to infringe that right.

The arguments of the defendants, in my opinion, overlook that the author sold the first edition of 1,100 copies. I see no force whatsoever in the argument that the plaintiff only bought the right to sell the novel published as a volume only. That appears to me to be as convincing as if the author had contracted that his photograph should appear on the cover, and then contended that he was entitled to publish his novel in a plain cover. In my opinion it is the defendant and not the plaintiff who seeks to imply a term into this contract. The contract was for the sale of the first edition of 1,100 copies. To imply a term that that meant a reasonable time only for such sale, or that the author could publish the book in any other form, seems to me to contradict the contract.

There will be an injunction restraining the two defendants, their servants or agents, from publishing or selling the novel in any form or shape or in any collection of novels until the last copy of the first edition is sold or disposed of. That, in my opinion, is sufficient and the plaintiff is not entitled to any copies of the collection. As regards damages the parties arranged that there should be an inquiry; that must be on the basis laid down in 1929 P C 11 (4); and unless the parties can agree to some figure, the question of damages will be referred to such officer as the Registrar may select. The costs of the suit will be paid by the defendants and the costs of the reference, if any, reserved.

K.S. *Suit decreed.*

4. Kamalapat v. Swadeshi Mills Company, Ltd., 1929 P C 11=114 I C 30=56 I A 1=51 All 182 (P C).

A. I. R. 1935 Calcutta 509

REMFRY, J.

Tarun Kumar Ghose, In the Goods of.

Testamentary and Intestate jurisdiction, Decided on 17th July 1934.

(a) Court-fees Act (1870), S. 4—In matters of exemption, Registrar must refer matter to Chief Justice—Practice.

When a claim for exemption of duty is made, the Registrar should refer the matter to the Chief Justice. It is not a matter of valuation, but of exemption. [P 510 C 1]

(b) Court-fees Act (1870), Ss. 4 and 19-H —Certificate granted under S. 4 is conclusive for certain purposes —It does not preclude Collector from applying under S. 19-H.

The certificate of the Registrar under S. 4 though conclusive for certain purposes, does not preclude the Collector from applying under S. 19-H : 32 *C W N* 799, *Rel on.*; 1925 *Cal* 1201, *Ref.* [P 510 C 1]

Under S. 19-H, the Collector can challenge the validity of a claim of this kind. The valuation of the estate is under-estimated if part of it is wrongly exempted on the ground that it was held in trust. The valuation is for the purpose of assessing the duty payable and the estimate of such valuation is under-estimated if assets which should not have been excluded from that valuation are excluded. [P 510 C 1]

(c) Practice — Man acting in certain way —He cannot be heard to say for his benefit that he acted wrongfully—Person depositing money in minor son's name in post office—Death of minor—Father cannot subsequently say in order to avoid duty while applying for letters of administration that he did so in order to escape income-tax — Letters of Administration.

When a man may have acted rightly or may have acted wrongfully, he cannot be heard to say for his own benefit that he acted wrongfully. [P 511 C 2]

Where the defendant invested money in the post office in the name of his minor son and on death of the minor applied for letters of administration.

Held : that he could not be heard to say in order to escape duty that the money was his own and that it was invested in the minor's name to escape illegally from paying income-tax and that he should pay duty in respect of the fund: *English cases referred.* [P 511 C 1, 2]

Order.—This is an application by the Collector of Calcutta under S. 19-H (4), Court-fees Act of 1870 as amended. The facts are that one Monmotha Nath Ghosh opened an account in the Post Office Savings Bank in the name of his minor son Tarun Kumar Ghosh as his guardian and made deposits in his name amounting to some Rs. 11,000. The son died a minor in October 1932. The

father obtained letters of administration to the estate of his minor son in May 1933. In the affidavit of assets he set out this deposit, but in Sch. B claimed that it was held in trust not beneficially or with a general power to confer a beneficial interest. The Registrar of this Court granted a certificate under S. 4, Court-fees Act, certifying that no duty was payable. Pausing here, it seems to me that when a claim of this sort is made the Registrar should refer the matter to the Chief Justice. It is not a matter of valuation but of exemption. In the present application it is alleged on behalf of the Collector that the money was the money of the minor and Court-fees are payable in respect thereof. In my opinion the certificate of the Registrar, though conclusive for certain purposes, does not preclude the Collector from applying under S. 19-H : see 32 C W N 799 (1).

In the case cited for the defendant, 29 C W N 879 (2), Rankin, J., as he then was, expressly reserved the point whether a certificate under R. 4, Ch. 35, owing to S. 5, Court-fees Act, "hampers the Collector in claiming more money under S. 19-H." The result is that the point was not decided, and if I may say so, I agree with the decision of Costello, J. in the first cited case. The certificate is conclusive in a Court on the point as to whether the correct duty has been paid, execpt when an application is made under S. 19-H. And under S. 19-H, the Collector can challenge the validity of a claim of this kind. The valuation of the estate is under-estimated if part of it is wrongly exempted on the ground that it was held in trust. The valuation is for the purpose of assessing the duty payable, and the estimate of such valuation is under-estimated if assets, which should not have been excluded from that valuation, are excluded. The question to be decided is whether in fact the deposit was the property of the minor or whether he was the benamidar of his father. It is not disputed that the father made the deposit with his own money. It is admitted that the doctrine of advancement is not applicable to Hindus. The question is what was the intention of the father, and whether he can be heard to allege an intention contrary to his conduct or which involves an assertion that he intended to act dishonestly.

The father gave evidence and he did not seriously allege that he was not aware of the rules and really admitted that his intention was to withdraw the money before the son attained majority, and for that purpose to make a false declaration that he was withdrawing it for the use of the minor. He stated that the minor was his youngest son aged 6 or 7 at the time and that he himself had already deposited in his own name Rs. 21,500 in the Post Office and as he could only deposit another Rupees 1,000 in his own name he adopted the device of opening an account in the name of his minor son, so as to be able to deposit more than the rules permitted with a view to save income-tax. Apparently apart from his pay, he had no other assets,and he had six children: four girls and two boys. It is abundantly clear therefore that in fact he had no intention to give this large sum to his youngest son. His intention clearly was to use the name of his son to obtain the benefit of an investment for himself in the Post Office. In my opinion there is nothing to prevent the father from alleging that the transaction was for his own benefit, unless there is any rule which precludes him from being heard to say that he intended to act dishonestly. The position is otherwise than that of an ordinary benami transaction and that unless the object of the transaction was fraudulent and succeeded, the parties can prove their actual intentions. The position of an account in the name of a minor under the Post Office Rules is that under R. 7 no trusts are recognized. Under R. 26 no money can be withdrawn by a guardian unless he certifies that the money is withdrawn for the use of the minor, and when the minor attains majority payment is made to him.

The defendant according to his own statement intended to withdraw the money before the minor attained majority and to certify that the money was required for the use of the minor. That would have been a false statement according to the defendant himself. Ac-

1. In the Goods of Arratoon Stephen, (1928) 32 C W N 799.
2. In the Goods of Bhubaneswar Trigunait, 1925 Cal 1201=95 I C 529=52 Cal 871=29 C W N 879.

cording to the decision in 13 Beav 78 (3), the mere fact that the depositor had, in order to evade the rule that no one could deposit more than a stated amount in a Post Office Savings Bank, used other persons' names, would not affect his right to the money deposited in excess of the stated limit. It does not appear that the depositor had to make a false statement in order to withdraw the money, and the only point for decision was whether there were trusts in favour of the persons whose names had been used. In 23 C W N 707n (4) at p. 714n, Lord Sumner declined to assume in the favour of a party that he lacked honesty, and added, "I cannot assume" that. Fletcher Moulton, L. J. in (1911) 2 K B 330 (5) at p. 339 declined to accept the evidence of the plaintiffs that they acted dishonestly and adds: "I shall presume that they . . . (acted) . . . honestly." In 2 A C 792 (6) at p. 807 Lord Blackburn said: "It does not lie in the mouth of a Railway Company, to set up its (own) illegality." In this case the defendant seeks to allege that he opened an account with the intention of violating the rules of the Post Office; those rules being rules passed under an Act, he alleges that he acted illegally; he then alleges that he intended to make a false declaration that was a dishonest intention, and I decline to accept his statement. I shall presume that he acted honestly and intended to act honestly. Jessel, M. R. in 13 Ch D 696 (7) at p. 727 laid it down that

> nothing can be better settled . . . . in the law I suppose of all civilised countries, than this, that where a man does an act which may be rightfully performed, he cannot say that that act was intentionally and in fact done wrongly . . . . wherever it can be done rightfully he is not allowed to say against the person entitled to the property or the right that he has done it wrongfully.

Bowen, L. J. in (1891) 1 Q B 440 (8) at p. 443 said:

> The rule is that no one is allowed in a Court of Justice, in order to escape from liability, to put forward a plea that that which he is doing is illegal.

In that case the defendant company alleged, in order to escape a tax, that they had exceeded their powers under a statute. Jessel, M. R., in the same case said: "They (the company) cannot I think be heard to say this." Fry, L. J., concurred. In my opinion the last cited case is very similar to the present case. There a Railway Company, in order to escape the parish rates, sought to allege that they had acquired land but not under their statutory powers, the railway company had no other legal powers. Here the defendant, in order to escape paying duty, seeks to be heard to say that in order to escape illegally from paying income-tax he wrongfully invested money in the name of his minor son with the intention of recovering it by a false statement. In my opinion the rule is clear that when a man may have acted rightly, or may have acted wrongfully, he cannot be heard to say for his own benefit that he acted wrongfully. The result is that the claim that there was a benami transaction fails, and the duty in respect of the fund is payable.

K.S. *Order accordingly.*

3. Field v. Lansdale, (1850) 13 Beav 78=19 L J Ch 560=14 Jur 995.
4. Chandanmull v. Donald Campbell & Co., (1916) 23 C W N 707n.
5. Hirachand Panamchand v. Temple, (1911) 2 K B 330=80 L J K B 1155=105 L T 277.
6. Doolan v. Midland Railway Co., (1877) 2 A C 792=25 W R 882=37 L T 317.
7. In re Hallett's Estate, (1880) 13 Ch D 696=49 L J Ch 415=28 W R 732=42 L T 421.
8. Overseers of Putney v. L. & S. W. Ry., (1891) 1 Q B 440=60 L J Q B 438=55 J P 422=39 W R 291=64 L T 280.

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REMFRY, J.

Mrs. Eliza Martin, In the goods of.

Original Suit No. 282 of 1934, Decided on 17th July 1934.

Succession Act (1925), S. 303—Son obtaining probate of will of deceased mother—Money set apart by mother as due to another after obtaining letters of administration to estate of her mother *E*—Such money invested in Bank for interest by son—Another person obtaining letters of administration to estate of *E* and money set apart handed over to him—That person applying by originating summons and seeking son to account for interest obtained—Originating summons lies—Even though proceeding is not suit, leave was necessary—Held also claim is governed by Limitation Act, Art. 120.

One *E* died intestate leaving some next of kin. Letters of administration were obtained to her estate by her daughter. That daughter died and her son, the defendant, obtained probate to her will. His mother had put aside a sum of money said to be some Rs. 17,413-8-0 as the share of one of the brothers of *E*, whose whereabouts were unknown. The defendant deposited this money in a Bank on interest. The present plaintiff obtained letters of administration de bonis non to the estate of *E*. The defendant paid over to her same Rs. 17,413-8-0 as the share of brother of *E*. The plaintiff applied on an originating sum-

mons in which she sought to make the defendant account for all interest obtained or which may be deemed to have been earned by this sum of Rs. 17,000 and for an inquiry as to what money came into his hands:

Held: that the present question was one which arose in the administration of the estate, and there being no disputed question of fact, an originating summons lay and that the defendant was not an executor de son tort and that what he did was not wrong: *In re Powers*, 30 *Ch D* 291. *Rel. on.* [P 512 C 2]

Held also: that even if this proceeding is not a suit, without leave under Cl. 12, it was not a proceeding warranted under the Charter and that by adjourning the matter into Court and at the same time giving leave under Cl. 12 of the Charter, the Court could not give itself jurisdiction: 1931 *Cal* 651 and 1929 *Cal* 358, *Ref.* [P 513 C 1]

Held further: that the claim was governed by Art. 120, Lim. Act. The defendant was not holding under an express trust, but the claim against him was an equitable claim and by taking charge of a fund as executor to his mother, in respect of which the mother was clearly a trustee, although not holding on an express trust, the defendant although he was not a derivative executor, rendered himself liable in equity to account for the fund and that limitation ran only from date when there was a denial of or an infringement of the right claimed: 1930 *P C* 270 and 1931 *P C* 9, *Ref.* [P 513 C 1]

Order.—It appears that one Eliza Martin died intestate, on 15th January 1896, leaving some next of kin. Letters of administration were obtained to her estate by her daughter. That daughter died on 4th April 1905, and her son, the defendant obtained probate of her will. His mother had, it seems, put aside a sum of money said to be some Rs. 17,413-8-0 as the share of one of the brothers of Eliza Martin, one Thomas Jones, whose whereabouts were unknown. The defendant deposited this money in a Bank on interest. The present plaintiff obtained letters of administration de bonis non on 21st December 1933, to the estate of Eliza Martin. The defendant paid over to her same Rs. 17,413-8-0 as the share of Thomas Jones.

The plaintiff has applied on an originating summons in which she seeks to make the defendant account for all interest obtained or which may be deemed to have been earned by this sum of Rs. 17,000 since 1905, and for an inquiry as to what moneys came into his hands. The first objection raised was that this relief could not be obtained on an originating summons. But the defendant's counsel could not point out any disputed question of fact; he did not dispute that the Rs. 17,000 odd came into the hands of the defendant in 1905. In my opinion the present question is one which arises in the administration of the estate, and there being no disputed question of fact, an originating summons lies: see 30 Ch. D. 291 (1). That decision shows that in respect of an exactly similar rule in England, it is not necessary that the defendant should be interested in the estate, it is sufficient if he is a debtor to the estate. In my opinion the argument that the defendant was an executor de son tort is unsound. All that is alleged to have been done by him is to invest the money on interest and to make inquiries for the missing Thomas Jones or his heirs.

As regards the deposit of the money in a Bank on interest, that was but for the preservation of the money and comes within S. 303, Succession Act. It was clearly his duty to preserve the assets that came into his hands, and clearly he was right in investing the money on interest. Doubtless he did not invest it in securities which an executor should select, but that is not material on the present point. The fact that he made inquiries for the missing heir, was not an intermeddling with the estate at all. It is not a fair deduction that had he found the heir, he would have paid the money to him without insisting on the necessary legal formalities. The test is, was anything done which was legally wrong if the person doing it was not an executor or administrator? Judged by that test, inquiries for a missing heir were not wrong. The next point raised was whether leave under the Charter was necessary. It is contended that as the plaintiff obtained letters of administration from this Court, part of the cause of action arose within the jurisdiction. That point has been decided in other cases, in favour of the plaintiff, and doubtless it is too late now to raise the question whether a plaintiff's derivative title is really part of the cause of action against the defendant.

It is admitted that the rest of the cause of action arose in Darjeeling. No leave was obtained under the Charter. It was argued that an originating summons is not a suit, but a proceeding brought under the rules of the Court. It

1. In re Powers, (1885) 30 Ch D 291=53 L T 647.

was held in 58 Cal 768 (2) that an originating summons was a suit. In 49 C L J 212 (3) the actual point decided was that if an originating summons was held to be incompetent, and the summons were treated as a proper plaint and the matter heard in Court, leave was necessary. In my opinion the jurisdiction of this Court depends on the Charter as far as civil suits are concerned. The sections of the Code of Civil Procedure 17—20 do not apply under S. 120. It seems to me therefore very doubtful whether this Court could by rules under the Charter give itself a jurisdiction which by its Charter it did not possess. It appears to me impossible to claim a jurisdiction to adjudicate on matters in respect of which a suit lies under the Charter which are not within the jurisdiction given by the Charter on the ground of any inherited jurisdiction. It follows that even if this proceeding is not a suit, without leave under Cl. 12, it is not a proceeding warranted under the Charter.

In my opinion however leave was necessary, for this proceeding is a suit, and I am unable to agree that by adjourning the matter into Court and at the same time giving leave under Cl. 12 of the Charter, the Court can give itself jurisdiction. It may however be desirable to express my opinion on the last point taken whether the claim is barred by limitation. The claim is for an account of moneys received, and for interest on or profits earned by the Rs. 17,000 already paid. The defendant received the money in 1905. Admittedly he had no right to the money. It is therefore argued that Art. 36, Limitation Act, applies. The plaintiff argues that Art. 120 applies. If this claim comes under Art. 120 it is argued that under Art. 120 until the person in possession denies the title of the plaintiff the cause of action does not accrue. Reliance was placed on 57 I A 325 (4) and 58 I A 1 (5). These cases were concerned with claims against trustees who did not hold the money claimed under an express trust. The question is whether Art. 62 does not apply. Doubtless that article does not apply to claims for an account against a trustee. Clearly, the defendant was not holding under an express trust, but the claim against him is an equitable claim, and by taking charge of a fund as executor to his mother, in respect of which the mother was clearly a trustee, although not holding on an express trust, the defendant, although he is not a derivative executor, rendered himself liable in equity to account for the fund, and therefore this claim is within Art. 120; and as there has been no denial of or infringement of the right claimed, the claim is not barred by limitation.

But as in my opinion leave was necessary, this Court has no jurisdiction to try this matter. The plaintiff must pay the costs.

K.S. *Order accordingly.*

2. Sewdayal Ramjeedas v. Official Trustee of Bengal, 1931 Cal 651=134 I C 436=58 Cal 768.
3. Maharajah Manindra Chandra Nundy v. Lalmohan Roy, 1929 Cal 358=120 I C 577=56 Cal 940=49 C L J 212.
4. Balo v. Koklan, 1930 P C 270=127 I C 737=57 I A 325=11 Lah 657 (PC).
5. Annamalai Chettiar v. Muthukaruppan Chettiar, 1931 P C 9=130 I C 609=58 I A 1=8 Rang 645 (PC).

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(Special Bench)

COSTELLO, BARTLEY, AND HENDERSON, JJ.

Emperor

v.

Nirmal Jiban Ghose and *others*—Accused.

Death Ref. No. 9 and Appeals Nos. 227 to 233 of 1934, Decided on 30th August 1934.

*** (a) Evidence Act (1872), Ss. 114, Ill. (b) and 133—Approver's evidence—Nature and extent of corroboration necessary explained—Duty of Court indicated—Accused can be convicted upon uncorroborated evidence—Criminal Trial.**

An accused person can legally be convicted upon the uncorroborated evidence of an approver; whether an accused person should or should not be convicted upon such evidence is left to the prudence and good sense of the tribunal after considering all the circumstances of the case. Prima facie the evidence of an approver, being tainted evidence, is unworthy of credit unless it is corroborated in some material particular tending to show that the accused committed the offence with which he is charged. It is for the Court to determine in the particular circumstances of each case whether the "matter" before it tending to corroborate the evidence of the approver (which may or may not be evidence strictly so called and as defined in the Evidence Act) is worthy of credence and is sufficiently reliable to be treated as evidence against the accused, and acted upon; the evidence of an approver may be corroborated by the evidence of another approver, or by the confession of a person who is being tried jointly with the accused

for the same offence implicating both himself and the accused; it is the duty of the Court to scrutinize with care such corroboration as that mentioned above, but whether it is to be treated as evidence against the accused or not is to be determined by the Court having regard to the circumstances of the case : 1931 *Rang* 235, *Foll.* [P 517 C 1]

(b) Criminal Trial—Approver's evidence—Independent evidence that accused are members of conspiracy—Whether corroboration of approver's evidence is sufficient is immaterial.

The question of what are the circumstances in which corroboration is required and the question of the amount of such corroboration are not material, if there is independent evidence that all the accused are members of the conspiracy. [P 517 C 1,2]

(c) Criminal Trial— Alibi — Witness to prove it must be called by accused who takes such defence– Such evidence must be tested by cross-examination by Crown.

Witnesses, to establish anything in the nature of an alibi, ought to be called by the accused person who takes that line of defence. Unless evidence of that character is tested by cross-examination on behalf of the Crown, it is very difficult for anyone to say what value should be attached to it. [P 520 C 2]

(d) Penal Code (1860), Ss. 120-B and 302 —Sentence—Murder committed by youths—They being members of revolutionary party engaged in killing officials—No evidence that they were under domination of others—No expression of regret—Denial of guilt—Held capital punishment was proper.

Where the accused who were youths were members of a conspiracy engaged in revolutionary activities like murdering officials and there was no evidence to show that they were impressionable youths who were under the domination of others, nor was any expression of regret made by them but they persisted to the very end that they were not members of the conspiracy at all and that a false case was manufactured against them :

Held : that capital punishment was proper. [P 525 C 2]

A. K. Roy and *J. K. Mukerji*—for the Crown.

H. D. Bose, B. Basu, Sarat Chandra Jana, Santosh Kumar Basu, Benoy Krishna Mukerji, Saroj Kumar Maity, Narendra Kumar Basu, Manindra Nath Mukherji, N. C. Sen, Basant Kumar Mukerji, Bholanath Roy and *Hira Lal Ganguli*—for Accused.

Costello, J.—By a Government of Bengal Notification dated 15th December 1933 a Special Tribunal was appointed by the Governor-in-Council under the provisions of sub-Ss. (1) and (2) of S. 4, Bengal Criminal Law Amendment Act, 1925, for the trial under that Act of thirteen persons who were accused of offences specified in Sch. 1 of the Act. The accused persons were the following: 1. Nirmal Jiban Ghose ; 2. Kamakhya Charan Ghosh ; 3. Brojo Kishore Chakravarty ; 4. Ram Krishna Roy ; 5. Sonatan Roy ; 6. Nanda Dulal Singh ; 7. Sukumar Sen Gupta ; 8. Bijoy Krishna Ghose ; 9. Purnananda Sanyal ; 10. Manindra Nath Choudhury ; 11. Saroj Ranjan Das Kanungo ; 12. Santi Gopal Sen and 13. Sailesh Chandra Ghose. When the trial of the case began, the Commissioners were informed by the Public Prosecutor that one of the accused persons, namely Santi Gopal Sen, was absconding and could not be produced before the Tribunal. At the same time on an application made on behalf of the Crown the Commissioners tendered a pardon on the terms and conditions imposed by S. 8, Bengal Criminal Law Amended Act, 1925, to the accused Sailesh Chandra Ghosh, namely on the condition of his making a full and true disclosure of the whole circumstances within his knowledge relative to the offence and to every other person concerned whether as principal or abettor in the commission thereof. He accepted this condition of pardon and was made an approver in the case. The Commissioners then proceeded to the trial of the other eleven accused persons.

The persons tried by the Commissioners were charged with the commission of an offence under S. 120-B, I.P.C., read with S. 302, I. P. C. The specific charge against them was that between 2nd March 1931 and 2nd September 1933 at Rajardighi Abash, Gope, Kedan Babu's house, Sukumar Sen Gupta's house, Golekua chak, Old Jail, College Ground, Police Ground and other places in or about the town of Midnapur and Kharagpore within the District of Midnapur, Calcutta and other places in Bengal, they along with Anath Panja, Mrigendra Dutta, Santi Gopal Sen, Sailesh Chandra Ghose, Bimal Das Gupta, Jyoti Jiban Ghosh, Parimal Roy, Phani Das, Pravangshu Pal, Prodyot Bhattacharjee and others, were parties to a criminal conspiracy, the object of which was to commit murder of District Magistrates and other high Government officials of the District of Midnapur, and in pursuance of the said conspiracy, Mr. Burge, the late Magistrate of that District, was murdered on 2nd September 1933.

All the accused persons were defended by counsel and the matter was gone into in great detail, and as far as we can see the Commissioners took into consideration all the arguments advanced on behalf of the accused. In the result the findings of the Tribunal were that the following accused persons, namely Nirmal Jiban Ghosh, Kamakhya Charan Ghosh, Brojokishore Chakravarty, Ram Krishna Roy, Sonatan Roy, Nanda Dulal Singh, Sukumar Sen Gupta, were guilty of the offence of criminal conspiracy to commit murder punishable under under S. 120-B read with S. 302, I. P. C. The rest of the accused, namely Bijoy Krishna Ghose, Purnananda Sanyal, Manindra Nath Choudhury and Saroj Ranjan Das Kanungo were fouud not guilty of the offence charged against them. They were acquitted and set at liberty. The Commissioner stated that they gave their very anxious consideration to the question of sentence. They said that they could conceive of the circumstances in which a young man might join a terrorist organization which had murder for its object, join in wild talk and even take part in plans for the projected murder without fully facing the fact that action would really be taken to carry out that murder. They then said:

> In the case before us, where two previous District Magistrates had already been murdered, no possible ground could exist for any youth who joined in the conspiracy to fail to be aware that it was a conspiracy in deadly earnest. The evidence shows that the accused persons Brojo Kishore Chakravarty, Nirmal Jiban Ghosh and Ram Krishna Roy had already joined the party before the murder of Mr. Douglas. It shows that after the murder of Mr. Douglas, Brojo Kishore became the leader of the party and that he throughout took a directing part in arranging the murder of Mr. Burge. The evidence shows moreover that both Nirmal and Ram Krishna were active in pursuing the object of the conspiracy and that they both took a leading part in all the activities of the conspirators. We are aware that Nirmal's intimacy with the approver seems to throw the activities of Nirmal into disproportionate prominence. But even making allowance for that fact, it is clear that Nirmal was one of the most enthusiastic and active members of the conspiracy.

The Commissioners then said that they have taken into consideration in their favour the extreme youth of these three boys as well as the insidious propaganda by which their minds were slowly poisoned:

> We feel however that these circumstances cannot weigh against the deadly object of their activities which were carried on and indeed carried on with greater vigour even after at least one District Magistrate had been murdered during their membership of the party. In these circumstances we feel that we should be doing less than our duty in awarding any other punishment than the maximum which the law allows.

The sentence of the Tribunal, accordingly, was that Nirmal Jiban Ghosh, Brojokishore Chakravarty and Ram Krishna Roy should be hanged by the neck until they be dead. As regards the other four accused Kamakhya Charan Ghosh, Sonatan Roy, Nanda Dulal Singh and Sukumar Sen Gupta, the Commissioners considered that their activities in pursuance of the conspiracy were a little less pronounced and in their case the extreme penalty of the law need not be exacted. They accordingly sentenced them to suffer transportation for life. All the convicted persons have appealed against their convictions and the sentences passed upon them. The matter comes in pursuance of appeals on the part of all the convicted persons and by way of a reference under S. 3 (2), Bengal Criminal Law Amendment (Supplementary) Act of 1925 for confirmation of the sentences of death which were passed by the Commissioners. We have therefore imposed upon us the responsible duty of deciding first of all whether the convictions of all or any of the appellants were justified by the evidence adduced before the Tribunal and, secondly, whether the three sentences of death or any of them ought to be confirmed.

The case for the prosecution as put forward at the trial has been set out by the learned Commissioners in the opening paragraph of their very lengthy and detailed judgment and we do not think it necessary to recapitulate the events and the incidents which, as the prosecution said, demonstrate that all the appellants were active participators in the conspiracy charged against them. As already stated one of the persons originally accused, was tendered a pardon upon the condition of his making a full and true disclosure of all the facts in connexion with the conspiracy and its object. That person is Sailesh Chandra Ghose. He gave evidence before the Commissioners and a large number of other witnesses gave evidence on behalf of the Crown not only for the purpose of

corroborating the evidence given by Sailesh as the approver in the case but for the purpose of furnishing independent and extraneous testimony to establish the existence of the criminal conspiracy described in the charge and in addition the complicity in it of the accused persons. We shall later on deal in detail with the evidence adduced before Commissioners. But before so doing we think it desirable to make some observations of a general character. At the outset we would say that as it is no doubt the fact that the Crown relied to a very large extent on the evidence given by the approver, one of the most important points before the Commissioners, and a point to which we have to direct our attention with great care, was the question whether the evidence of the approver had been sufficiently and satisfactorily corroborated by the evidenee given by other witnesses. We can state with confidence that it seems clear and certain beyond all controversy that the learned Commissioners in arriving at their decision and in dealing with the case throughout had well in mind the importance and the desirability and, indeed, the necessity for corroboration of the approver's story. That this was so appears from the Commissioner's own statement in their judgment (at p. 171) in which they said:

We have been constantly mindful of the position in which the approver stands. The approver has given his evidence in the hope of pardon and we are aware that he is under the temptation to depose in accordance with what he may have thought to be to his own advantage. We have no reason to suppose that he has deposed by reason of repentance for his own past activities or that his motives are anything but motives of self-interest. We have received his evidence with great caution and have scrutinized it with all the care of which we are capable. Bearing all those considerations in mind we are nevertheless of opinion that he has deposed with substantial truth.

In this connexion we were referred by the learned Advocate-General to the decision of this Court in 37 C. W. N. 934 (1) where it was held that

In a jury trial, the Judge must tell the jury that they may, if they choose, convict on the evidence of an accomplice alone, but that it is dangerous to act upon such evidence unless there is corroborative evidence implicating the accused. If such warning be given, but the jury nevertheless convict solely on the evidence of an accomplice, the conviction will not generally be set aside; but if such warning be not given, the conviction will be quashed. Similarly, a Judge sitting without a jury must bear the same considerations in mind. If they be not present to his mind and if there be no sufficient corroborative evidence, the conviction will be set aside.

Therefore, if a Judge sitting without a jury bears in mind the same considerations with regard to corroboration of the evidence of an accomplice as he would be bound to put before the jury were he sitting with a jury, then if those considerations are present in his mind, it is really a matter for him to decide whether or not there is sufficient corroborative evidence. The learned Advocate-General argued in the present case that the question of how far the tribunal could have acted on uncorroborated testimony or the degree of corroboration required, was really a matter to be left to the good sense and prudence of the Commissioners themselves. He urged that the Commissioners who constituted the tribunal at Midnapur and whose decision we are now reviewing did fully appreciate what was required of them concerning the question of corroborative evidence and as he put it, they did not in any sense misdirect themselves upon this point. The learned Advocate-General further said that if bearing in mind for their own guidance the kind of warning which a Judge would have to give to a jury, they came to a particular conclusion then they were quite within their rights in coming to that conclusion. With that proposition we entirely agree, but inasmuch as the whole case was before us for determination both as regards the facts as well as the law this point is really of little more than of academic interest. The learned Commissioners, if anything, were over cautious. They went so far as to say :

The law is well settled that the evidence of an approver should not be acted upon unless corroborated on material particulars not only against persons who are charged but with regard to the participation of each individual accused in the commission of that offence. The law does not require that the approver should be corroborated on all particulars, for in that case the evidence of the approver would be entirely superfluous. What the law requires is corroboration on material particulars. The nature and extent of the corroboration that should be required must be determined to a certain extent by the nature and the circumstances of each individual case.

No doubt as a broad proposition it is correct to say, as was reiterated in the

1. Madhu Sudan Sen Gupta v. Emperor, 1934 Cal 114=1934 Cr C 165=147 I C 1172=35 Cr L J 551=37 C W N 934.

case abovementioned, that in spite of S. 133, Evidence Act, the rule of practice that an accused person ought not to be convicted on the uncorroborated testimony of an accomplice has become virtually equivalent to a rule of law. But, the proposition is subject to various qualifications, and we do not assent to the proposition that in no circumstances can the evidence of an accomplice corroborate the evidence of another as suggested in the recent case, 38 C W N 777 (2). We are of opinion that the legal position as regards the evidence of an accomplice or an approver as deduced from the relevant sections of the Evidence Act and the English and Indian judicial decisions is comprehensively summarised by Sir Arthur Page, C. J. of Burma in 9 Rang 404 (3) at p. 427, where after quoting sections of the Evidence Act, and after having considered a large number of authorities he stated :

We are of opinion that the effect of these sections which are to be read together, is (1) that an accused person can legally be convicted upon the uncorroborated evidence of an approver ; (2) that whether an accused person should or should not be convicted upon such evidence is left to the prudence and good sense of the tribunal after considering all the circumstances of the case ; (3) that prima facie the evidence of an approver, being tainted evidence, is unworthy of credit unless it is corroborated in some material particular tending to show that the accused committed the offence with which he is charged ; (4) that it is for the Court to determine in the particular circumstances of each case whether the "matter" before it, tending to corroborate the evidence of the approver (which may or may not be evidence strictly so-called and as defined in the Evidence Act) is worthy of credence, and is sufficiently reliable to be treated as evidence against the accused, and acted upon ; (5) that the evidence of an approver may be corroborated by the evidence of another approver, or by the confession of a person who is being tried jointly with the accused for the same offence implicating both himself and the accused ; (6) that it is the duty of the Court to scrutinize with care such corroboration as that mentioned in (5), but that whether it is to be treated as evidence against the accused or not is to be determined by the Court having regard to the circumstances of the case.

We entirely agree with these propositions and respectfully adopt them as constituting a correct enunciation of the law. The question of what are the circumstances in which corroboration is required and the question of the amount of such corroboration are in the present instance, largely matters which are on the whole purely academic, as the independent evidence, if believed, leaves no doubt whatever that all the appellants were members of the conspiracy. The learned Commissioners rightly had before them the criterion to be applied by them as appears from the passage in their judgment (at p. 167) where they said :

The nature and extent of the corroboration that should be required must be determined to a certain extent by the nature and the circumstances of each individual case. The question that the Court is called upon to decide is whether having regard to the evidence of the approver and other evidence in the case, that is to say whether in taking a judicial view of the whole evidence it can be said that the approver's evidence has been so corroborated that on the whole it is safe to act upon his evidence. The points on which and the extent to which the approver's evidence has been corroborated are, we think, apparent from the review of the evidence which we have already made.

Having indicated the points on which they considered there was corroboration, they stated their conclusions in this form (p. 172) :

We should however not have been prepared to act upon his evidence unless we were satisfied that it had been sufficiently corroborated in material particulars and we now declare that we are of opinion that his evidence has received sufficient corroboration so far as the general story of conspiracy is concerned.

The appeal was argued before us on behalf of the accused in great detail and at considerable length for the hearing extended to a period of no less than 11 days. The learned Counsels who appeared for the accused subjected the evidence and the observations of the learned Commissioners to the most minute and detailed examination and criticism. We were taken through the evidence by one or other of the learned Counsel from end to end not only once, but as regards some of the evidence, several times. The whole of the testimony given before the learned Commissioners was examined microscopically and meticulously with the result however that this process of sifting the evidence only served to throw into high relief the undoubted truth of the prosecution story. We have since the hearing of the appeal, once more examined the evidence for ourselves and reconsidered all the arguments put forward by learned counsel on

2. Hafijuddi v. Emperor, 1934 Cal 678=1934 Cr C 1045=151 I C 486=35 Cr L J 1357=38 C W N 777 (SB).
3. Aung Hla v. Emperor, 1931 Rang 235=1931 Cr C 875=135 I C 849=33 Cr L J 205=9 Rang 404 (SB).

behalf of the appellants and in the result, we can only say that the more we looked into the evidence and the more we considered the arguments put forward on behalf of the appellants, the more solid and the more substantial and indeed, unassailable became the case for the prosecution. After very careful examination of the case and consideration of all the arguments put forward, we are definitely of opinion that the learned Commissioners were quite justified in coming to the conclusion and indeed they could have come to no other conclusion that the evidence of the approver was in every way sufficiently and satisfactorily corroborated. Moreover in the present case the question of corroboration of the approver's evidence assumes less importance than in other circumstances it might have done because as we have already observed, apart from the evidence of the approver, the facts proved by the other witnesses established beyond all question that there was a conspiracy as alleged by the prosecution and that all the appellants were active participants in that conspiracy.

Mr. N. C. Sen who appeared on behalf of three of the appellants namely, Kamakhya Charan Ghosh, Nanda Dulal Singh and Sukumar Sen Gupta, strenuously put forward on their behalf the contention that the approver was an entirely false witness and that even if there was a conspiracy the evidence given by the approver with regard to it was solely the result of "tutoring" on the part of the police. We have considered with care all Mr. Sen's suggestions and comments on the evidence and we now proceed to discuss them. One of Mr. N. C. Sen's arguments was that inasmuch as the names of certain persons who were mentioned by the approver in his confession as being amongst the conspirators were omitted altogether from the evidence given by the approver in the witness box, the inference is that the approver had deliberately made the omission at the nefarious instigation of the police because it was intended by the prosecution to call these same persons as witnesses at the trial. The learned Commissioners evidently had before them a similar argument at the trial and they seem to have allowed themselves to be misled by it because it appears that they thought fit to accept this contention in that they took the view, as appears from a passage in their judgment (p. 150) that

> The fact that he did omit the names in examination in chief rather suggests to our mind that the approver had accepted a hint from the prosecution not to bring the names of those persons into his evidence unless questioned on the point, and to this extent we are bound to hold that the approver, in our view, accepted tutoring from the prosecution side.

We may observe in passing however that the learned Commissioner also said that "this circumstance however in no way indicates that the approver has deposed in respect of the matter." We find it difficult to understand how it could have been imagined that any advantage would accrue to the prosecution from any such manoeuvre seeing that it would afford an obvious means of discrediting their principal witness. The opinion arrived at by the Commissioners was however based upon an erroneous view of the real facts; for unless it could be shown that all the witness in question were mentioned in the confession and that all the persons whose names were omitted were examined as witnesses, the whole basis of this somewhat curious argument completely disappears. The witnesses in question are Gouranga Mohan Roy (18), Jitendra Mohan Hazra (25), Jagadish Chandra Chandra (31) and Parimal De (39). Of these four witnesses the approver in his examination-in-chief did in fact mention Gourang Mohan Roy and Parimal De. It seems that the learned Commissioners must have confused the name of Gouranga Roy with that of Gouranga Das and the same name of Parimal De with that of Parimal Roy (p. 203). Incidentally it may be observed that this would appear to be an explanation of the otherwise apparently meaningless re-examination of Gouranga Roy who was solemnly asked whether his name was Gouranga Roy. Moreover the approver in his cross-examination actually mentioned the name of Jitendra Hazra explaining that he had previously omitted his name by mistake. He moreover in his cross-examination mentions the name of Jagadish Chandra Chandra. Obviously, he would have been careful not to have made any mention of these persons even in cross-examination if he had succumbed to any form of tutoring with the object in view suggested by Mr. N.C.

Sen. Of all the four persons the only one mentioned in the confession is Jagadish. The other person mentioned in the approver's confession and referred to in the argument is one Abul Fazle and he was neither a witness nor is he in the confession specifically mentioned as a conspirator. The result is that none of Mr. Sen's premises have any existence and this argument fails accordingly.

Mr. Sen's next argument was based upon the not uncommon suggestion that the approver was induced to make a false and "tutored" statement by improper means employed for the purpose by the police. (His Lordship examined the evidence and held that it was not a result of tutoring. The judgment then proceeded). No serious attempt was made to dispute the approver's testimony that there was a conspiracy and his statement is confirmed by circumstances altogether apart from the actual evidence given by the approver. The basic feature of the whole case—one which cannot be controverted—is that three District Magistrates of Midanapur were in succession foully assassinated. Prodyot Bhattacharjee who was hanged for the murder of Mr. Douglas belonged to the student class and so did the assassins of Mr. Burge. In Prodyot's pocket was found a paper showing that he committed the murder from no motive of any personal animosity against Mr. Douglas and it has never been suggested that Anath Panja or Mrigendra Dutta who killed Mr. Burge had any private animosity against him. The truth of the approver's story that there was a conspiracy is also proved by the fact that some of the cartridges and bullets found at places where the approver says revolver practice took place, are proved to have been fired from the identical revolver used by one of the assassins of Mr. Burge. The learned Commissioners came to the conclusion that the evidence regarding the three murders left not the slightest doubt in their minds that all the three murders were connected and were the acts of one party. They further said that they were satisfied that this party was a continuing one. We have no doubt whatever that the Commissioners were entirely right in coming to the conclusion that in the main and on all material points the evidence given by the approver was true. In this connexion they said:

> We have to remember that the approver has told a long story covering a very large number of points and that he has stated it with a considerable wealth of detail. He was in the witness-box for about a week and was subjected to searching cross-examination by experienced lawyers for upwards of four days. It is difficult to think that a boy of his age could have stood the test if the story he told was in the main a tutored one. In such a case we think he would have been likely to break down under cross-examination, but on the contrary he, on the whole, stood the cross-examination well.

In our opinion it must be manifest that once the theory of tutoring is rejected there would then be no reason at all why the approver should have falsely implicated any one of the accused persons. No grudge or ill-will on the part of the approver towards any one of the accused was proved. Vague suggestions of the approver seeking to wreak vengeance by reason of some real or fancied grievance were, it is true, put forward on behalf of Nanda Dulal Singh and on behalf of Sonatan Roy, both of them based on allegations founded solely upon their own statements before the tribunal but on no other evidence whatever. Nothing of the kind had been suggested in the course of the cross-examination on behalf of these two accused persons respectively or during the course of the case for the prosecution and it was only after all the evidence on behalf of the prosecution had been given that they were put forward. The learned Advocate-General rightly argued that the suggestions were trivial and in any event inadequate. The learned Commissioners with regard to Nanda Dulal's complaint said:

> The allegation that Monmohan (father of Nanda Dulal) refused to lend money because Nanda told him that Sailesh was a bad character is almost absurd.

It is clear that the learned Commissioners themselves thought that there was nothing whatever in Sailesh's alleged grievance against Nanda Dulal. As regards Sonatan's allegations the learned Commissioners said:

> Sonatan alleged in his written statement that the approver was known to him from boyhood but as the approver took to evil ways Sonatan's guardian stopped him from association with Sonatan and forbade Sailesh to come to Sonatan's house and for that reason Sailesh bore a grudge against Sonatan and falsely implicated him in the conspiracy. There is no evidence in support of this allegation nor did any circum-

stance transpire in cross-examination to support it. Having regard to the age of the approver it also seems to us that the allegation is improbable.

It is quite clear that the defence made no attempt to substantiate the theory that Sailesh was in any way actuated by ill-will towards any of the accused. Certainly no such ill-will was proved. (His Lordship then discussed the evidence in detail in chronological order and then continued.) We now come to the events of 1st September 1933, the day before Mr. Burge was murdered. According to the evidence of the approver on the afternoon of that day, Nirmal Jiban Ghosh, Sonatan Roy and himself went to Abash to see the "Ind" ceremony. He says: "I had gone at about 4 p. m. and returned after dusk." He also said that he read with his private tutor that night. In re-examination he said:

> Nirmal, Sonatan and I first went to Abash on cycles to see Ind ceremony sometime after 4 p. m. We left Abash at about 5 p. m. We then went to Amulya Dutt's house about 10 minutes after. From Amulya's house we went to the meeting at Pachatgarh tank.

That these three persons did go to Amulya is confirmed by Amulya himself. It is argued on behalf of the defence that there was nothing sinister in this inasmuch as it appears from the evidence of Amulya Krishna Dutt (14) that other boys also used to inquire whether Mr. Burge was playing. We are completely in the dark as to the reason which led them to make such inquiries. Of course if these two appellants thought that Mr. Burge was a good player and would be interested in watching him play there would be nothing at all sinister in such an inquiry. So far from attempting to establish any such explanation both these appellants deny that they made this inquiry at all. It is therefore quite clear that the reason given by the approver for it, is the true one, namely to ascertain whether Mr. Burge would be at the match in order, that arrangements might be made for murdering him there. A special argument was put forward by Mr. N. K. Basu on behalf of Sonatan Roy to the effect that he cannot possibly have made this inquiry as it is impossible to make the various times fit in. In the first place Sonatan was attending a practical chemistry class and Mr. Basu has contended that he could not possibly have left that class before about 10 minutes to 5. This argument is based upon the evidence of Durga Prasad Bhakat (53), a demonstrator in the Midnapur College. It is astonishing to find that this witness was called by the Crown at the request of the defence. It is obvious that witnesses to establish anything in the nature of an alibi ought to be called by the accused person who takes that line of defence. Unless evidence of that character is tested by cross-examination on behalf of the Crown, it is very difficult for anyone to say what value should be attached to it.

This witness stated that the practical period is divided into two portions of forty-five minutes each. The only importance of this evidence is its bearing on the statement of the approver that Sonatan accompanied him to Abash. It appears from the evidence of Jotish Chandra Roy (54), another demonstrator, that it was only after the murder of Mr. Burge that the Principal issued orders that the students should not be allowed to leave their classes before the period was over. We therefore see no reason why we should reject the approver's story with regard to Sonaton Roy merely because the practical class was going on at the time. It is to be noted that this argument was merely directed to show that the approver's evidence with regard to the doings of Sonaton Roy that afternoon was untrue but the excursion to Abash was on the face of it an innocent one having nothing whatever to do with the conspiracy and there is therefore no reason why the approver should have invented it. To establish the actual alibi reliance is placed on the evidence of Bejoy Krishna Dutt (20) who is also a student of the Midnapur College. In cross-examination he stated that on 1st September he "took out a procession" in order to collect money for the Flood Relief Fund and that Sonatan Roy was with him from the beginning to the end. Although he is not precise with regard to the actual time, it is unlikely that if Sonatan Roy was accompanying this procession he could have gone with the approver and Nirmal Jiban Gosh to see Amulya Dutt and attended the meeting at Pachetgarh. It is altogether extraordinary that this witness cannot re-

member what anybody else did in connection with this procession or who else was present in it. But be that as it may, in re-examination this witness could not be certain as to the date on which this procession went out. There is no reason to doubt that if in fact Sonaton was taking part in this procession he could easily have called a large number of persons to prove it. We see no reason to doubt that the approver's evidence with regard to Sonatan's movements on that afternoon is entirely true.

We now pass to what is from many points of view the most important event prior to the incidents in connection with the actual murder of Mr. Burge, that is to say the last meeting of the conspirators, namely that which took place at the ghat of the Pachetgarh tank on the evening of 1st September. The approver in his evidence in Court said that in the afternoon of 1st September, he, Nirmal Jiban Ghosh and Sonatan Roy went to the house of Amulya Krishna Dutt to enquire whether Mr. Burge would play for the Town Club on the next day. The approver then went on to say that after ascertaining that Mr. Burge would play for the Town Club the next day (i. e. on 2nd September), they and others met at the ghat of the tank which is close to the house of Anath. The approver stated that at that meeting the respective duties of the members of the party in connection with the murder of Mr. Burge were assigned and he gave a detailed account of the allocation of the duties. Anath and Mrigen were to kill Mr. Burge; Santi Gopal Sen was to stand to the west of the field with a revolver to assist Anath and Mrigen to escape; Brojokishore Chakravarty and Ram Krishna Roy were to give the signal to Anath and Mrigen for committing the murder; Nirmal Jiban Ghosh with a revolver was to be near the Mission School and Kamakhya Charan Ghosh was to remain with a revolver near the Collectorate; Sonatan Roy was to stand with a dagger on the Diamond Ground and the approver himself was to remain with a dagger on the College ground; Sukumar Sen Gupta and Manindranath Nath Choudhury were to destroy the books and correspondence belonging to the party. Evidence to corroborate the approver was given by Gouri Dassi (22) and Bepin Behary Pramanik (29). Gouri Dassi (22) stated that at about 5 or 5-30 in the afternoon of 1st September when she went to the ghat of the Pachetgarh tank to wash her cloths she saw there Anath, Mrigen, Brojokishore Chakravarty and seven or eight others, in all ten or twelve; some seated on the masonary benches on the ghat and some standing. All of them were talking. Bepin Behari Pramanik (29) says that on that afternoon, while he was passing by the side of the Pachetghar tank just before sunset, he heard a voice from the direction of the ghat saying that the Magistrate must be finished on the playground and that the next day would be his last. The voice he did not recognise. But he then heard another voice which he recognised to be that of Anath Panja saying, "Certainly", and still another voice he recognised to be that of Mrigen Dutt saying "Take care". When he rounded the wall and advanced to a point from which the ghat was visible and came quite close he recognised Anath Panja, Mrigen Dutt, Brojokishore Chakravarty and Ram Krishna Roy amongst five or six other boys at the ghat.

At the trial the main criticism directed against the evidence of Gouri Dassi (22) was that at the identification parade held in the jail she could not identify Brojo Kishore Chakravarty although she stated that she had known him for about a year previously. The learned Commissioners commenting upon this said:

> It appears that at the jail identification parade eight groups of persons were shown to the witnesses and that in each group there were about forty persons. Each of the groups consisted of thirty six outsiders, the same thirty six outsiders together with four or five suspects Gouri Dasi is a woman about fifty years of age. We are inclined not to attach great importance to her failure to identify Brojokishore at the identification parade in view of the large number of persons, really over three hundred in all, who were submitted to her inspection and we are inclined to think that in an environment which was strange to her (the parade was held inside the jail) she may not have examined carefully the persons paraded for her and was probably in a hurry to get out as early as possible from the parade.

A similar criticism was directed against Bepin Pramanik, namely that he could not identify Ram Krishna at the identification parade although he says

he knew Ram Krishna from before both by sight and name. Similar criticisms have been urged before us and the fact that Gouri Dasi (22) did not pick out Brojokishore Chakravarty and the fact that Bepin Pramanik (29) did not identify Ram Krishna Roy have been made the basis of the suggestion that the evidence of these two witnesses with regard to the Pachetgarh meeting ought to be rejected. The learned Commissioners point out that the Magistrate (Babu Kulada Ranjan Das Sarkar) who held the test identification parade said in his evidence that:

> The identification parade started at about 4 p. m. and was conducted hurriedly in order to get it finished before dusk on account of the existence of the Curfew order in Midnapur, and we are inclined to think that a fair opportunity may not have been offered to Gouri Dassi and Bepin Pramanik to pick out the persons whom they claimed to know and we are not inclined to attach too much importance to their failure at the identification parade.

We ourselves do not attach any importance to the failure of these two witnesses to pick out Brojokishore Chakravarty and Ram Krishna Roy, having regard to the manner in which the identification parade was conducted. In fact we are really surprised that any witness identified anybody. The procedure adopted by the Magistrate was this. The witnesses informed him that they had come to see if they could identify any of the suspects confined in connection with the Burge murder case. They were then taken to the various groups and if they picked out anyone they were asked in what connection they identified him. We are completely in the dark as to what the witnesses meant or how they were supposed to know who were the suspects confined in connection with the Burge murder case. We do not know whether they thought they were asked to identify persons whom they suspected themselves or whom they thought or had been told by the police were such suspects. It is clear that no useful purpose whatever could be served by a test identification parade conducted in this manner. The Magistrate should have started the proceedings by asking these witnesses whether they would be able to pick out any persons whom they had seen meeting together at the Pachetgarh tank on the afternoon before the murder. If this had been done, there is no reason to suppose that they would not have picked out these appellants. But even had they done so no useful purpose would have been served. Bepin Pramanik (29) served as a clerk of the father of Ram Krishna Roy and he must have been previously well acquainted with Ram Krishna. Gouri Dassi knew Brojo Kishore Chakravarty by name. If these witnesses had picked out these men at the test identification it would in no wise have served to substantiate the truth of their evidence. The fact that they did not do so in the circumstances in no way affects their credibility.

No other criticism was made with regard to the evidence of these witnesses. The learned Commissioners said:

> So far as the fact is concerned these two persons saw a number of persons sitting at the ghat and so far as their evidence bears on the subject of conversation of those boys we find no reason from their testimony to disbelieve them.

We also find no reason whatsoever for not accepting the evidence of these two independent witnesses and this evidence clearly establishes that there was a meeting at Pachetgarh tank on the afternoon of 1st September at which the majority of the conspirators were present. Furthermore it affords ample corroboration of the approver's story of the meeting. The approver stated that he himself, Nirmal Jiban Ghosh, Brojokishore Chakravarty, Sonaton Roy, Kamakhya Charan Ghosh, Ram Krishna Roy, Anath Panja and Mrigendra Dutt were amongst those present. Ram Krishna Roy was asked to inform Santi Gopal Sen of the duty allotted to him and Nirmal Jiban Ghosh was asked to inform Nanda Dulal Singh. In passing, we may mention that Nanda Dulal was the only one of the appellants who at the trial attempted to set up anything like a substantial alibi. In answer to questions put to him under the provisions of S. 342, Criminal P. C., he said that he was not in Midnapur from the month of June to the month of September and in the written statement which he put in he stated that he was prosecuting his studies in Calcutta since July 1933 and residing there and not at Midnapur. He went on to say that as 3rd September was a Sunday and as the other students of the medical school were granted holidays on 4th, 5th, 6th and 7th September, on account of the examination of the irregular medical

students, he came home on 2nd September last. He however called no witness in support of that defence and as far as we can see there is nothing whatever to show that he was not present and taking part with the conspirators in Midnapur on all the occasions when the approver and the other witnesses said that they had seen him there.

We now come to the events of the day of the actual murder of Mr. Burge. On that day there was a football match on the police ground between the Mohamedan Football Club and the Town Club in connexion with the Corners Shield Competition. Mr. Burge was to play for the Town Club. At about 2 o'clock or shortly after Brojokishore Chakravarty was seen by the witness Gouri Dassi (22) paying money to Anath Panja. That corroborates the approver's statement that Brojo Kishore was not only the leader but also the treasurer of the party and the suggestion of the prosecution is that Brojokishore was providing Anath with means to assist him in making his escape after the projected murder and supporting himself while in hiding. At about 2 or 2-30 p. m., Nirmal and Anath were seen together near the Public Library as appears from the evidence of Dhirendra Nath Nandi (33). The only criticizm that was made on behalf of the appellants as regards this witness was that he was related to persons in public positions and so amenable to police influence. We need hardly say that we do not consider that this was any reason why he should falsely implicate Nirmal Jiban Ghosh, or anybody else. At 4 p. m. Brojokishore Chakravarty, who sometime previously had attempted to bring Jagadish Chandra Chandra into the party, spoke to Jagadish. He said that probably he (Brojokishore) would be arrested that day. At 4-30 p. m. Anath Panja, Mrigendra Dutt, Santi Gopal Sen, and Nirmal Jiban Ghose were seen together at Golkuechak.

It was noticed that Nirmal was smoking a cigarette. The evidence of the approver on this point is confirmed by that of Jitendra Mohan Hazra (25). At about the same time Ram Krishna Roy, Kamakhya Charan Ghosh, Sonatan Roy, Brojokishore Chakravarty and Bijoy Krishna Ghosh were seen together near the Collectorate going in the direction of the police lines. The evidence of the approver with regard to this is confirmed by that of Kishori Mohan Mal (21). He says that he saw these persons passing by the road in front of the Subdivisional Officer's Court towards the police lines. They stopped in front of the Subdivisional Officer's Court and talked together for some time. Kamakhya Charan Ghosh turned towards the south and the others proceeded towards the police lines. At 5 p. m. Anath Panja, Mrigendra Dutt, Nirmal Jiban Ghosh, Brojokishore Chakravarty and Ram Krishna Roy were seen in a group near the Mission School, quite close to the Police Ground. Khairul Alam (17) said that he asked Nirmal if he would go to witness the match on the Police Ground. Nirmal said : Go on, I am following." Khairul Alam then walked to the Police Ground and took his stand on the southern line near the goal. At that time the players of the Mohammedan Football Club were kicking the ball about for practice near the southern goal. The match had not begun. Sometime after, Anath Panja, Mrigendra Dutt, Ram Krishna Roy and Brojo Kishore Chakravarty arrived. Ram Krishna and Brojo Kishore stood on the south-east corner of the ground. Anath and Mrigen went on to the field and began to play. Sometime after came Nanda Dulal. He talked to Ram Krishna and Brojo Kishore and then went away. Then Mr. Burge came in a motor car. He alighted from his car and went on to the ground. At once Khairul heard sounds of "Khat Khat." He could not say who was responsible for the sounds. He heard the sounds.

The evidence of this witness taken in conjunction with what has gone before proves beyond all shadow of doubt whatever that Nirmal Jiban Ghosh, Brojo Kishore Chakravarty and Ram Krishna Roy along with Anath Panja and Mrigendra Dutt were implicated in the actual murder itself. It shows that Brojo Kishore Chakravarty, Ram Krishna Roy, Anath Panja and Mrigendra Dutt and then Nanda Dulal Singh were all on the Police Ground together immediately before the murder ; Nirmal Jiban Ghosh, according to the prosecution case, having stayed behind in order to take up the position assigned to him at the Pachetgarh meeting. At 5-10 p. m. Burge was killed. It appears from the evidence of Captain Linton (3), Mr. Smith (9) and

Mr. Jones (10) that a revolver and a pistol were taken from the assassins. Anath was killed on the spot and Mrigen was wounded. He died the following day in the hospital. We have referred to the fact that bullets which had been fired from the revolver used by Anath Panja in killing Mr. Burge were found at places where the revolver practice had been carried out.

It will be seen from the foregoing recitation of the events in chronological order that the conspirators made no less than four "previous attempts," (to adopt the expression used by Mr. H. D. Bose) to kill Mr. Burge. The Commissioners point out that it was in contemplation to murder Mr. Burge on the day of the charity match between Mohan Bagan and Midnapore Mixed which was played on the 12th August on the College Ground. No opportunity having presented itself on that date it was next arranged, according to the approver, that an attempt should be made on the 16th August when the League Final Match was played between the Institute and the College on the Police Ground. On this occasion also no opportunity having presented itself, the next occasion chosen was the public meeting in connexion with Flood Relief arrangements. That meeting was held in the Central Bank building under the presidency of Mr. Burge, on the 19th of August. On that date also nothing could be done and then an attempt was to be made at the match in connexion with the Bradley-Birt Challenge Cup which was played on the Police Ground between the Institute and the Town Club on the 31st August. The learned Commissioners point out that there was evidence that Mr. Burge was present on all these occasions, but there was no opportunity found for the projected murder. The evidence of the approver implicates all the appellants in these designs.

The Commissioners have analysed and set out in their judgment in separate sections, under the names of each of the appellants respectively the evidence of the approver as it touches each one of them and the evidence of other witnesses both as it affords corroboration of the approver's story and as constituting distinct and independent testimony in support of the prosecution. We do not think it necessary to attempt to recapitulate the evidence in that form. We have examined and considered the evidence against each of the accused as set forth by the learned Commissioners and we are entirely satisfied that the case for the prosecution as against each of the appellants severally and individually has been proved beyond any doubt whatever. It is to be observed that most of the appellants made no answer to the charges brought against them beyond a bare denial of their guilt and an assertion that all the evidence given against them is false thereby denying the existence of incidents which, in themselves and apart from the other aspects of the case, might have been quite innocent, such as the walk to Gope or their association together. The learned Commissioners, have dealt with the case carefully and conscientiously and with a full sense of the responsibility which lay upon them. They gave every possible latitude to the defence even to permitting the prosecution to call one or two witnesses who according to normal procedure, ought to have been called by the defence and the Commissioners took into account and seriously discussed all the arguments which were put forward on behalf of all the accused persons including arguments of a somewhat fantastic character and those merely based on forensic theories. We in our turn, as already stated, have given this case our most anxious consideration. We have re-examined and sifted all the evidence for ourselves and we have directed our attention and given the utmost consideration to all the arguments advanced by the counsel on behalf of their respective clients. In the result we can come to no other conclusion than that the conviction of all these appellants is wholly right and justifiable both on the facts and in law. The appeals of all the appellants must therefore be dismissed. As regards the sentences the learned Commissioners said that they had given their very anxious consideration to the matter. They say:

> We can conceive of circumstances in which a young man might joint a terrorist organisation which had murder for its object, join in wild talk and even take part in plans for the projected murder without fully facing the fact that action would really be taken to carry out that murder.

They then said that in the case before them however

where two previous District Magistrates had already been murdered, no possible ground could exist for any youth who joined the conspiracy to fail to be aware that it was a conspiracy in deadly earnest. The evidence shows that the accused persons Brojo Kishore Chakravarty, Nirmal Jiban Ghose and Ram Krishna Roy had already joined the party before the murder of Mr. Douglas. It shows that after the murder of Mr. Douglas Brojo Kishore became the leader of the party and that he throughout took a directing part in arranging the murder of Mr. Burge. The evidence shows moreover that both Nirmal and Ram Krishna were active in pursuing the object of the conspiracy and that they both took a leading part in all the activities of the conspirators.

The Commissioner took notice of the fact that Nirmal's intimacy with the approver seemed to throw the activities of Nirmal Jiban Ghosh into disproportionate prominence. They were however of opinion that even making allowance for that fact it was clear that Nirmal Jiban Ghosh was one of the most enthusiastic and active members of the conspiracy. The Commissioner also took into consideration in favour of the accused what they described as the extreme youth of these three boys as well as the insidious propaganda by which their minds were slowly poisoned. The Commissioner felt however that these circumstances could not weigh against the deadly object of their activities which were carried on and indeed carried on with greater vigour even after at least one District Magistrate had been murdered during their membership of the party. It is for these reasons that they sentenced Nirmal Jiban Ghosh, Brojo Kishore Chakravarty and Ram Krishna Roy to death. As regards Kamakhya Charan Ghosh, Sonatan Roy, Nanda Dulal Singh and Sukumar Sen Gupta the Commissioners found that their activities in pursuance of the conspiracy were a little less pronounced and so in their case they were of opinion that the extreme penalty of the law need not be exacted. They were therefore sentenced to transportation for life. We for our part have also given our very anxious consideration to the question of the sentences passed upon all the convicted persons respectively. We are quite unable to find any reason for saying that those sentences were not entirely just and correct in the circumstances of the case.

Mr. S. K. Basu contended that the finding of the Commissioners that the three men sentenced to death took a prominent part in the conspiracy is based upon the uncorroborated testimony of the approver. We may observe that if the criterion to determine whether the extreme penalty is to be imposed is the amount of activity displayed by a particular conspirator, it is in ordinary circumstances only possible to find out what that activity was from the evidence of somebody who was himself within the conspiracy. In the present case we have not only the evidence of the approver but also that of Gouranga Mohan Roy (18), Jagadish Chandra Chandra (31) and Parimal De (39) on this point. In view of what they have said there can be little doubt that they were members of the party using that term in a wide sense. But it has not been proved that they were actually members of this particular conspiracy to murder Mr. Burge. None of the witnesses who gave evidence with regard to the meeting stated that any of these men were present. It is abundantly clear from the evidence of these men, whom we have no reason to disbelieve, that Nirmal Jiban Ghosh, Brojo Kishore Chakravarty and Ram Krishna Roy made a determined attempt to enlist them into the inner circle of the party. It is also to be noted that these three appellants are the oldest in age of all the appellants before us and have been actively engaged in revolutionary activities for a longer period than the others. Brojokishore actually recruited Nirmal Jiban Ghosh, Kamakhya Charan Ghose, Anath Panja, Mrigendra Dutt and Santi Gopal Sen and he was the leader of the party and its treasurer. Mr. Basu's real difficulty lies in the fact that he was quite unable to show any extenuating circumstances which would justify us in interfering with the decision of the Commissioners. No doubt if it could have been shown that these appellants were impressionable youths who were under the domination of some more powerful character so that they were deprived of their independent judgment and that they had expressed regret for what they had done, extenuating circumstances might have been pleaded. But so far from doing that the appellants have peristed up to the very end that they were not members of the conspiracy at all and that a false case has been

manufactured against them, and so far as there is any question of domination the evidence shows that the dominating members of the party were, in fact, Nirmal Jiban Ghosh, Brojokishore Chakravarti and Ram Krishna Roy.

We would point out that there is nothing in the argument which was directed to differentiate the position of these three appellants from that of the others as regards the sentences. It is a two-edged argument because it might equally lead to the conclusion not that they ought not to have been sentenced to death but that the rest of the appellants should have shared the same fate because the normal penalty for the offence of which all the appellants have been found guilty is death and a less grave sentence should only be passed where manifestly there are extenuating circumstances. However unpleasant the duty may be, we feel we have no other course open to us in the present instance than to confirm the sentences which the Commissioners have thought fit to pass. We accordingly confirm the sentences of death passed on Nirmal Jiban Ghosh, Brojikishore Chakravarty and Ram Krishna Roy.

K.S. *Appeals dismissed ;*
Sentences confirmed.

A. I. R. 1935 Calcutta 526

PATTERSON AND CUNLIFFE, JJ.

Emperor

v.

Motilal Mallik—Accused.

Death Ref. No. 21 and Appeal No. 621 of 1934, Decided on 1st October 1934.

(a) Penal Code (1860), S. 34—'Act' includes series of acts but all in pursuance of common intention.

The word "Act" includes a series of acts, and S. 34 contemplates, amongst other things, a series of acts done by several persons, some perhaps by one of those persons and some by another, but all in pursuance of a common intention. [P 532 C 2]

Where the accused who was in the company of others who had fired shots did not try to run away or even try to prevent his companions doing what they did but he was seen putting his hand on his waist belt where lay a dagger to wound those who where surrounding him:

Held: he also was guilty of the murder like his companions. [P 532 C 2]

(b) Penal Code (1860), S. 302—Accused aged 20—It is not sufficient to justify lesser penalty.

The fact that the age of accused is only 20 will not be sufficient to justify in refraining from imposing the maximum penalty prescribed by law, a man of twenty being of a sufficient age to be fully able to realize the nature of his acts. [P 532 C 2]

Khundkar and *Anil Chandra Roy Choudhury*—for the Crown.

Suresh Chundra Taluqdar, *Bejan Behari Das Gupta* and *Mohendra Nath Mitra*—for Appellant.

Patterson, J.—This reference is for confirmation of the sentence of death passed on one Moti Lal Mallick, on his conviction under S. 302 read with S. 34, I. P. C. There is also an appeal by the said Motilal Mallick against his conviction and sentence under the above sections as also against his conviction under certain provisions of the Arms Act, in respect of which no separate sentences were passed. The trial was before a tribunal composed of three Commissioners appointed by the Local Government under the provisions of the Bengal Criminal Law Amendment Act of 1925 and this being so, an appeal lies to this Court on the facts as well as on questions of law. One Kalachand Shaha was tried along with Motilal Mallick, but was acquitted, and although his case is not before us, it may at once be said that the fact of his acquittal has been urged before us as one of the grounds for not placing complete reliance on the evidence of the prosecution witnesses. It appears that the case against Kalachand failed by reason of certain defects in the evidence of identification. No question of identification, however, arises regarding Motilal Mallick and the defects referred to above are therefore no ground for regarding the evidence of the prosecution witnesses with suspicion so far as the present case is concerned. Having said this I do not propose to refer further to the case of the other accused Kalachand Shala.

The allegations on which the charges are based are briefly as follows: The principal persons concerned in the occurrence which gave rise to this case are, with the exception of witness Guljar Shah, residents of a village called Baburail which appears to be either a part, or at any rate on the outskirts of the town of Narayanganj in the district of Dacca. Witness Guljar Shah is a resident of another portion of Narayangunj or its outskirts known as Paikpara but he was well known to the people of

Baburail by reason of his close connection with the local mosque. The accused Motilal is a resident of a village called Deobhog, which adjoins Baburail to the west. His house is on a continuation of Baburail Road (which runs from east to west through Baburail) and is only a few hundred yards from the residences of the principal persons concerned in this case. On the night of 9th April 1934, three men of Baburail, namely, Alfajuddin, Ramjan and Sadey Akkas, together with Guljar Shah of Paikpara, decided to sit up at night for the purpose of detecting an intrigue that was said to be going on between the daugher of one Abdul Gani and her brother-in-law Samad. These four men took their seat in the verandah of the house of one Kameruddin Sardar, which is situated just to the north of Baburail Road. Seeing a man enter Abdul Gani's bari which is almost immediately to the west of Kamaruddin's bari, they sent Saday Akkas to Gani's bari in order to keep a closer watch over it, and meanwhile Ramjan was sent to call another neighbour, Muzaffarali by name. Muzaffar came to Kamaruddin's house on being called by Ramjan, and he together with Guljar Shah, Alfajuddin and Ramjan remained seated together on Kamaruddin's verandah. Shortly after 2 a. m. they saw three men dressed in dhotis and shirts, and having no shoes on their feet, going along Baburail Road, from west to east. Their suspicions being aroused, they accosted these three men, and went a short distance along the road with them as far as the house of one Ali. There they all stopped and presently Muzaffar and his companions attempted to seize the men and to search their persons.

Two of the men thereupon pulled out revolvers and fired at the two men who had caught hold of them, namely, Ramjan and Muzaffar, while the third man (the present accused) tried to draw a dagger that he had in his waist belt. Muzaffar and Ramjan, on being shot, released their hold and the two men who had shot them then made off towards the east, pursued by Ramjan, while Muzaffar remained on the road at the place where he had been shot. Meanwhile Guljar, seeing that the accused Motilal was attempting to draw a weapon from his waist belt had flung his arms round him, with the result that they rolled down the slope of the road together, and remained their struggling with one another. Just then Ali in front of whose house this occurrence had taken place, came to the spot, together with his immediate neighbour Ismail. Guljar Shah called out to them that the man who was struggling with him had a dagger, and asked them to take it away from him whereupon Ismail, seeing a dagger in the accused's hand, twisted his hand and managed to take it from him. The accused was then tied up and on his person being searched, a knuckle duster was found in his pocket. I ought to have said that at an earlier stage of the proceedings a bundle containing three Balaclava helmets (locally known as "monkey caps") had fallen to the ground from under the arm of the present accused, and had been picked up by Muzaffar. Thus, immediately after the occurrence, the position was that the accused Moti had been seized by Guljar Shah with the help of Ismail and Ali and that the dagger which he had already drawn, evidently with a view to using it, as well as a knuckle duster, had been found on his person. Muzaffar was still on the road in a wounded condition, and Ramjan and the present accused's two companions had disappeared into the darkness.

It should here be remarked that, on hearing the disturbance one Afiruddin whose house is situated a short distance to the south of the place of occurrence, had come to the spot, and on his way there had had a shot fired at him by two men whom he saw running away towards the east, obviously Moti's two companions. Saday Akkas who had also come to the spot from Gani's house on hearing the disturbance, was then sent off to the police station (which was only a quarter of a mile off), while the accused Moti, after being searched and tied up, was also sent to the police station, accompanied by Gulzar and others, as well as by two constables who had in the meantime come to the spot. Muzaffar however did not wait for the arrival of the police, but proceeded at once to the hospital, accompanied by Afruddin and some others. He took the bundle containing the three monkey caps with him, and two of these were taken from him by Afruddin either on

his way to, or at the hospital, while the third remained with him. The first information given to the police was by Saday Akkas and was recorded by the officer-in-charge Habibar Rahaman at 2-45 a. m. The essential facts were mentioned in this information, namely that Muzaffar and his three companions had challenged three Bhadralog youths on suspicion, and that on their seizing them, two of them had fired at and wounded Muzaffar and Ramjan and that Ramjan had followed these two and had not returned. It was also stated that one of the three assailants had been secured, together with a dagger and a bundle.

On receipt of this information the Sub-Inspector immediately proceeded to the place of occurrence, but it so happened that he did not meet Guljar Shah and the other persons who were at that time on their way to the thana bringing the present accused with them, the reason being that there are several ways of getting to the thana from the place of occurrence. Guljar Shah however arrived at the police station at 3-15 a. m., very shortly after the Sub-Inspector had left for the place of occurrence, accompanied by two constables and some local people, and bringing with him the present accused Motilal Mallik. The accused was then taken charge of by a literate constable, named Muhammad Samed Ali, who found a dagger in the hand of the accused and a knuckle duster in his pocket. Meanwhile the Sub-Inspector, on going to the place of occurrence, had searched for Ramjan and had found his dead body lying at a distance of about 60 feet from the place of occurrence and on the south side of a small and shallow khal. He had also been handed the scabbard of a dagger by one Rahij Mia who had found it, as well as a rope in front of Ali's house, on the slope of the road. A torch which is said to have been dropped by the accused and his companions was also found on this part of the road and made over to the Sub-Inspector. After having taken charge of the articles referred to above and taking the necessary steps with regard to Ramjan's dead body, the Sub-Inspector, on learning that Muzaffar had gone to the hospital went there and recorded his statement. That was at some time between 4-30 and 6 a. m. The Sub-Inspector, after recording Muzaffar's statement, took charge of a monkey cap, which the latter produced from under his pillow, as well as of two other monkey caps which were made over to him by Afiruddin.

These are the main allegations on which the charges are based, but it should be added that all the witnesses speak of a third shot having been fired, as well as the two shots which wounded Muzaffar and Ramjan. This third shot appears to have been the shot which was fired at Afiruddin on his way to the place of occurrence. It should also be added that on the day following the occurrence, a bullet was found by the side of Ali's bari and was made over to the Sub-Inspector, this bullet being identical with the bullet which was found in the dead body of Ramjan at the post mortem examination. The medical examination discloses the fact that the shots which wounded Muzaffar and killed Ramjan were fired at very close quarters probably from a distance of one to three feet. Ramjan had been shot in the neck and, apparently in a downward direction, and the shot had passed into his body and had injured one of his lungs. The medical officer who held the post mortem examination, was however of opinion that Ramjan might have been able to run some distance after receiving the injury, before he fell down and died. Muzaffar had been shot in the abdomen the shot having penetrated the body from front to back. He was detained in hospital for about a month and was then discharged fully cured.

As regards the defence taken by the accused it appears that on being first questioned by the police he remained silent. Later on he made a statement to the police alleging that an attempt had been made to rob him. When examined by the Commissioners at the close of the case he stated that he had been attacked when on his way home from the cinema and had fallen down unconscious and that, on recovering his senses he had found that a large crowd had collected; he had then been taken to the thana. In this statement, as well as in his previous statement to the police, he denied having had a knuckle duster and the dagger in his possession. The defence taken by his pleader in argument at the close of the trial before the Com-

missioners was that as Moti was returning from the cinema, he had been seized on suspicion of having been concerned in the shooting and taken to the thana and that the dagger and the knuckle duster had been planted on him in order to strengthen the case against him. Before us however the learned advocate appearing on his behalf has taken in the line that there are certain features in the case, and especially in the evidence of Muzaffar which tend the throw suspicion on the whole story, and further that even if the evidence be accepted in its entirety, it is not sufficient to establish the fact of actual participation in the crime nor the existence of any common intention to commit murder.

It is not and cannot of course be denied, that the person who shot Ramjan in the neck at close quarters was guilty of murder, and if the evidence be accepted, the only question is whether the circumstances are such as to attract the operation of S. 34, I. P. C., and so to make the present accused also liable for the murder of Ramjan.

As regards the actual external facts there is litle to be said. It has been contended on behalf of the accused that there is no mention of the monkey caps, the dagger and the knuckle duster having been found in the possession of the accused in the earliest recorded statements, and our special attention has in this connection been drawn to the statement of Muzaffar which was recorded by the Sub-Inspector at the hospital in the early hours of the morning following the occurrence. That statement contains a mention of the monkey caps, but not of the dagger and the knuckle duster nor does it contain any mention of the fact that Ali and Ismail had come to the spot immediately after the occurrence. Our attention has also been drawn to the so called "dying declaration" of Mazuffar Ali which was recorded in the hospital by a Magistrate at about 8 a. m. on the day following the occurrence. In that statement too the monkey caps are mentioned, but there is no mention of the dagger or of the knuckle duster nor is there any mention of Ali and Ismail having come to the spot. It further appears that in his so called "dying declaration" Muzaffar stated that he had himself helped to secure this man, the present accused, when he was struggling with Guljar Shab, whereas in his evidence he has denied having done so, or even having said that he had done so. It seems to me that these are small matters, in respect of which discrepancies are almost bound to occur especially as the deponent was suffering from a severe wound at the time when the statements referred to were recorded.

Moreover these statements did not really form the starting point of the investigation. The starting point of the investigation was at 2-45 a. m. when Saday Akkas went on ahead to the thana, and told the Sub-Inspector of what had occurred and in that information mention was made of the man who had been captured having had a dagger and a bundle in his possession, although no mention was made of the knuckle duster. It is moreover clear from the evidence of the Head Constable who was left in charge of the thana when the Sub-Inspector went to the place of the occurrence, that the accused was produced in the thana at 3-15 a. m. by Guljar Shah who is said to have taken the principal part in securing him, and that a dagger and a knuckle duster were produced along with him, the dagger being found in his hand and the knuckle duster in his pocket. In these circumstances it is quite impossible to attach any importance to the omissions referred to above in the earlier statements made by Muzaffar and it is quite impossible to hold that there was any concoction of evidence even if any one had wished to concoct evidence against the present accused. Actually no suggestion has been made as to why any one should wish to concoct evidence against the present accused. It is true he lives at quite a short distance from the houses of some of the principal witnesses, but he is only very slightly known to these witnesses, and there is no suggestion of any enmity existing between him and them. As has been suggested on behalf of the accused that the dagger, the knuckle duster and the monkey caps might not have been with the accused at all but that they might have been left behind by his companions.

For the reasons indicated above, namely that there was no motive for the concoction of evidence against the

accused and that moreover there was no time for such concoction, I have no hesitation in rejecting this suggestion as being entirely devoid of foundation. So far as the other evidence in the case is concerned no suggestion has been made as to why it should not be believed. That evidence consists mainly of the evidence of two out of the three persons who seized the accused and his two companions namely Muzaffar Ali and Guljar Shah and also the evidence of Alfazuddin who does not however appear to have taken any active part but who was present throughout the occurrence. The third man who seized one of the accused's companions was Ramjan who is dead. So far as what might be called the external facts are concerned, there is therefore the evidence of the three witnesses I have just mentioned and their evidence is corroborated by the evidence of Saday Akkas, Ismail Ali, and Afiruddin who came to the spot immediately after the occurrence, as well as by the evidence of the Sub-Inspector to whom the facts were at once reported, and the evidence of the literate constable before whom the accused and the incriminating articles were produced, very shortly after.

I have no hesitation in accepting this evidence in its entirety, and the only question remaining to be considered is whether the circumstances established by that evidence are such as to attract the operation of S. 34, Penal Code. This is indeed the only substantial question that arises for decision in this case, and in order to decide it, it is necessary to consider the facts established by the evidence a little more closely. It appears that when the accused and his companions were first observed by Muzaffar and the other three watchers at Kamaruddin's house, the present accused was a little behind the other two, and that on being challenged, the accused at once stopped and said to Muzaffar: "Don't you know me, I am Moti. These persons came to have a meal at my house", and so on. In the meanwhile the other two men had moved on in an easterly direction and on being again challenged, one of the two stopped while the third continued to move onwards towards the east. Muzaffar and his friends together with the accused Moti, and the other man who had stopped, followed the third man and all of them finally stopped in front of Ali's house. The evidence is that a torch was then produced and that by its light one of the men was recognized as the present accused Moti, Moti's two companions being found to be complete strangers to the witnesses. Seeing a bundle under Moti's arm, Muzaffar asked what it was. Moti said it was nothing. Muzaffar then pulled Moti's arm and the bundle fell on the ground. It was then discovered that it contained three "monkey caps" which, it may here be observed, are eminently suited for disguise, as they only leave a small portion of the face visible. Seeing these caps, Muzaffar caught hold of the man next to him by the arm, and asked Ramjan to pick up the caps. Guljar at the same time caught hold of Moti, while Ramjan seized the third man. The man whom Muzaffar had seized thereupon drew a revolver, and shot Muzaffar in the abdomen, and the man whom Ramjan had seized shot Ramjan on the neck, while Moti struggled hard to draw the dagger he had in the waist-belt. What happened next has already been described, and it is not necessary to restate it. The question is what inference should be drawn from the facts referred to above. In the first place, it is abundantly clear that Moti and his two companions had set forth together for the purpose of committing some crime involving violence and the use of the weapons with which they were armed.

It is also a reasonable inference that their common intention was, if necessary, to commit murder either at the time of the commission of the crime which was the object of their expedition, or in order to enable them to escape in the event of their being interfered with. It has been pointed out that there is no evidence of previous conspiracy between them, but the facts speak for themselves. There must have been an agreement between them before setting forth fully armed, at dead of night, in the manner described by the witnesses. It has further been suggested that each may not have known how the others were armed. It was however vital to the success of their joint enterprise, and essential to the safety of each, that each should know how the others were armed, and that there

should be some agreement between them, as to how and in what circumstances their respective weapons were to be used.

I however agree with the learned Advocate appearing for the accused in his contention that a mere common intention to commit murder in certain circumstances, might not, of itself, be sufficient to justify a finding that the accused and his companions had, at the time of actual occurrence, the common intention of murdering Ramjan. In order to decide whether or not the accused and his companions had the common intention of murdering Ramjan, it is necessary to consider what happened immediately before Ramjan was shot, and on a consideration of the facts disclosed by the evidence, as set forth above, I have no hesitation in holding that the accused and his two companions acted in concert at that time, and that they all had the common intention of murdering the persons who had seized them, in order to make good their escape. It was only Ramjan's assailant who succeeded in killing his man, while Mozaffar's assailant failed although he did his best to kill him, while the present accused Moti's conduct shows that he would have tried to kill Guljar Shah if he had been able to use his dagger. The dagger in question has been produced before us. It is about a foot in length, and about an inch in width, and is indeed a most murderous weapon. The circumstances under which the murder was committed are therefore such as to leave no doubt in my mind that the accused and his two companions stand in the same common intention, namely the intention of causing the death of the persons who had accosted and seized them.

It has been contended on behalf of the present accused that both his own conduct and the conduct of his two companions, immediately before the actual shooting took place, indicate that there was no such common intention, and that if they had any such common intention, it had been abandoned or frustrated so far as Motilal was concerned. It has been pointed out that Motilal had stopped and spoken to Muzaffar and his companions as soon as the latter had accosted them, that there had been no resistance offered when the bundle of monkey caps was snatched from under Moti's arm and that it was only when Moti's companions were seized and an attempt was made to search them, that the firing took place. Moti's conduct, it is suggested, indicates that he had no intention of offering any forcible resistance to the persons who had accosted him, and that if he had any such intention, he had seen that resistance was useless, and had abandoned the idea. It is also contended that the conduct of Moti's companions in not attempting to intervene on Moti's behalf, indicates the absence of any common intention between them and Moti. I am unable to accede to these contentions.

It seems to me that the only reasonable explanation of the conduct of Moti and his companions is that Moti was a known man, being a resident of that locality. He knew, and his companions knew, that even if it were possible for him to make good his escape that night, he would inevitably be brought to book later on. His companions, on the other hand, (the men who were armed with revolvers), were complete strangers who, if they could make good their escape at that time, were likely to escape punishment altogether. Moreover the fact that they were armed with revolvers indicates that they were the most important members of the party, and that being so, their main object would naturally be to escape, and Moti's main object would be to enable them to escape. This he at first attempted to do by putting up a false story that they were his friends, that they had come to his house on a visit, that they had dined with him, and so on, thereby seeking to gain time and thus enable them to escape. When however Muzaffar and his companions caught hold of them, and indicated their intention of searching them, Moti's conduct showed that he was in complete unanimity with his two companions, who at once proceeded to use their weapons, with the result that Ramjan was killed and Muzaffar severely wounded, and with the further result that the two principal men, the men armed with revolvers, were able to make their escape. It has been suggested that the circumstances are compatible with the theory that the shooting of Ramjan was an individual act on the part of one of Moti's two com-

panions, and that Moti cannot be held responsible for that act by virtue of the provisions of S. 34, I. P. C. I am unable to accept this contention. The act of the man who fired the fatal shot was, in the eye of the law just as much the act of Motilal, as if the latter had fired the shot with his own hand.

Our attention has also been drawn to the fact that Ramjan's dead body was found at a distance of about 60 ft. from the place of occurrence, that is to say from the place where the accused and his companions were seized, and also to the evidence to the effect that Ramjan ran after the two men with revolvers when they were trying to escape. It is suggested that Ramjan may have been shot after going for some distance in pursuit of these two men, and it is contended that, if that were the case, Moti Lal ought not be held responsible for the murder. There would have been great force in this contention, if it were possible to hold that Ramjan may not have been shot at the actual place of occurrence, but at some distance from it, but it is not possible so to hold. The medical evidence shows that the shot which killed Ramjan was fired from very close quarters indeed, and the evidence of all the eye-witnesses is to the same effect. Only two shots were fired at the place where the accused and his companions were seized, and those were the shots that killed Ramjan and wounded Muzaffar. The third shot was fired at some little distance from that place, but it cannot have been that shot that killed Ramjan, for it is stated by Afiruddin, whose evidence there is no reason to disbelieve, that that shot was fired at him. This being so, I have no hesitation in holding that the shot that killed Ramjan was fired at very close quarters at the time of the struggle in which the accused and his two companions were simultaneously involved, and after Ramjan had gone in pursuit of Moti's companions. In my opinion, the facts as found above are clearly such as to attract the operation of S. 34, I. P. C. That section runs as follows:

> When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.

This section has been fully discussed by their Lordships of the Privy Council in 52 Cal 197 (1) in which it has been pointed out that the word "act" includes a "series of acts" and that S. 34 contemplates, amongst other things, a series of acts done by several persons, some perhaps by one of those persons and some by another, but all in pursuance of a common intention. At p. 211 of the report it is laid down that

> Section 34 deals with the doing of separate acts, similar or diverse, by several persons; if all are done in furtherance of a common intention, each person is liable for the result of them all, as if he had done them himself.

Again on p. 217 of the same report we find the following passage:

> In other words, a criminal act means that unity of criminal behaviour, which results in something for which an individual would be punishable, if it were all done by himself alone, that is, in a criminal offence.

Applying these principles to the facts of the present case I think it is impossible to come to any other conclusion than that the accused is, by virtue of the provisions of S. 34, to be held to have been guilty of murder and that he has been rightly convicted under S. 302 read with S. 34, I. P. C. On the question of sentence, there are only two things that can be said in the accused's favour (1) that he is very young—his age being about 20 and (2) that his was not the hand that fired the fatal shot. As regards the second contention I am of opinion that in the circumstances of the present case, the accused is not only just as guilty in the eye of the law, but that he is also just as guilty morally, and from every other point of view, as if he himself had fired the shot that killed Ramjan. With regard to the fact that his age is only 20 this fact would not be sufficient to justify in refraining from imposing the maximum penaly prescribed by law, a man of twenty being of a sufficient age to be fully able to realize the nature of his acts. I would accordingly dismiss the appeal, uphold the conviction, and confirm the sentence of death passed by the Commissioners.

Cunliffe, J.—I am of the same opinion. The appellant has been convicted and sentenced for the crime of murder by a Special Tribunal on the basis of S. 34, the common intention of the section of the Penal Code. That section is

1. Barendra Kumar Ghose v. Emperor, 1925 P C 1=85 I C 47=26 Cr L J 431=52 I A 40=52 Cal 197 (P C).

a statutory embodiment of the English common law principle that there is joint responsibility between co-conspirators, —a very old rule. Those who are interested in criminal law know that it goes so far back as Hales' Pleas of the Crown. Now the first point that was considered by the Special Tribunal in regard to this case was whether the crime committed by the unknown absconder was in reality murder. The story which has been detailed by my Lord in his judgment can be briefly referred to again. Three conspirators, of whom the appellant was one, were found on the road at about two in the morning by certain villagers who were sitting up, watching for evidence of a villager intrigue; and the first point that drew the attention of the watchers was that these three well-dressed young men were coming down the road without their footwear. They were stopped. The watchers came down from the open verandah into the street and challenged them. The unknown absconder was in front: the man who was put on his trial under the name of Kalachand Saha was next; and the appellant was bringing up the rear. The villagers who were all Mahommedans, became so suspicious at the answers which were given them by the appellant that each of the three men was seized by the clothes for the purpose of taking them in custody; or at any rate, of holding them until they gave a better explanation of what they were doing. Evidence goes on to show that immediately this was done the unknown leading man (the absconder) whipped out a revolver,—it must have been at a very close range and shot the villager Ramjan on the side of the neck. Then the man who was put on his trial under the name Kala Chand Saha also took out his revolver almost simultaneously and shot the man who was holding him, Muzaffarali by name.

The result of both these efforts on the part of the two criminals was that they were enabled to break away and make their escape down the road. Ramzan who died subsequently as a result of his wounds actually pursued them while Muzaffarali stayed where he was as he was badly injured, shot in the stomach. In fact after he was taken to hospital, so serious was his wound thought to be that he made a dying deposition. The conduct of the appellant was different to that of his companions. He was not armed with a revolver, as far as we know; but he was nevertheless armed and heavily armed as my Lord has pointed out, with a dagger and a brass knuckle duster; and before he was seized —because he was seized by one of the villagers (Guljar Saheb)—he was seen putting his hand to the belt which action the villagers suspected was for the purpose of drawing the dagger and making use of it. He was then thrown down on the ground; a struggle took place and two other villagers came up. Finally he was overpowered. During this struggle it was found that his hand had again gone to this handle of the knife to his belt. In fact so apprehensive was Guljar Saheb that when his two friends came to try and assist him he said: "Take away the dagger before I get up, as I am afraid of some one being stabbed" or words to the effect.

Now the primary intention no doubt of these two leading conspirators was not to commit murder, but to disable the two persons who caught hold of them. The criminals knew that, if they could disable and frighten them at the same time, there was a chance of getting away; and so it proved. But in law if a person deals such a grievous hurt to another that death takes place and the person responsible for the act knows that it is likely to take place or should know it unless he is mentally unsound, that he is guilty of murder. This is the effect as I understand it of Cls. 3 and 4 of S. 300, I. P. C. It remains to be decided whether the appellant knew when he started out on this expedition with his two companions that it was their intention to take the course they did if some such circumstances arose such as I have detailed. There is no direct evidence on the point. The evidence against the present appellant was only by way of inference. I have no doubt in my mind that the joint criminal intention of these people when they went out at night together was not only to defend themselves to the utmost with their weapons, if attacked, but in all probability they had another criminal intention to commit some definite robbery under arms. To my mind there can be no other inference to draw from their being together and armed in the

way they were armed. From the situation and from the further piece of evidence that they were carrying three disguise caps, it was obvious that they were out on a secret expedition for the commission of some crime of violence. It is little uncertain however just at the moment as to what exactly is the law in relation to homicide in Bengal. Take, for example, the Hill Station dacoity case. There the Court of appeal held that when certain evilly disposed persons, heavily armed, each gunman with an attendant carrying an electric torch, attacked the station for the purpose of robbery, and during the attack a cooly was deliberately shot in the stomach for the purpose of disabling him and he afterwards died of his wound, this was not murder.

The Court of appeal gave as their reason for this finding that the man died of peritonitis caused by his wound and they also found that the person who fired could not be supposed to have known that he was doing such a dangerous act as to cause death. I can only say with great respect to the learned Judges who decided that case that I do not agree with them. If criminals are permitted to go about the country killing innocent people in this manner and not be guilty of murder then in my view the criminal Courts might just as well cease to function. Had I been able to agree, I might find perhaps some difficulty in thinking that the action of the unknown absconder in this case was murder. But I have got no such difficulty in saying that I consider both the crime committed in this case and the Hill case to be murder and clear murder within the meaning of the Indian Penal Code. That being so, the only point that remains to be considered is the contention advanced by the defence that the conduct of the appellant was not of such a kind that it was in any way parallel to that of his two companions and his conduct could not be considered to have afforded any assistance to his companions. Mr. Talukdar has asked us to hold that in fact the appellant was surprised and had no knowledge of the extreme course which the two others would adopt and did adopt. It is quite obvious that a criminal, even if he has a criminal intention which is shared by others, can at any moment abandon that criminal intention. He can, for example, when a crisis arises, turn tail and fly. He can even go so far as to render assistance to those who were attacked or he may do something either by his act or words to prevent his companions from carrying out the crime they all had originally contemplated. The appellant did here none of these things. There is no evidence that he tried to prevent his companions from doing what they did. There is no evidence that he tried to run away. The only piece of evidence which at all bears on what happened before shots were fired, as far as his doing was concerned, is that he was seen by those who were surrounding him, putting his hand on his waist belt where lay a dagger.

In these circumstances I consider that his responsibility is on the same footing as the responsibility of each of the others would have been if they had been found guilty before a Court. It has been pointed out by the Privy Council that a man who waits outside the door of a house where robbery is committed, keeping guard in a position to give warning of anyone who may disturb his confederates, is just as much responsible for the crime as the person or persons inside; and so far as organised crime in the form of a gang robbery is concerned this is a situation which is frequently encountered. In these circumstances I consider that the appeal should be dismissed and the conviction upheld. I may add that, the sentences passed should be confirmed.

K.S. *Appeal dismissed.*

A. I. R. 1935 Calcutta 534

LORT-WILLIAMS AND JACK, JJ.

Asanulla and *others*—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 622 of 1934, Decided on 7th February 1935.

Criminal P. C. (1898), S. 297 –Charge to jury — Direction about reasonable doubt should be at end of charge or in its appropriate place—Merely to name several witnesses by their numbers without discussing their evidence is not sufficient.

A direction about reasonable doubt should appear at the end of the charge, or in its appropriate place in the body of the charge. All such matters should be introduced in the charge in appropriate places as and when something occurs in the discussion of the evidence which gives rise to them, and necessitates their application. The evidence must be sifted or weighed

so as to guide the jury to some clear conclusion. To hang a lot of witness-numbers round the neck of each accused without any discussion of the evidence given by these witnesses, is not the way in which to carry out the instructions of the High Court that the evidence of each accused must be dealt with separately.

[P 536 C 2; P 537 C 1]

Suresh Chandra Talukdar and *Priya Nath Dutt*—for Appellant.

Lalit Mohan Sanyal—for the Crown.

Lort-Williams, J.—In this case 26 persons were charged with various offences of whom 7 were acquitted and 19 convicted, and all those convicted have appealed. Of the charges, all were accused of offences under S. 147, I. P. C. No. 1, Asanulla, was also charged under S. 304. The other 25 were all charged also under S. 304/149. Nine of them were also charged under S. 304/109. Of the appellants, Asanulla was convicted under Ss. 326 and 148 and sentenced to four years and two years, respectively, to run concurrently. Sk. Bhola alias Soifulla was convicted under Ss. 148 and 324 and sentenced to two years and three years respectively to run concurrently. Nos. 3 to 8 and 11 to 19 were convicted under S. 147 and sentenced each to one year's rigorous imprisonment. Nos. 9 and 10 were convicted under Ss. 148 and 324 and sentenced to two years and three years respectively, to run concurrently.

Abdul Majid had a plot of land in Dundurpur Kitta of Mauza Chandpur in which he grew boro paddy. His servants, Hanif and Montaj, and his day labourers Waris and Reasat were transplanting paddy with the assistance of two other servants, Sifat and Rushan, when the accused, numbering 26 in all, came in a body with lathis, sulfis, jathas, kuchasolas, etc., to take possession of Abdul Majid's land. They were asked to go away and then on the order of the accused Kali Kumar, the accused Asanulla hit Hanif on the head with a sulfi, and Hasmat, Wahab, Najib, Ram Nath and Sashi Nath beat him with lathis on different parts of his body. Bhola hit Waris in the belly with a sulfi. Taimus struck Waris on the side with a kucha. Injad, Sikandar, Asad and Kanai beat him with lathis on different parts of his body. Injad struck Montaz on the abdomen with a kochashola. Husu, Hashu, Bhulai and Azamdi struck him with lathis and Taimus Khan dealt a blow with a kochashola on the hand of Reasat, and Kazim, Yakub, Tarik and Intaz struck him with lathis.

The complainant Abdul Majid stood at a little distance and then ran away out of fear while he was chased by the accused on the order of Kali Kumar. The wounded persons were taken to the hospital on the evening of the same day, and dying declarations of Hanif and Waris were recorded by a Magistrate. Hanif died in Hospital, as a result of these injuries, on 17th Jannary, the occurrence having taken place on 1st January. The learned advocate for the appellants has argued that the convictions ought to be set aside owing to misdirection by the learned Judge. He has not been able to point to any specific misdirection, but says that the charge is confused and unintelligible. This case is a striking instance of the impossibility of the task which the Criminal Procedure Code, as construed and elaborated by the decisions of this and other High Courts, has placed upon the shoulders of Judges of subordinate Courts, and it causes one almost to despair of trial by jury, under the conditions which have been imposed by the legislature.

A charge to a jury ought to be delivered extemporaneously, immediately after the conclusion of the final speeches of the lawyers engaged in the trial, or of the evidence, in the absence of such speeches. Obviously, it ought not to be written out beforehand in extenso, and equally obviously it is not humanly possible except perhaps in isolated and very exceptional cases, to write it out afterwards in extenso from memory. In the absence of a shorthand writer, no verbatim report of the charge is or can be available. Those who drafted the Criminal Procedure Code and the amendments thereof recognized this difficulty, and provided in the proviso to S. 367, that in trials by jury, the Court need not write a judgment, but the Court of Session shall record the heads of the charge to the jury. Even this must be a somewhat difficult feat to perform with regard to an extemporaneous oral statement, but even so, such a provision, if followed literally, would have the effect practically of nullifying the powers given to High Courts on appeal. The result has been that from time to time High Courts have declared that these

words must be construed reasonably, and must be held to include such a statement on the part of the Sessions Judge as will enable the appellate Court to decide whether the evidence has been properly laid before the jury or whether there has been any misdirection in the charge: cf., the decision in 23 W. R. (Cr.) 32 (1) which was followed in other cases. In 25 Cal. 561 (2) the Judges said:

> We should observe that as a rule we expect some statement in the record to show that the law has been explained to the jury

and in 34 Cal. 698 (3):

> We are not unmindful of the fact that the law requires only the heads of the charge to be recorded. At the same time, since the law allows an appeal on grounds of misdirection, it is not only desirable but necessary that the charge should be recorded in an intelligible form and with sufficient fulness to enable the appellate Court to satisfy itself that all points of law were clearly explained to the jury in reference to the facts and the evidence in the case.

In 36 Cal 281 (4), referring to circular orders of the Calcutta High Court, Ch. 1, O. 59, it was stated that:

> The heads of the charge should represent with absolute accuracy the substance of the charge, and be such as to enable the High Court on appeal to see distinctly, whether the case was fairly and properly placed before the jury.

The Judges of Subordinate Courts have therefore been placed in an impossible position, and faced with an insoluble dilemma. The only possible alternative ways in which they can satisfy the requirements of the High Court are equally wrong, and equally disengenuous. Either they must write out their charge in extenso in anticipation of the end of the trial, or they must compile afterwards from memory what they believe or hope that they said to the jury. Either production then masquerades before the High Court as the record of what the Judge actually said. In the present case the record of the charge covers 35 closely typewritten pages, and I refuse to believe that the Judge was able, afterwards, to recall to memory all the words and phrases with which he addressed the jury, and to reproduce them thus in extenso for our edification. When therefore the learned Advocate asks us to scrutinise closely the phraseology contained in this document, and minutely examine and criticise the exact words recorded, as if they were those actually used by the Judge, I declined to accede to such a suggestion. Undoubtedly, the record discloses much involved and almost unintelligible verbiage, and I can only hope and trust that nothing like it was ever actually addressed to any jury. I assume that it is but a compilation of what this and other High Courts have led the Judge to think that this Court will expect and require.

It begins with a reference to a number of sections of the Indian Penal Code and some explanation of the provisions therein contained, but without relating them to the particular facts of the case as the explanation proceeds. Then follows a very long and most involved and unintelligible statement, covering several pages and relating to the charge of rioting and to "unlawful assemblies" and "common objects", without any clear explanation about what these terms mean, or how they apply to each of the accused. Equally involved explanations follow about other charges, for another five pages, to which the same kind of criticism applies. Then comes the first head of charge "caution", in which a number of legal maxims, parts of decisions, and judicial platitudes (including, I observe sadly, some of my own) are jumbled up together and left so to speak, in the air, unrelated to any kind of context, either of the case under trial, or any other. A direction about reasonable doubt appears here in a kind of vacuum, instead of at the end of the charge, or in its appropriate place in the body of the charge, and this head is concluded with an academic disquisition on the subject of proof, fit only for a lecture to a body of legal students. Such a method of charging a jury is not only useless and a waste of time, but will certainly have the effect of filling their minds with confusion. All such matters should be introduced in the charge in appropriate places, as and when something occurs in the discussion of the evidence which gives rise to them, and necessitates their application.

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1. Queen v. Hoolas, (1875) 23 W R Cr. 32.
2. Biru Mandal v. Queen-Empress, (1898) 25 Cal 561.
3. Panchu Das v. Emperor, (1907) 34 Cal 698=5 Cr L J 427.
4. Fanindra Nath Banerjee v. Emperor, (1909) 36 Cal 281=1 I C 970=9 Cr L J 452.

Next follows a good and concise statement of the prosecution and defence cases and the points for determination and, afterwards, the learned Judge deals with the evidence. The faults so often found in this part of a charge are here in profusion. There is little, if any, attempt to sift or weigh the evidence, or guide the jury to some clear conclusion. The marshalling of the evidence is but a travesty of what it should be, and consists of attaching a string of witness-numbers without name or other distinction to the name of each accused. It covers four pages, and is worse than useless and presumably is designed to meet the frequent declarations of this Court that the case of each accused must be dealt with separately. To hang a lot of witness-numbers round the neck of each accused without any discussion of the evidence given by these witnesses, is not the way in which to carry out the instructions of this Court. Then follow long separate disquisitions on circumstances discrediting, and discrepancies in the evidence, again in vacuo and totally unrelated to the main discussion, instead of being pointed out as and when they find their places appropriately in the story. These and a final reference to the case for the defence occupy another fourteen pages.

As I have said, there is no specific misdirection in this charge, and I am hopeful that the record does not accurately represent what the Judge really said to the jury. If he said a tenth part of it, in simple and direct language which the jury could understand and appreciate, it would be sufficient. Whatever criticism may be justified, the result has been very fortunate for the accused, about whose very serious offences the jury and the Judge have taken a very lenient, and probably a quite unjustifiably lenient view. So far as the interests of the accused are concerned, the less said about this case the better. The appeal is dismissed. Such of the appellants as are on bail will surrender to their bail bonds, and serve out the remainder of their sentences imposed upon them.

Jack, J.—I agree that this appeal should be dismissed. It is true that the learned Judge's charge must have been confusing to the jury, but I have no doubt that they well understood the legal points involved in the charge of rioting and that the facts and the evidence against each of the accused were sufficiently clearly explained to them. The sentences are extremely lenient.

K.S. *Appeal dismissed.*

A. I. R. 1935 Calcutta 537

AMEER ALI, J.

Udai Chand Pannalal—Plaintiff.

v.

Thansing Karamchand—Defendant.

Suit No. 1837 of 1933, Decided on 12th December 1934.

(a) Tort—Trespass—Damages—Person not entitled to possession of goods cannot sue simply for trespass.

Qua action for trespass simply, an owner would not be entitled to sue unless entitled to possession. [P 540 C 1]

(b) Tort—Trespass—Owner not entitled to possession of goods can sue if permanent injury to goods has been caused—Cause of action can arise even if injury is to right in respect of goods though not to goods.

An owner not entitled to possession of goods has a right of action to sue for damages if there has been some permanent injury to the goods in respect of which trespass has been committed. Even in cases where the injury is not to the goods but to a right in respect of the goods, a cause of action may arise. [P 540 C 2]

(c) Tort—Trespass—Damages—Measure of—Suit for damages for trespass by owner not entitled to possession—Actual loss of business must be proved—Else only nominal damages should be awarded.

In a suit for damages for trespass by owner not entitled to possession of the goods, the principles applicable in the case of trespass to or detention of the goods of a person entitled to possession would be utterly wrong. The plaintiff has to show circumstances pointing to an actual loss of business of some kind. Where he has not proved it, he is only entitled to nominal damages. [P 540 C 2]

(d) Partnership—Union of two joint families cannot form partnership.

A union of two joint families through their kartas cannot in law be a partnership. Neither can one joint family be a partnership of itself, nor can two joint families brought into relation with one another by an agreement be a partnership; but there can be a partnership between two persons where each is a member of joint family and karta. [P 541 C 1,2]

S. N. Banerjee, K. P. Khaitan and *S. P. Choudhury*—for Plaintiff.

W. W. K. Page, B. C. Ghose and *B. Ray Choudhury*—for Defendant.

Judgment.—The short facts of this case are as follows : Shortly before the events in issue in this suit, the firm of Chandanmull Khanmull, big jute dealers, were indebted to the Bank of India, and as security for this indebtedness they had deposited with that Bank a number

of bales of jute to the extent of 41,000. Before the events in suit, the liability and the security had been transfered to the National Bank. This firm of Chandanmull Khanmull were also indebted to creditors other than the Bank, in particular to a firm of the name of Udai Chand Pannalal, the plaintiff in the present suit. As one means of obtaining payment, the plaintiff firm in the beginning of 1933 instituted insolvency proceedings against Chandanmull Khanmull whom I will call the debtor firm. Pending these proceedings a system of payment or satisfaction was discovered and certain creditors including Udai Chand Pannalal made an arrangement to take over certain bales at a certain price, paying to the National Bank a sum of Rs. 19 per bale which represented the fractional or proportionate amount of the indebtedness of the debtor firm to the Bank, the remaining value of the bales being applied in discharge of the debtor firm's indebtedness to the creditor other than the bank. In the case of the plaintiff firm, the number of bales was 10,750. Those are the goods in question in this suit. The transfer was prior to 29th May. On or about that date another arrangement was entered into between the plaintiff firm and the Bank. I should have mentioned, earlier perhaps, that the plaintiff firm, apart from the arrangements between themselves and the debtor firm, had guaranteed the total indebtedness of the debtor firm to the Bank. A letter of guarantee was issued on 27th May 1933 and in support of that guarantee the 10,750 bales were pledged to the Bank, a letter of lien in the usual form being executed on 29th May 1933.

On 30th May 1933 the Bank made over to the plaintiff firm a letter (see first letter in the Brief of Correspondence) recognising the transfer from the debtor firm to the plaintiff firm acknowledging payment of their dues from the plaintiff firm, and acknowledging that they held the goods "deliverable to you in trust for you under an arrangement arrived at with you." Something turns upon the language of that clause, the position being unless it can be successfully argued that the declaration of trust nullifies the pledge that the bank were not only trustees of the goods but that it was also entitled to certain possession as pledgee. Shortly after this the defendant firm Thansing Karamchand filed an application for attachment before judgment. It is obvious from paras. 4, 5, 6 and 7 that the defendant firm must have had fairly accurate information from some source or other of what had taken place between the debtor firm and the other creditors. The paragraphs in question reads as follows: On 2nd June 1933 upon the allegations contained in those paragraphs, an order was made in terms of the notice of motion attaching "the 41,000 bales of jute belonging to the defendant firm in the hands of the National Bank of India Limited, subject to the claim of the said Bank." On the same date Messrs. Khaitan & Company for the plaintiff firm called upon the defendant firm to withdraw the attachment and claimed a sum of Rs. 50,000 as damages. On 5th June the bank wrote to the solicitors of the defendant firm stating "the number of bales in the Bank's hands belonging to the defendant firm is approximately 25,302."

So far as the correspondence relates to negotiations for settlement between the attaching creditor, and the debtor firm I need not refer to it. On 5th June the attorneys for the defendant firm answered Messrs. Khaitan & Company's letter (see page 10 of Brief) denying knowledge of the sale by the debtor firm of 10,750 bales, and stating that they had "not attached any goods belonging to the plaintiff firm" and quoting the words of the writ of attachment. On 5th June also the sub-manager notified the parties concerned of the order of attachment treating it as an attachment of 41,000 bales of jute. On the 5th also an application was filed by the plaintiff firm to have the attachment removed, and on the 7th (see p. 23 of Brief) the attorneys for the defendant firm refused to discuss the matter further with Messrs. Khaitan & Company as the matter had been argued in Court and was subject to the proceedings in Court. The attachment in question, and apparently another attachment with which we are not concerned were removed by 10th June though actually the plaintiff firm did not receive notice of the withdrawal of the attachment until the 13th. I should mention that the motion for removal of the attachment came up for hearing on the 13th or there-

abouts and the attachment having already been removed no order was made except that the plaintiffs in this suit were awarded the costs of the application. The plaint in this suit was filed on 16th August 1933. The issues raised were as follows : (1) Did the defendant cause 10,750 bales to be attached as alleged in the plaint ? (2) If so, did the defendant act with malice and/or negligence? (see para. 6 of the plaint). (3) If so, were the said bales by reason of such attachment withheld from the plaintiff until 13th June 1933 ? (see para. 4 of the plaint). (4) Was the plaintiff by reason of such attachment deprived of possession of the goods, or power of disposing same? (see para. 4). (5) Damages.

At the time the issues were raised I suggested that issues 3 and 4 were not issues essential to the action being merely questions of fact having a bearing on issue 1 (the factum of the attachment) and issue 5 (quantum of damage). During the course of the trial a further issue was raised on the results of cross-examination by counsel for the defendant, namely whether the suit was maintainable in its present form. Evidence was given of the matters in issue by the plaintiff's gomasta, one Chunilal, and by one of the proprietors Johorimull on the incidental question raised as to joint family or partnership. The evidence of Chunilal was directed to show that he could not get the goods from the bank on 2nd June because of the attachment. He spoke of a certain interview, and also attempted to bring out throughout his evidence that but for the attachment, the bank would not have retained the goods notwithstanding the letter of lien. No evidence was called on behalf of the defendant firm. I propose to deal with the technical point as to the maintainability of the suit last.

Counsel's contentions on behalf of the defendant firm were as follows : First of all, that no property of the plaintiff was attached. For his argument on this point Mr. Page relied upon the following: First, the form of order itself, i. e., the words "belonging to the defendant." Secondly, he relied upon the fact there was in fact no physical attachment, the order being made effective by a notice to the bank. Thirdly, he suggested that the bank in fact was aware, that the order related only to such goods as had not been transferred to the plaintiff firm, i. e., the goods other than the 10,750 bales. He contended, that on the terms of the order the case was precisely analogous to the case of an attachment of a certain sum to the credit of a customer in a bank, a sum which before the order for attachment had been reduced by being drawn on. The matter seems to depend not very much upon how the bank understood the position although it appears to me clear (notwithstanding the letter of explanation by the bank of 5th June), that the bank regarded the attachment as an attachment of the whole 41,000 bales. It appears to depend upon whether the property attached is 41,000 bales described as belonging to the defendant, or is such of the 41,000 bales as belonged to the defendant. I read the order as an attachment of 41,000 bales. Goods therefore of the plaintiff were attached.

Mr. Page's further argument was upon the two intermediate issues that were raised, namely whether the goods had been withheld and whether the plaintiffs had in fact been deprived of their use. He suggested from the correspondence that the bank in fact would have delivered notwithstanding the attachment. That I am not prepared to find. He suggested also that it was the duty of the plaintiffs to have sold forward so as to minimise the loss. That argument again does not appeal to me. He lastly relied upon the fact of the pledge. Mr. Page used it to show that the plaintiff in fact could not have obtained possession of the goods; that therefore the attachment was not the effective cause of the detention. Hence there was no attachment in fact. Alternatively no damage was in fact caused.

Mr. Page on this question of pledge suggested that the Bank would, notwithstanding the attachment, have delivered if there had been no pledge. Neither side called the Bank. The Bank I find, would not have been prepared either to waive their pledge or to disregard the order of attachment. As regards the effect of the pledge, I am not prepared to accept Chunilal's evidence so far as it was directed to show that the Bank would have delivered had there been no attachment, an impression which he sought to give from his evidence of the conversa-

tion of 2nd June and of the relationship between the plaintiff firm and the Bank. As regards that interview, I am of opinion that so far as the statement by the officer of the Bank is for this purpose it is inadmissible.

In my opinion the fact of pledge as a matter of law assumes an importance considerably greater than that originally attributed to it by consent on either side. Yesterday, Mr. Banerjee contended, simply—attachment of the plaintiff's goods: detention from 2nd to 13th June: therefore, damages which must be assessed on the difference between the highest rates between those dates and the market price at the date of release. It appeared to me that this could not possibly be the position when the person claiming damages was not entitled to possession, and that if the case was based upon a right to damages for any interference with a reversion or reversionary right the basis of damages must be entirely different. I therefore asked Mr. Banerjee to consider that point further. Mr. Khaitan who followed Mr. S. N. Banerjee this morning, apparently anticipated the further difficulty which appeared to me last night on looking into Arnold on damages, namely, whether an owner not entitled to possession is at all entitled to claim for trespass.

If I may say so, Mr. Khaitan dealt with the matter logically and frankly. He conceded and I think on the authorities referred to in Arnold on Damages, he was bound to concede that qua action for trespass simply an owner would not be entitled to sue unless entitled to possession. On this point he had to fall back therefore upon the conversation of 2nd June 1933 and upon the further argument, namely whether having regard to the form of the letter of trust the pledge could be regarded as having been superseded. In other words, had the plaintiff firm the right, notwithstanding the pledge, to call for an immediate possession? As to the first point, the conversation of the 2nd June, I have already expressed my view. On the second also I am of opinion that the transaction of pledge and the transaction of acknowledgment or declaration of trust by the bank must be regarded as one, neither transaction giving place to the other.

The next point I asked Mr. Khaitan to deal with, was whether, irrespective of an ordinary suit for trespass, the owner, not entitled to possession, could sue for damages at all or had the right of suit. On that point, I think, there is some difficulty. According to the authorities, he can do so if there has been some "permanent injury" to the goods in respect of which the trespass has been committed, the words in Clark and Lindsell, 8th edition, being a little wider, namely "loss or permanent damage of his chattel." It is contended therefore by the defendant firm that there is no right to recover unless it is a case of actual injury to the goods. On the other hand the question which troubles me is this: assuming that an attachment does affect the capacity of an owner to sell it any more, should that not give a right of action? It might in certain cases be a matter of great importance. I am not prepared to hold that there is no such cause of action. I think there is, even though the injury is not to the goods but to a right in respect of the goods.

But it appears to me, and this brings one back to the original point discussed yesterday with Mr. Banerjee, that as regards measure of damage to apply the principles applicable, which would be applied in the case of trespass to or detention of the goods of a person entitled to possession would be utterly wrong. Mr. Khaitan contended on this point that even so he would not be obliged to prove that the plaintiff had in fact obtained any contract; there I agree. He contended further that the measure of damage would, at any rate, be analogous. There I do not agree. I think the plaintiff has to show circumstances pointing to an actual loss of business of some kind; on the facts before me I do not find that he has established such loss. That would yet entitle the plaintiff to nominal damages. The question remains whether in this case the damages should be increased upon the basis of malice using the expression in its extended meaning. On this point the petition for attachment before judgment has been relied upon. The matter depends again upon the inference to be drawn from paras. 5, 6 and 7. The plaintiffs contend that the defendants must have known the full facts of the transfer of the 10,750 bales; that they knew it to be

genuine, but in order to obtain attachment before judgment, they alleged that it was surreptitious and with a view to defeat their claim. The defendant's counsel suggest that the allegations really relate to matters in insolvency and that no suggestion was made against the plaintiff firm of the genuineness or honesty of the plaintiff firm's transactions. I do not think it is possible to go quite as far as this. On the other hand there were all sorts of arrangements going on between the plaintiff firm and other creditors, with the debtor firm from which the defendant firm in this case had been left out. They were naturally agitated and desired to get in. Some allowance must be made for that. I assess the damage at Rs. 500. The point as to the maintainability of this suit, although one for which I feel no great enthusiasm is yet substantial. Its determination depends upon the construction to be put upon a certain document and the very scanty oral evidence. It is this: The first question asked him in cross-examination of Chunilal was the names of the partners of the plaintiff firm. The witness gave Hazarimull, Johorimull and three others. He also stated that a few minors were interested in the business. In Q. 22 he stated those other than Hazarimull were members of the joint family (see also Q. 23). There was re-examination to show that Hazarimull and Johurimull had certain shares covering the whole of the 100 per cent interest in the firm.

Johurimull put in an award purporting to provide for adjustmeut or dissolution of the alleged partnership. This has been relied upon by the defendant firm who aked me to infer from it that the alleged partnership was an arrangement between Hazarimull and Joburimull as respective kartas of two joint families, the result of the arrangement being a union of two joint families through their kartas which cannot in law be a partnership. The defendant relies also upon the evidence of Chunilal which if it is to be taken as correct would indicate that there was one joint family not two. Mr. Page has been good enough to address me on this point and I fully accept his contentions that neither can one joint family be a partnership of itself, nor can two joint families brought into relation with one another by an agreement be a partnership. The whole question is whether I should so read what evidence there is and the documents as showing that there was an agreement of partnership between Hazarimull and Johurimull, both members of joint families and having rights and duties vis a vis those families, but not an agreement between the joint families through the persons named. On the whole that is the view I take, namely that there was a partnership between Hazarimull and Johurimull, the fact being that each was a member of a joint family and karta.

K.S. *Order accordingly.*

A. I. R. 1935 Calcutta 541

NASIM ALI, J.

Durgapada Karmakar—Appellant.

v.

Nrisingha Chandra—Respondent.

Appeal No. 1420 of 1932, Decided on 14th December 1934.

(a) Transfer of Property Act (1882, as amended in 1929), S. 53-A—Retrospective effect—It does not affect pending actions.

Section 53-A is not retrospective in the sense that it affects pending actions. It does not lay down simply a rule of procedure. It touches vested rights under the law as it stood before it came into operation. The case should be decided under the law as it stood when the suit is brought: *Case law referred.*

[P 542 C 2; P 543 C 2]

(b) Interpretation of Statutes — Retrospective effect—Law as it exists on date of commencement of suit must decide rights.

The law as it existed when the action was commenced must decide the rights of the parties unless the legislature expresses a clear intention to vary the relation of litigant parties to each other: *English cases relied on.* [P 543 C 1]

(c) Landlord and Tenant—Tenant not misled into building structures which are not permanent—He is not entitled to compensation—Acquiescence.

Where the structures are permanent and it is found that the tenants were not led into belief that they had permanent tenancy and that they raised the structures under that belief, they are not entitled to get compensation for the structures built by them : 1933 *Cal* 612, *Dist.*

[P 544 C 1]

Panchanan Choudhury—for Appellant.

Surajit Chandra Lahiri, *Satindra Nath Mukherjee* and *Satish Chandra Munshi*—for Respondent.

Judgment.—This is an appeal by defendants 1 and 2 in an action for ejectment. Plaintiffs case is that the plaint land was let out to the defendants at an annual rent of Rs. 3 that the tenancy was a tenancy at will and was determined by a notice to quit. On these allegations plaintiff brought

the present suit for ejectment. The defendant pleaded inter alia that the plaintiff was not the owner of the entire land, that the northern portion of the land about 1½ cottas in area was settled permanently by the predecessor in interest of the plaintiff in the name of the defendants' eldest brother Ananda in 1319 B. S. by an unregistered patta. The defendants also claimed mokarari right on the basis of a new oral settlement by the plaintiff after his purchase. The defendants also claimed compensation for the structures raised by them on the disputed land. The trial Court decreed the plaintiffs' suit. On appeal before the lower appellate Court the learned Judge has come to the following findings:(a) That the plaintiff is the sole owner. (b) That the patta dated 1319 B. S. relied on by the defendant is one of doubtful origin. (c) That even if the patta be genuine it cannot create a permanent interest as it was not registered. (d) That the defendant cannot get the benefit of S. 53-A, T. P. Act. (e) That the incidents of the tenancy are governed by the Transfer of Property Act. (f) That the tenancy has been validly terminated by a notice to quit. (g) That the defendants being tenants at will are not entitled to claim any compensation for the structures raised. The learned Judge accordingly dismissed the appeal. Hence the present appeal by defendants 1 and 2.

Two points are raised by the learned advocate for the defendant in support of this appeal: (1) That the defendants are entitled to get the benefit of S. 53-A, T. P. Act. (2) That in any event the defendants are entitled to get compensation for the structures raised by them.

As regards the first point the line of reasoning adopted by the learned advocate for the appellant is this: The unregistered lease was found to be genuine by the trial Court. The lower appellate Court has not reversed this finding, though he had some doubt about the origin of this document. The patta must therefore be taken to be a genuine document. It created a permanent lease and though it was not registered the defendants came into possession on the basis of the said patta which was for consideration. There has been consequently part performance of the contract. S. 53-A is retrospective in its operation and applies to pending actions. Therefore, though the present suit was instituted on 10th June 1929, the plaintiff is debarred from ejecting the defendants.

Now, in view of the recent pronouncements of the Judicial Committee in 58 I A 91 (1), 39 C. W. N. 34 (2), it was not disputed that under the law as it stood before S. 53-A was introduced in the Transfer of Property Act by the amending Act of 1929, the plaintiff was entitled to eject the defendants. It is also conceded by the learned advocate for the plaintiff-respondent that if the defendants are entitled to the benefit of the provisions contained in S. 53-A plaintiffs' suit must fail. The point for determination therefore is whether the defendants are protected by S. 53-A. The contention of the learned advocate for the appellant is that S. 53-A has retrospective effect. Now an Act may be retrospective in the sense that it applies to all transactions before it comes into operation and to all actions in Courts relating to these transactions whether such actions are started before or after the Act comes into operation. It may also be retrospective in the sense that it will bring within its operation all transactions completed before it begins to operate, provided these transactions had not been already the subject-matter of litigation before the Act comes into force. The present suit was started before S. 53-A came into operation. In the present appeal therefore I am concerned only with the question whether S. 53-A is retrospective in the sense that it affects pending actions. S. 53-A does not lay down simply a rule of procedure. It touches vested rights under the law as it stood before it came into operation.

No decision of this Court bearing on the question of the retrospective operation of S. 53-A was cited before me by the Advocates of the parties in this appeal. Certain decisions of other High Courts were cited but these decisions are not uniform. The Madras High Court has taken the view that S. 53-A does not at all affect transactions prior to 1st April 1930 when Act 20 of 1929

1. Ariff v. Jadunath Mazumdar, 1931 P C 79 =131 I C 762=58 I A 91=58 Cal 1235 (P C).
2. Pir Bux v. Mahomed Tahar, 1934 P C 235= 151 I C 326=61 I A 388=58 Bom 650=39 C W N 24 (P C).

which introduced S. 53-A in T. P. Act of 1882, came into operation : see 1932 Mad. 734 (3). The Allahabad High Court has followed the Madras case in 1934 All. 701 (4). The Patna High Court appears to hold that the section does not apply to pending actions : see 1934 Pat. 546 (5). Wadia, J., of the Bombay High Court has applied S. 53-A to a suit instituted before it came into operation : see 1933 Bom. 381 (6). In 1924 All. 768 (7) the Allahabad High Court has applied the new section to a case started after it came into force.

The object of S. 53-A was to alter the statute law in the country by the partial importation of the English doctrine of part performance :

> Now the law as it existed when the action was commenced must decide the rights of the parties unless the legislature expresses a clear intention to vary the relation of litigant parties to each other : per Lord Denman, C. J., in (1837) 6 A & E 943 (8).
>
> It is a general rule that where the legislature alters the rights of the parties by taking away or conferring any right of action its enactments unless in express terms they apply to pending actions do not affect them : per Jessel, M. R., in (1875) 1 Ch. D. 48 (9).
>
> It certainly was considered in many cases that where a person had commenced an action he had a vested right and that any subsequent statute ought not to be construed as retroactive so as to alter that right. This is not an inflexible rule and it does not apply if the language of statute is clear and express : per Pollock, B., in (1890) 24 Q. B. D. 557 (10).

In the light of the principles laid down in the above English cases I will now proceed to determine whether in Act 20 of 1929 the legislature has given a clear indication that S. 53-A would apply to pending actions. The only section which has got any bearing on the point under discussion is S. 63 of the Act. S. 63 is in these terms :

> Nothing in any of the following provisions of this Act, namely, Ss. 3, 4, 9, 10, 15, 18, 19, 27 and 30, Cl. (c) of S. 31, Ss. 32, 33, 34, 35, 46, 52, 55, 57, 58, 59, 61 and 62 shall be deemed in any way to affect : (a) the terms or incidents of any transfer of property made or affected before 1st April 1930 ; (b) the validity, invalidity, effect or consequences of anything already done or suffered before the aforesaid date ; (c) any right, title, obligation or liability already acquired, accrued or incurred before such date, or (d) any remedy or proceeding in respect of such right, title, obligation or liability ; and nothing in any other provision of this Act shall render invalid or in any way affect anything already done before 1st April 1930, in any proceeding in a Court on that date ; and any such remedy and any such proceeding as is herein referred to may be enforced, instituted or continued as the case may be, as if this Act had not been passed.

It appears from the first portion of the section that it does not include S. 16, which introduces S. 53-A. This section therefore comes under the operation of the words " in other provisions of this Act " in Cl. (d) of section. From the clause it appears to me that S. 16 is not intended to render invalid or in any way affect anything already done before 1st April 1930, in any proceeding in a Court on that date and any such proceeding may be enforced or continued as if the Act had not been passed. So even if it be assumed that by necessary intendment S. 53-A is to be applied to transaction completed before 1st April 1930 the provisions of that section cannot be applied to pending actions. This conclusion seems to be supported by the following observations of the Judicial Committee in 39 C. W. N. 34 (2) to which reference has already been made :

> As the law of India stood at the date of this case it is in their Lordships' opinion no relevent defence to an action by a land owner for ejectment to plead that the plaintiff has agreed to sell to the defendant the land of which the plaintiff seeks to obtain possession. . . . . It remains to take note of the fact that since the present suit was brought the law in India has been altered by the Transfer of Property Act (Amendment) 20 of 1929 which has inserted a new S. 53-A in the principal section whereby a defendant in an action of ejectment, may in certain circumstances effectively plead possession under an unregistered contract of sale in defence to the action. Their Lordships' view as enforced in the present case must therefore be understood to be referable to the state of the law before the partial importation into India of the English equitable doctrine of part-performance.

The case before their Lordships was brought in 1921, the decision of the trial Court was given on 11th September 1926. The Act came into operation on 1st April 1930. Their Lordships decided the case in 1934. If really S. 53-A applied to pending actions it is difficult to understand why their Lordships decided the case under the law as it stood when the suit was brought. If an enactment is intended to apply to pending actions, the fact that the action is pend-

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3. Kanji and Moolji v. Shunmugun Pillai, 1932 Mad 734=139 I C 870.
4. Gauri Sankar v. Gopal, 1934 All 701=151 I C 388.
5. Mukteswar v. Barakar Coal Co., 1934 Pat 546.
6. Soleman Haji v. P. N. Patel, 1933 Bom 381.
7. Gajadhar v. Bechan, 1934 All 768=153 IC 717.
8. Hitchcock v. Way, (1837) 6 A & E 943.
9. Re Joseph Sucha & Co. Ltd., (1875) 1 Ch D 48.
10. Attorney-General v. Theobold, (1890) 24 Q B D 557=38 W R 527=62 L T 768.

ing in appeal at the time when the Act comes into operation makes no difference. See the observations of Atkin, L. J., in (1919) 88 L. J. K. B. 1044 (11):

Though the Act was passed after the judgments both of the County Court Judge and of the Division Court I think we must determine the appeal in accordance with its provisions.

I am therefore of opinion that the defendant is not entitled to rely on the doctrine of part performance as embodied in S. 53-A to resist the plaintiffs' claim for ejectment. The first contention therefore fails In support of the second point the learned advocate for the appellant placed much reliance upon a recent decision of the Court in the case of 37 C. W. N. 473 (12) and argued that in any view of the case the defendants were entitled to get compensation for the structures built by them. In this case however it has not been found that the structures are permanent, neither has it been found that the defendants were led into belief that they had permanent tenancy and that they raised the structures under that belief. The Courts below were therefore right in rejecting the defendants' claim for compensation. The result therefore is the appeal is dismissed with costs.

K.S. *Appeal dismissed.*

11. Stovin v. Fairbrass, (1919) 88 L J K B 1044.
12. Badal Chandra v. Debendra Nath, 1933 Cal 612=145 I C 892=37 C W N 473.

A. I. R. 1935 Calcutta 544

GUHA AND BARTLEY, JJ.

Rani Kanak Prova Debi—Petitioner.

v.

Abdulla Akunji—Opposite Party.

Civil Rule No. 607 of 1934, Decided on 10th January 1935.

Execution—Decree for rent — Execution Court cannot compel decree-holder to proceed against tenure in arrears in first instance.

Where a decree-holder who has obtained a decree for rent thinks fit to proceed against the property of the judgment-debtor other than the tenure in arrears, the executing Court has no jurisdiction to direct that the decree-holder must proceed against the tenure in arrears in the first instance. [P 544 C 2]

Bijan K. Mukerji and *Pankaj K. Mukerji*—for Petitioner.

Syed Nausher Ali and *Ramendra Mohan Majumdar*—for Opposite Party.

Order.—The petitioner as a cosharer landlord, in whose favour a decree for her share of rent was passed, applied to have that decree executed in the Court of the Subordinate Judge of Khulna. The application for execution was dismissed for default on 23rd November 1933 as the decree-holder did not comply with the direction of the Court to take steps in proceeding "against the rent land" within 7 days of the order passed on 15th November 1933 after holding that :

It was bad move on the part of the decree-holder to fall upon other properties in the first instance.

It may be mentioned in this connexion that the decree-holder thought fit to proceed against the property of the judgment-debtor other than the tenure in arrears for realization of her decree for rent, and it was this to which exception was taken by the Court of execution. The application for execution came to be dismissed ultimately, the decree-holder having failed to act according to the proceedure indicated by the Court of execution. There was an appeal against the order passed by the Court of execution on 23rd November 1933 to the District Judge of Khulna, which was obviously incompetent under the law, and the appeal was dismissed. The question raised in support of the application to this Court, directed against the orders passed by the Court of execution on 15th and 23rd November 1933 on which this Rule was issued, were that the Court of execution was wrong in holding that the decree-holder must proceed against the tenure in arrears in the first instance, and further that the Court had no jurisdiction to direct that the decree-holder must proceed against the tenure in arrears in the first instance. The reason given for the order recorded by the Subordinate Judge, the Court of execution, on 15th November 1933 is wholly insupportable and the contention urged in support of the Rule, must be allowed to prevail The Rule is made absolute. The orders complained of are set aside. We direct that the application for execution filed by the petitioner in the Court below be considered on its merits and dealt with in accordance with the law. The costs in the Rule will abide the decision of the Court of execution on remand; hearing fee being assessed at two gold mohurs.

K.S. *Rule made absolute.*

A. I. R. 1935 Calcutta 545

S. K. GHOSE AND HENDERSON, JJ.

Sultan Ahmad—Petitioner.

v.

Emperor—Opposite Party.

Misc. Case No. 145 of 1934, Decided on 3rd December 1934, from order of Sess. Judge, Chittagong.

Criminal P. C. (1898), S. 337 (3)—Detention in custody of approver must end with trial—There is no question of proceedings in appeal.

The wording of sub-S. (1) of S. 337 shows that the High Court or a Court of Session is being considered in this section as the Court where an offence is being tried and there is no question of proceedings in appeal. On the other hand sub-S. 3 clearly provides that so far as the trial Court is concerned, the detention in custody of the approver must end with trial. Hence an order of the Court that he cannot be released until the period fixed by the law of limitation expires or until appeals are heard and determined is not legal. The Judge has no authority to order the detention of the approver in anticipation of any possible orders from the Court of appeal : 37 *Cal* 845 and 30 *Bom* 611, *Rel. on.* [P 545 C 2]

D. N. Bhattacharjee—for Petitioner.

Lalit Mohan Sanyal—for the Crown.

S. K. Ghose, J.—The petitioner in this rule is one Sultan Ahmed who was an approver at the trial of a case under S. 395, I. P. C., in the Court of the Sessions Judge at Chittagong. The case ended in conviction and the co-accused of the petitioner were sentenced to various terms of imprisonment. On 18th July 1934 the Public Prosecutor prayed that the approver might be released immediately. Thereupon the learned Sessions Judge recorded the following order on 17th August 1934 :

Read the petition of the Public Prosecutor praying that the approver may be released immediately. This cannot be allowed until the period fixed by the law of Limitation expires or until appeals (if any) to the Honourable Court are heard and determined, since the Honourable Court has every authority and power to order a re-trial of the case if that is found to be necessary, and in that event the approver's evidence would again be taken.

Against that order the petitioner has moved this Court. It is contended on his behalf that the further detention of the petitioner in jail is contrary to law. The learned Advocate for the Crown has contended that the order of the learned Judge quoted above is not contrary to the provisions of S. 337, Criminal P. C. Sub-S. (3) of that section provides :

Such person, "unless he is already on bail" shall be detained in custody until the termination of the trial.

It is contended that the word "trial" here includes the proceedings if any in the Court of appeal, on the ground that the appeal is merely the continuation of the trial. It is pointed out that in the old Code of 1898 the words of the corresponding sub-S. (3) were as follows :

Such person, "if not on bail," shall be detained in custody until the termination of the trial by the Court of Session or the High Court, as the case may be.

This argument overlooks the wording of Sub-S. (1), which shows that the High Court or a Court of Session is being considered in this section as the Court where an offence is being tried and there is no question of proceedings in appeal. On the other hand sub-S. (3) clearly provides that so far as the trial Court is concerned, the detention in custody of the approver must end with the trial. The expression "unless he is already on bail" is also governed by the words "the termination of the trial." This view has been taken in the case of 30 Bom. 611 (1) and this has been followed in the case of 37 Cal. 845 (2). Mr. Bhattacharjee appearing for the petitioner has pointed out that the expression "termination of the trial" means the same thing as the expression "conclusion of trial" which occurs as a sub-heading over S. 297, Criminal P. C., and which shows that in a jury trial the termination must either be according to S. 306 or S. 307 of the Code. In the present case the trial in the Court of Session terminated according to S. 306 and thereafter the learned Judge had no authority to order the detention of the petitioner in anticipation of any possible orders from the Court of appeal. The rule must be made absolute and the petitioner must be released from custody and discharged from the bail bond. Let the record be detained for the hearing of the appeals already preferred by some of the convicted persons.

Henderson, J.—I agree. The learned Sessions Judge ordered the detention of the petitioner under the provisions of S. 337, sub-S. (3) of the Code till the period of limitation for filing an appeal has expired. It is quite clear that this provides no criterion for deciding when the trial terminates. There may never

1. Emperor v. Kothia Navalya Bhil, (1906) 30 Bom 611=4 Cr L J 346=8 Bom L R 740.
2. Emperor v. Abani Bhusan Chakravarty, (1910) 37 Cal 845=3 I C 721=11 Cr L J 702.

be an appeal. In such a case it would be absurd to suggest that the trial must be held to have continued until the period of limitation has expired.

K.S. *Rule made absolute.*

A. I. R. 1935 Calcutta 546

COSTELLO AND M. C. GHOSH, JJ.

Nil Kantha Pal — Accused—Petitioner.

v.

Bisakha Pal—Opposite Party.

Criminal Revn. No. 1196 of 1934, Decided on 25th February 1935.

Criminal Trial—Sentence— Imprisonment in default of payment of fine—Payment not made and imprisonment begun to be served —Order of Court to realize amount of fine by execution against property of defaulter held proper.

An accused was sentenced to pay certain amount as fine or in default to undergo imprisonment. He surrendered himself and stated that he was unable to pay it. Thereupon he was committed to jail to undergo the rigorous imprisonment imposed. On the same day, the Judge made an order that a warrant should be issued to the Collector authorizing him to realize the amount of the fine by execution according to the Civil process against the moveable and immovable properties or both of the defaulter:

Held : that the order was proper and that proviso to S. 386 (1) (b), Criminal P. C., did not apply as he had not undergone the whole of imprisonment in default. [P 545 C 2; P 546 C 1]

Nirmal Chandra Chakravarty — for Petitioner.

Surajit Lahiri—for Opposite Party.

Costello, J.—In this case the petitioner Nil Kantha Pal was convicted on his own plea of guilty of a charge which originally was laid under S. 304 but subsequently altered to one under S. 325, I. P. C. The petitioner by his plea of guilty acknowledged criminal responsibility for the death of one Akshoy Hari Pal who was the husband of Srimati Bisakh Pal who is a respondent in these proceedings. The killing of Akshoy Hari Pal was no doubt done in course of a quarrel and in the heat of the moment. The fact remains however that the blow struck by Nil Kantha, although the instrument used was merely a stick about an inch in diameter and two feet in length, was of such gravity that Akshoy Hari's skull was fractured, and he died within some eight hours after he had received this injury. The post-mortem report shows that there was a linear fracture of the skull extending from the front of his head backwards, a length of about seven inches. It is to be seen therefore that the blow struck by the present petitioner must have had considered force behind it.

The learned Sessions Judge seems to have taken the view that the widow of the deceased man ought to be compensated for the loss of her husband. He accordingly sentenced the petitioner not to any substantial term of imprisonment but to pay a fine of Rs. 5,000 and in default of payment to undergo rigorous imprisonment for a term of five years. In the ordinary and normal course of events a substantive sentence of five years rigorous imprisonment would not have been inappropriate to the circumstances of the case. However the Sessions Judge chose to give the convicted man an opportunity of evading imprisonment by making compensation to the widow of the man whom he had killed. After the Sessions Judge had passed the sentence it seems to have occurred to him that it was not lawful to impose so large a term of imprisonment in default of payment of fine. He accordingly referred his own order to this Court in order that the matter might be set right. The reference was accepted and the term of imprisonment which was designed to serve as a sanction for the payment of the fine was reduced to of one year and nine months by an order of this Court dated 21st July 1934.

The petitioner was originally convicted and sentenced on 27th July 1934. Thereupon he asked for time for the purpose of enabling himself to pay the fine imposed upon him. He first of all obtained one month's respite and on the expiry of that period a further month. Then on 27th August 1934 he surrendered himself and stated that he was unable to pay the fine. Thereupon he was committed to jail to undergo the rigorous imprisonment of the term of one year nine months. On the same day the learned Sessions Judge made the order which is now complained of. After hearing the pleaders in respect of an application made by Srimati Bisakha Pal the learned Judge directed that a warrant should be issued to the Collector of the District under the provisions of S. 386 (1) (b), Criminal P. C., authorizing the Collector to realize the amount of the fine, that is to say Rupees

5,000 by execution according to the Civil process against the moveable and immovable properties, or both of the defaulter that is to say Nil Kantha Pal.

Mr. Chakravarty who has argued this rule on behalf of the petitioner has invited us to take the view that the Sessions Judge was not justified in making any such order having regard to the fact that Nil Kantha Pal had already begun to serve the sentence passed upon him in default of payment. It seems to be clear law that where a sentence of imprisonment is imposed by way of providing a sanction for the payment of a fine if the fine is not paid, and that sentence is served out in its entirety, it is still possible to insist on payment of the fine being made. To put the matter in another way: to serve the sentence of imprisonment is not to be taken as an exoneration or absolution as regards the payment of fine. There is however a proviso in S. 386 (1) (b) which enacts that if the offender has undergone the whole of the imprisonment in default, no Court shall issue a warrant unless for special reasons to be recorded in writing it considers it necessary to do so. That proviso does not apply to the present case, because the offender has not undergone the whole of the term of imprisonment to which he was sentenced.

When the matter was before this Court a few days ago we granted Mr. Chakravarty an opportunity of ascertaining whether the defaulter was now willing and able to discharge the fine or a substantial part of it. We are now told that the utmost which can be done is that a sum of Rs. 400 or Rs. 500 might be provided within the course of the next fifteen days. In our view that suggestion is not one which ought to be allowed to operate in favour of the petitioner. He was given an opportunity at the time of his conviction, of evading imprisonment. He either refused or neglected to avail himself of that opportunity. He has paid nothing whatever towards the liquidation of the fine imposed by way of compensation to the widow of the man whom he had killed. In the circumstances, we feel that no other course is open than to say that the matter must be allowed to take its course. There is nothing in law to prevent the making of the order which the Sessions Judge made on 27th August last year. The rule must be discharged.

K.S. *Rule discharged.*

A. I. R. 1935 Calcutta 547

GUHA AND BARTLEY, JJ.

Emperor

v.

K. C. B., a Pleader.

Civil Ref. No. 8 of 1934, Decided on 4th December 1934.

Legal Practitioner—Professional misconduct—Giving false information to client held amounted to professional misconduct.

Where a pleader falsely told a marwari, in whose custody certain tins of ghee impounded by a municipality as being adulterated had been kept, that the Subdivisional Officer had ordered that the goods be sent to the person they belong to and the said marwari relying upon this information sent the tins to the owner:

Held : that the pleader concerned was guilty of fraudulent or grossly improper conduct in the discharge of his professional duty, as contemplated by S. 13 (b). [P 548 C 1]

Bijan Kumar Mukherjee—for Crown.

Gopendra Nath Das—for Pleader.

Order.—This is a Reference under S. 14 (b), Legal Practitioners Act, made to this Court, by the learned District Judge of Burdwan, recommending the suspension of a Pleader practising at Katwa, for one year, on the ground that the pleader was guilty of grossly improper conduct in the exercise of his professional duties. It appears that the pleader was charged by the Subdivisional Magistrate, Katwa, for having falsely told one Bazrang Lal Marwari that the Subdivisional Officer, Katwa, had ordered that "the goods be sent to the person they belonged to," in respect of twenty-three tins of ghee which the Katwa Municipality had impounded as being adulterated, and which had been kept in the custody of the said Bazrang Lal Marwari by the Municipality, and Bazrang Lal Marwari had sent the ghee back to the person to whom it belonged, by relying on the said false statement of the pleader. An inquiry into the charge was made by a Magistrate in which inquiry evidence was taken. On the materials placed before the inquiring Magistrate, he came to the conclusion that the allegation against the pleader had been proved. The report of the Magistrate was in due course placed before the District Magistrate of Burdwan as required by law; and the District Magistrate held that the conduct of the

pleader was most reprehensible, and was of opinion that action should be taken against him under the Legal Practitioners Act. The record of the case was thereupon sent to the District and Sessions Judge of Burdwan for taking necessary action. The District Judge accepted the conclusions of the inquiring Magistrate and the District Magistrate, and has reported the case of the pleader to this Court for such action as this Court might think fit and proper, with the recommendation for suspension of the pleader, as mentioned above

It was argued on behalf of the Pleader that the evidence in the case was wholly insufficient to substantiate the charge against the Pleader. The relevant portions of the evidence on the record was placed for our consideration by the Advocate representing the Pleader. On careful consideration of the materials on the record, we are unable to hold that the conclusion arrived at by the Magistrates and the learned Judge, that the Pleader had given his client the false information that the Subdivisional Magistrate had ordered the tins of ghee to be sent back to the person they belonged to; that the Subdivisional Magistrate had permitted the disposal of the tins of ghee, which were the subject-matter of a charge under S. 16 (1) (c), Bengal Food Adulteration Act, is wrong. In our judgment, the pleader concerned was guilty of fraudulent or grossly improper conduct in the discharge of his professional duty, as contemplated by S. 13 (b), Legal Practitioners Act. In view of the facts and circumstances appearing from the materials on the record, we have come to the decision that an order of suspension of the pleader for the period of three months will sufficiently meet the justice of the case before us; and we direct accordingly.

K.S. *Reference answered.*

A. I. R. 1935 Calcutta 548

LORT-WILLIAMS AND JACK, JJ.

Khitish Chandra Bose—Complainant—Petitioner.

v.

Nanuram Maklania—Accused—Opposite Party.

Criminal Revn. Nos. 334 and 354 of 1935, Decided on 24th May 1935.

Criminal Trial — Cross-cases—Magistrate hearing evidence in each case separately—Same argument for both cases and one judgment delivered—Held : trial, though irregular, did not cause prejudice to accused.

In two cross-cases, the evidence in each was taken one after another, the two cases were heard by one argument and one judgment was delivered.

Held : that though the procedure was irregular, no prejudice was caused to the accused and the High Court should not therefore interfere : 20 *Cal* 537, *Rel on.* [P 549 C 1; P 550 C]

Sures Chandra Talukdar—for Petitioner.

Joges Chandra Sinha—for Opposite Party.

Lort-Williams, J.—These two cases were cross cases of assault. In Revision No. 354, the complainant was a Marwari gunny broker who held a monthly tramway pass. On 9th October, in the morning, he boarded a car from Sealdah to High Court as a first class passenger. The accused, who was a tramway conductor, asked for his ticket and the complainant showed him his pass. It was alleged that the accused suspected that the ticket was not the complainant's. At any rate, there was an altercation between them, during which, it is alleged, the accused abused the complainant and the complainant retaliated. Upon this, the accused is alleged to have called the complainant a swine and assaulted him. Afterwards, the complainant went to the thana and lodged a complaint. His pass which had been deposited by the accused at the thana was returned to him. Subsequently, the complainant went to the hospital. The accused, on the other hand, filed a complaint against the complainant, which is the subject matter of Revision No. 334. The conductor's case was that upon being asked for his pass, the Marwari refused to show it to him and abused him. Further, with the help of Marwari fellow passengers, the Marwari assaulted him.

The Judge first heard the evidence for the prosecution in Revision No. 334. There was no evidence for the defence. Then he postponed judgment, and heard the case which is the subject matter of Revision No. 354. In that case, evidence was again called for the prosecution, but none for the defence. At the end of that evidence, the pleaders on both sides addressed the Court with respect to both the cases, and, subsequently, the Magis-

trate gave one judgment, which is the judgment in respect of Revision No. 354, and in No. 334 he recorded the following order : "Vide order in the connected case. The accused is acquitted under S. 258, Criminal P. C." The Magistrate in his explanation says that the occurrence which formed the subject matter of the two cases was the same, and as such one was the cross case to the other, and the prosecution in the one was the defence in the other. Evidence in both the cases was separately gone into, after hearing which the lawyers made the same arguments for both, as the facts were the same. Both the cases were decided on their merits after weighing the evidence in both, as will appear from the order in case No. Cr/2380 of 1934 which was considered to be a part of the present case.

It is obvious that this procedure was not objected to by either of the pleaders. No objection was recorded. On the contrary, they both made one speech with regard to the evidence in both the cases. If objection had been raised by either of the pleaders, doubtless the Judge would have given separate judgments. The procedure adopted by him obviously was for the purpose of saving time and for convenience, and the only question for us to consider is whether, in these circumstances, this procedure was illegal or irregular and, if either illegal or irregular, whether it is necessary for us to interfere in Revision on the ground that some prejudice has been caused to the accused in Revision Case No. 354. In his judgment, the learned Judge after reciting the facts said :

> Evidence was adduced in both the cases; and it is for determination which story is true and probable.

He then dealt with the evidence on behalf of the Marwari and gave his reasons why he thought that the evidence of the Marwari witnesses was true. The second witness was a Sikh by nationality and not a Marwari and the Magistrate said that

> his status in life and straightness leaves no doubt in my mind that the story of the complainant is true.

Then he dealt with the evidence on behalf of the conductor, and remarked that there was not only hopeless discrepancy in witnesses' statement regarding the stage at which the altercation and assault took place, but discrepancy in the Inspector's own statement as to where he actually boarded the car :

> If he had actually got into the car at the time of the alleged assault on the conductor, would he not have interfered then and there to stop the assault ? Evidently, he came in after the incident was over and his deposition that he saw the alleged assault is false.

This appears to be an accurate criticism of this part of the evidence, because the Inspector said that he was at the junction of Central Avenue and Harrison Road. On hearing the golmal he went into the car; complainant was being asaulted by the accused. There were others who stopped the accused. Whereas a conductor who was in the second-class car said that he heard the hallas between the parties. He noted the assault on the complainant's facc. At the Chitpore Junction, the car stopped and he noticed the cuts on the complainant's face. The Inspector came at this junction. That seems to show that the assault was just over when the car reached the junction and the Inspector boarded it, in which case he could not have seen the assault itself, though he might have seen the effects of the assault on the face of the conductor. It appears that the Inspector tried to improve his evidence on this point. Therefore the Magistrate was justified in disbelieving his evidence and holding that it was discrepant. Then the Magistrate made this observation : "Over and above this it appears that complainant's story in the present case is more probable," that is to say, in addition to the fact that he believed the Marwari's witnesses and disbelieved the conductor's witnesses; he also thought the Marwari's case more probable.

Now, strictly speaking, this procedure undoubtedly was irregular, if not illegal. Each case ought to have been tried separately, one after the other. But even so, there would have been no objection to the Magistrate postponing judgment in the first case until he had disposed of the second case. If therefore he had followed the regular procedure, there is nothing to show that his final conclusion would have been different. Assuming that he found these discrepancies in the evidence on behalf of the conductor and came to the conclusion that he could not accept that evidence as true, he must have acquitted the accused in that case and assuming,

as he says, that he did believe the Sikh witness called on behalf of the Marwari, the result must have been that he would accept the Marwari's case and convict the conductor of assault. The question therefore arises whether there is any necessity for us to interfere in revision. The case of 20 Cal 537 (1), is very much in point. In that case there were two cross cases of rioting and grievous hurt committed separately for trial before a Sessions Judge, who, having heard the evidence in the first case, heard the evidence in the second case, examined some of the accused in the one case as witnesses for prosecution in the other and vice versa, and subsequently heard the arguments in both the cases together, and the opinions of the assessors (who were the same in both the cases) were taken at one time, and both the cases were dealt with in one judgment. It was held that this mode of trial, although irregular, did not prejudice the accused in their defence, and that under such circumstances a retrial was not made necessary by reason of such irregularity. In these circumstances, and being of opinion that no prejudice was done to the Conductor owing to this mode of trial, we do not think it necessary to interfere, and both these rules must be discharged.

Jack, J.—I agree.

K.S. *Rules discharged.*

1. Queen-Empress v. Chandra Bhuiya, (1893) 20 Cal 537.

A. I. R. 1935 Calcutta 550

M. C. GHOSE, J.

Jagadish Chandra Maity—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 907 of 1934, Decided on 22nd November 1934.

Penal Code (1860), S. 216-B—Harbouring—Mere knowledge of whereabouts of offender does not amount to harbouring.

"Harbour" includes the supplying a person with shelter, food, drink, money, cloths, arms, ammunition or means of conveyance or the assisting a person in any way to evade apprehension. Mere knowledge of the whereabouts of an offender does not amount to harbouring him.

Where a father who was asked to produce his son who was charged with an offence and was absconding, produced him when the police demanded him :

Held: that he was not guilty under S. 216-B merely from this fact: 25 *All* 261, *Rel on.*

[P 550 C 2]

Santosh K. Bose and *Apurba Charan Mukherjee*—for Petitioner.

Order.—Upon hearing the advocate for the accused it appears that the petitioner's son was charged with an offence under S. 17 (2), Bengal Criminal Law Amendment Act in April 1932 and the said son absconded and could not be found. The petitioner was appointed a special Police Officer and was directed to produce his son at the police station. On 24th November 1933, about 18 months afterwards a Police Officer went to the petitioner's house and demanded him to produce his son whereupon the petitioner sent for his son who was said to have gone out for a walk, and when the son came back the petitioner produced him to the Police Officer without delay. Upon these facts the petitioner has been convicted under S. 212, I. P. C. The two facts upon which the learned Sessions Judge has based the conviction are (1) that the petitioner knew the whereabouts of his son and (2) that he did not himself produce the son nor gave information to the Police Officer as to the whereabouts of the son.

It is urged by the advocate that these facts are not sufficient to amount to a harbouring within the definition of S. 216-B, I. P. C. There it is stated that "harbour" includes the supplying a person with shelter, food, drink, money, cloths, arms, ammunition or means of conveyance or the assisting a person in any way to evade apprehension. Mere knowledge of the whereabouts of an offender does not amount to harbouring him: See in this connexion the case of 25 All. 261 (1) where the accused men actually tried to mislead the police by telling lies as to the whereabouts of the offender and yet they were found not to have harboured him. The present case is stronger inasmuch as the petitioner produced the offender to the police as soon as the police demanded him. In the circumstances, the conviction is set aside and the fine, if paid, will be refunded.

K.S. *Conviction set aside.*

1. Emperor v. Husain Bakhsh, (1903) 25 All 261 =1903 A W N 29.

A. I. R. 1935 Calcutta 551

M. C. GHOSE, J.

Kadamali and *another* — Accused — Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 894 of 1934, Decided on 22nd November 1934.

Wrongful confinement — Peon arresting person under valid warrant in discharge of duty—Objection by such person that he is exempt under S. 135 (2), Criminal P. C.—Peon taking him to Court and release of person—Peon held not guilty under S. 342, I. P. C.

A peon arrested the judgment-debtor in the discharge of his duty under a valid warrant. The judgment-debtor protested that he was exempt from arrest under S. 135 (2), Criminal P. C., but the peon took him to the Munsif who after finishing a suit released him :

Held : that the peon was not guilty under S. 342, I. P. C., as he could not be said to have acted criminally : 30 *Mad* 129 and 7 *Rang* 598, *Rel on.* [P 551 C 2]

Phanibhusan Chakrabarti — for Petitioner.

Order.—In this case accused Kadamali has been convicted under S. 342, I. P. C., and accused Jatindra Banerjee has been convicted under Ss. 342/109, Penal Code. No one appears to oppose the rule. Upon hearing the learned advocate for the accused petitioners, it appears that accused Kadamali was a civil Court peon and accused Jatindra was a decree-holder in a suit in the Munsif's Court. The decree was against the complainant Asutosh Roy. The decree being unsatisfied the decree-holder obtained from the Court a warrant of arrest of the judgment-debtor in execution of the decree. The warrant was made over to the accused Kadamali for execution. The complainant was arrested at about 3 p. m. on the day of occurrence in a betel shop in the civil Court compound. The peon arrested him on the identification of the accused Jatindra and took him forthwith to the civil Court but as the Munsiff was busy in trying a title suit the judgment-debtor was detained till 5 p. m. when the Munsif was at leisure to attend to the case. The Munsif heard the defence of the judgment-debtor that he was exempted from arrest under S. 135, sub-S. 2, Criminal P. C. Accepting the defence the Munsif ordered his release. Thereafter, the complainant instituted the present complaint against the peon and the decree-holder charging them with wrongfully arresting him and detaining him.

As to the wrongful detention, the facts do not support the contention of the prosecution. The judgment-debtor was arrested at about 3 p. m. and forthwith taken to the Munsif's Court. The report of the Munsif shows that he was at the moment busy in hearing a title suit. The peon was therefore justified in keeping the judgment-debtor until 5 o'clock when the Munsif was at leisure to attend to the case. There was nothing wrong in detaining him, in the circumstances from 3 p. m. to 5 p. m. see the case of 30 Mad 179 (1). The next question is whether the peon acted criminally in arresting the judgment-debtor. It is stated that the judgment-debtor protested that he had come to the criminal Court to attend to a case and that therefore he was exempted from arrest under S. 135 (2). It is urged by the advocate that it was not the duty of the peon to enquire into the truth of the judgment-debtor's allegation, but that it was his duty to produce him forthwith to the Court of the Munsif which was nearby and let him state his defence to the Court. The defence is supported by the decision in 7 Rang 598 (2). The peon acted in the discharge of his duty in arrecting on a valid warrant, the judgment-debtor against whom the decree was pending and in the circumstances, it cannot be said that he acted criminally. He is acquitted of the offence. Accused 2 who is accused of abetting the peon in committing the offence will also be acquitted as the peon committed no offence. The fines, if paid, will be refunded.

K.S *Petition allowed.*

1. Emperor v. Samuel, (1907) 30 Mad 179= 5 Cr L J 102.
2. U. Theve v. A Kim Fee, 1930 Rang 131=123 I C 137=7 Rang 598.

A. I. R. 1935 Calcutta 552

GUHA AND BARTLEY, JJ.

Secy. of State—Defendant—Appellant.

v.

Promatha Nath Ganguli—Plaintiff—Respondent.

Appeal No. 117 of 1931, Decided on 19th March 1935, from original decree of Addl. Sub-Judge, Dinajpur, D/- 21st January 1931.

(a) Master and Servant — Departmental enquiry leading to dismissal — Irregularity therein condoned by employee himself—He cannot subsequently claim damages on score of such irregularity.

Where departmental rule of procedure, under which the enquiry leading to the dismissal had to be held, was sufficiently and substantially complied with :

Held : that a claim for damages could not be allowed, on the score of an irregularity which was condoned by the plaintiff himself during the progress of the enquiry. [P 553 C 2]

(b) Bengal Police Regulation, Vol. 3, R. 88 (b)—"Criminal proceeding"—Investigation into crime not going beyond police enquiry—No action taken on final report — There is no criminal proceeding.

An investigation into a crime which does not go beyond police enquiry, and results in a final report on which no action could be taken under the law, so far as the commission of a crime is concerned, and which does not come before any criminal Court, cannot be held to be a criminal proceeding as contemplated by the rule of procedure to be followed in the matter of infliction of punishment on a police officer, who is departmentally charged with having taken bribes or illegal gratification in connexion with the investigation of a reported commission of a crime. [P 554 C 1]

S. C. Basak and *Bijan Kumar Mukherjee*—for Appellant.

Radha Binode Pal and *Jitendra Mohan Banerji*—for Respondent.

Judgment.—This is an appeal by the Secretary of State for India in Council from a decision of the learned Subordinate Judge, Dinajpur, passing a decree in favour of the plaintiff-respondent in this Court, for Rs. 780 by way of damages for wrongful dismissal from Government service. The case before the Court was that the plaintiff was a Sub-Inspector of Police, and as such had to investigate into several dacoities, bad livelihood cases and a gang case in the year 1921. On a confidential enquiry made as to the conduct of another police officer, it transpired from statements of some persons that the plaintiff had extorted money from various persons, and had attempted to obtain illegal gratification, by using threats of house search, arrest and other injuries. After those statements had been recorded, the plaintiff was directed to show cause why he should not be dismissed on the ground that he had obtained illegal gratification in the shape of money, by means of extortion practised on persons named in the charges framed against the plaintiff by the Superintendent of Police on 24th July 1924. It would appear that after proceedings were drawn up, the plaintiff was allowed to take copies of the statements of persons on the basis of which the charges were framed, and some of those persons were cross-examined, during the course of the proceedings, by the plaintiff, having been summoned to appear at his instance, the plaintiff not having considered it necessary to cross-examine others.

In addition to the witnesses previously examined in the absence of the plaintiff, other witnesses were examined and cross-examined during the course of the proceedings instituted against the plaintiff, and he was dismissed from service on 7th December 1924 by the order of the Superintendent of Police. There was appeal and representation to the higher authorities ; and the order of dismissal was ultimately affirmed by the Government of Bengal on 6th July 1925. The questions raised in the case before the Court below, and the points raised in this appeal, related to irregularities in the proceedings held in the matter of dismissal of the plaintiff from service, which was characterised as illegal dismissal. The claim for damages was on that basis. It was asserted that the Superintendent of Police holding the enquiry did not comply with the provisions of the Police Regulations, Bengal, Vol. 3, R. 108 (a), which lays down that witnesses shall be examined in the presence of the officers proceeded against. It was in the next place asserted that the Superintendent of Police acted illegally in not complying with the provisions of the Police Regulation, Bengal, Part 3, R. 88 (b), which lays down that in cases of misconduct arising out of, or in connexion with judicial trials and criminal proceedings, the Superintendent of Police shall not inflict any punishment without previous consultation with the District Magistrate, and the case of the plaintiff was that the proceedings arose out of allegation of bribery in connexion with Akbarpur Dacoity case.

The Judge in the Court below has held, and we are in agreement with his decision in this part of the case, that R. 108 (a) referred to above, on which the plaintiff relied, applied to the enquiry held into the plaintiff's conduct as a police officer. The question however remains whether it could be said on the facts and in the circumstances of the case as disclosed by the materials on the record, that plaintiff could claim relief by way of damages, simply by showing that the letter of the rule was not followed. In our judgment, the conduct of the plaintiff during the enquiry had to be taken into consideration in determining whether the non-examination of certain persons in his presence, during the course of the enquiry, amounted to such an infringement of the provisions of a rule of procedure, and was such an irregularity as could entitle the plaintiff to claim damages for an order of dismissal by the authorities concerned, which was ultimately confirmed by the Government of Bengal. In this connexion reference has to be made to the evidence given by the Surerintendent of Police by whom the enquiry leading to the dismissal of the plaintiff, was held in the year 1924, as a witness in the case. According fo him, the plaintiff was asked if he wanted to have the witnesses examined in his absence before charges were framed, examined again, and he was told he could do so ; we see no reason to doubt the veracity of the witness on this point, although the plaintiff wanted to make out by his own evidence before the Court that he was never told that if he so wanted, he could have the witnesses previously examined in the course of preliminary enquiry, examined in chief again in his presence. There is no question that facilities were given to the plaintiff in the matter of obtaining copies of the statements of those witnesses, and all of them whom the plaintiff wanted to cross-examine during the course of the proceedings, were summoned to appear, and were cross-examined by the plaintiff.

In addition to that, the plaintiff had to admit in his cross-examination before the Court, that he did not ask that the 19 witnesses might be examined in chief again in his presence. On the materials, we have no hesitation in coming to the decision that the departmental rule of procedure under which the enquiry leading to the dismissal had to be held, was sufficiently and substantially complied with ; and that a claim for damages could not be allowed, on the score of an irregularity which was condoned by the plaintiff himself, during the progress of the enquiry, by the Superintendent of Police. The second irregularity and non-compliance with rules of procedure, complained of by the plaintiff, was the one relating to consultation with the District Magistrate before infliction of punishment by the Superintendent of Police. The rule provided for consultation in certain specified cases; and there is no doubt that the rule so far as it went, applied to the proceedings terminating in the order of dismissal of the plaintiff by the Superintendent of Police, which was ultimately affirmed by the Government, on full consideration of the evidence against the plaintiff. In cases of misconduct of a police officer, arising out of or in connexion with criminal proceedings, the District Magistrate had to be consulted before any punishment could be inflicted on the police officer with reference to whose conduct enquiry was held. The plaintiff's case was that: "The proceedings arose out of allegation of bribery in connexion with Akbarpur Dacoity Case"

The charges framed against the plaintiff on 24th July 1924, and his explanation submitted to the Superintendent of Police on 9th October 1924, show the real nature of the case against the plaintiff. In view of the details mentioned therein, it is not possible to hold that the enquiry as to misconduct on the part of the police officer arose out of or in connexion with any criminal proceedings as contemplated by R. 88 (b), Police Regulation, Bengal. The plaintiff, it would appear from the nature of proceedings against him was accused of misconduct as police officer, during the investigation of a dacoity case ; the investigation however ended in a final report, and the case was dropped. The expression "criminal proceedings" has not been defined in any Legislative enactment, and it was used in the rule in question in conjunction with a judicial trial. It appears to be clear that an investigation into a crime which does

not go beyond police enquiry, and results in a final report on which no action could be taken under the law, so far as the commission of a crime was concerned, and which did not come before any criminal Court, cannot be held to be a criminal proceeding as contemplated by the rule of procedure to be followed in the matter of infliction of punishment on a police officer, who is departmentally charged with having taken bribes or illegal gratification, in connexion with the investigation of a reported commission of a crime. In our judgment the facts of the case before us, regard being had to the charges framed against the police officer which he had to meet, a consultation with the District Magistrate was not necessary, and was not enjoined by the rules of procedure under which the enquiry was held by the Superintendent of Police.

The question of prejudice was raised in the Court below, and it received the consideration of that Court. The position indicated by the learned advocate for the respondent in this appeal was that the question of prejudice did not really arise in the case; the plaintiff was entitled to get damages for wrongful dismissal on his establishing that there was non-compliance with the Rules of procedure in the matter of an enquiry into misconduct on his part. In our opinion, the question of prejudice need not have been gone into in the case before us, regard being had to the position that the plaintiff claimed damages on account of non-compliance with the provisions of law, relating to an enquiry which resulted in his dismissal. No case of prejudice was set out in the plaint and no issue was directed on that question. The Judge in the Court below has held that there was prejudice so far as the plaintiff was concerned, attributable to the irregularities complained of, following upon non-compliance with statutory rules and on the violation of the same; and has given reasons of hypothetical and general nature, which have no real bearing on the facts of the case before us. The reasons are not based on any evidence on the record, and are therefore not acceptable, so far as the decision of the Court below on the questiou of prejudice on account of non-compliance or violation of statutory rules is concerned.

The result of the conclusions we have arrived at, on the question arising for consideration in this appeal, as mentioned above, is that the appeal is allowed, and the decision and decree of the Court below are set aside. The plaintiff's suit is dismissed with costs including the costs in this Court. The hearing-fee in this Court is assessed at three gold mohurs.

K.S. *Appeal allowed.*

A. I. R. 1935 Calcutta 554

GUHA AND BARTLEY, JJ.

Jotindra Nath Haldar and *others* — Plaintiffs—Appellants.

v.

Aswini Kumar Mondal and *others* — Respondents.

Appeal No. 1655 of 1931, Decided on 17th January 1935, from appellate decree of Addl. Dist. Judge, Jessore.

Landlord and Tenant—Rent—Suspension of rent allowed to tenant on ground of dispossession in prior suit for rent—Subsequent publication of Record-of-Rights in which tenants were marked as being in full possession of land—Subsequent suit for rent by landlord—Onus is on tenants to prove continuance of dispossession from earlier suit—Record of Rights.

Where in a prior suit for rent by the landlord the tenant is allowed suspension of rent on the ground of dispossession but a subsequently prepared Record-of-Rights shows that the tenant is in full possession of the land and the landlord sues for rent for subsequent period, it is for the tenant if he claim suspension, to prove that the earlier dispossession had continued down to the period of the subsequent suit. It is for him to rebut the presumption arising in favour of the plaintiff from the Record-of-Rights and it is not for the landlord to establish that the tenants have been restored to possession: 1933 *Cal* 290, *Rel on.* [P 555 C 2]

Radha Binode Pal and *Bhupendra Kisore Bose*—for Appellants.

Sarat Chandra Roy Chowdhury and *Rejendra Nath Das*—for Respondents.

Ramendra Mohan Majumdar — for Deputy Registrar.

Judgment.—The plaintiffs in the suit out of which this appeal has arisen, prayed for recovery of arrears of rent in respect of a tenancy bearing an annual rental of Rs. 627-13-0 held by the tenant defendants, defendants 1 to 29 in the suit. The claim for realisation of rent was in regard to the arrears due for the years 1330 to 1333 B. S. It appears to be clear from the plaint in the suit that the plaintiffs' claim for rent was

on the footing that the tenant defendants held a tenancy under them comprising an area of 980 bighas of land, in respect of which the rent of Rs. 627-13-0, as mentioned above was payable annually.

The only defence of the contesting defendants to the claim for rent as made by the plaintiffs was that the plaintiffs had dispossessed them from portions of the land in respect of which rent as claimed in the suit was payable, and substantially interfered with their possession. On that defence, it was asserted by the tenant defendants that there should be total suspension of rent. As it has been stated in the judgment of the trial Court, no evidence was adduced in support of the plea of dispossession from any portion of the lands appertaining to the tenancy in respect of which rent was claimed. It was however urged on the side of the contesting defendants that the facts found and the reasons given in the judgment in a suit for rent for a previous period instituted by the plaintiffs in 1919, should be adopted in the present case.

It was contended that the question of dispossession of the tenant defendants should be treated as one concluded by the judgment in the previous suit of 1919, Ex. C. in the case. The trial Court refused to accept the plea of res judicata raised by the tenant defendants, as indicated above; and rejecting the plea of dispossession as raised by them passed a decree in favour of the plaintiffs. A decree was passed in favour of the plaintiffs for recovery of arrears of rent as claimed in the suit. On appeal by the contesting defendants, the decision and decree of the trial Court was reversed by the Court of Appeal below, on the ground that the judgment in the previous rent suit of 1919 operated as res judicata against the plaintiffs, on the question of the dispossession by the plaintiffs, and that regard being had to the position that the kabuliat (Ex. 1 in the case) was held in the previcus suit of 1919 to be one which had not been acted upon and, there were no material before the Court, on which a decree could be passed in favour of the plaintiffs apportioning the rent payable to them by the tenant defendants. According to the lower appellate Court, the entire rental had to be suspended for the period in suit. The plaintiffs appealed to this Court.

It requires to be noticed that after the decision of the previous suit of 1919, there was the final publication of the Record-of-Rights in the settlement proceedings in 1925; and according to the entry in the finally published Record-of-Rights the tenant defendants were in possession of 333.37 acres of land, equivalent to more than 1000 bighas; the jama recorded in respect of the lands in possession of the tenants defendants was Rs. 627-13-0. In the suit for rent giving rise to this appeal, the tenant defendants claimed suspen sion of rent on the ground of dispossession from a part of the tenancy held by them. The onus was on the defendants to prove dispossession and the extent of eviction, even though suspension of rent was allowed on the ground of dispossession in a suit for rent for a previous period. It was for the tenant defendants to prove affirmatively, that the earlier dispossession continued down to the period for which rent was claimed in the present suit. The onus was not on the plaintiffs landlords to establish that the tenants had been restored to possession: See in this connexion 60 Cal 247 (1). Furthermore in the case before us, the entry in the finally published Record-of-Rights, at the date subsequent to the period covered by the previous suit for rent instituted in 1919, made it incumbent upon the tenant defendants to rebut the presumption arising in favour of the plaintiffs that there was no dispossession of the tenants from any portion of the tenancy comprising 980 bighas of land in respect of which rent was claimed. The tenant defendants having failed to make out any case for any suspension of rent payable by them, the plaintiffs were entitled to a decree for rent claimed by them in the suit. In the above view of the case the decision of the Court of Appeal below and decree passed by it, dismissing the plaintiffs' suit must be set aside, and the decree passed by the trial Court in favour of the plaintiffs, appellants in the Court, restored. In the result therefore, this appeal is allowed, and the decree passed by the Court of first instance in favour of the appellants is

1. Satish Chandra Pal v. Hrishikesh Law, 1933 Cal 290=143 I C 30=60 Cal 247.

restored. The plaintiffs-appellants are entitled to realise their costs in the litigation including the costs in this appeal, from the tenant defendants, respondents in this appeal.

K.S. *Appeal allowed.*

A. I. R. 1935 Calcutta 556

R. C. MITTER, J.

Mohesh Chandra Mali and *others*—Defendants—Petitioners.

v.

Gangamayee Mazumdar — Plaintiff—Opposite Party.

Civil Rule No. 28 of 1935, Decided on 11th February 1935, from order of Dist. Judge, Mymensingh, D/- 4th August 1934.

Jurisdiction—Small Cause suit—Suit filed as Small Cause suit—Munsif transferred and successor not having Small Cause powers appointed—Suit transferred to his Court—Before commencement of hearing, Munsif invested with powers of Small Cause Court Judge to try such suits—Decision of Munsif is final and not appealable—Only revision is competent.

If a suit is instituted in a Court of Small Causes and if that Court is subsequently abolished, the case will have to be sent to the ordinary civil Court having jurisdiction under the provisions of S. 35, Provincial Small Cause Courts Act. If the Court to which the case is sent under the provisions of S. 35 acquires before the date of the trial the powers to deal with the said suit as a Small Cause Court suit, the provisions of sub S. (1) of S. 32 would be applicable. [P 557 C 2]

A suit for recovery of Rs. 145 was filed as a Small Cause Court suit, was numbered as a Small Cause Court suit and was registered as Small Cause Court suit. Subsequently, the officer before whom the suit was filed was transferred to another place and was succeeded by another who had powers to try Small Cause Court suits up to the value of Rs. 100 only. As there was no Court of Small Causes then having jurisdiction to try suits of Small Cause Court nature, the values whereof exceeded Rs. 100 under the provisions of S. 35, the Small Cause Court suit was transferred to the Court of a new officer. But before the hearing commenced the new officer was invested with the powers of a Small Cause Court Judge to try suits up to the value of Rs. 150. At the date of the trial and at the date of the judgment, he had the powers to try this particular suit, which was originally instituted as a Small Cause Court suit:

Held: that his decision was final and not appealable. The party's remedy was only by way of revision under S. 25. [P 556 C 2; P 557 C 2]

Abinash Chandra Ghose — for Petitioners.

Upendra Kumar Roy and *Ramendra Chandra Roy*—for Opposite Party.

Order.—This Rule has been obtained by the defendants against an order of the learned Additional District Judge of Mymensingh dated 31st July 1934 and also against the judgment and decree of the Subordinate Judge of that place passed in Money Appeal No. 210 of 1934. The point taken by the petitioners is that no appeal lay to the Court of the learned District Judge against the judgment and decree passed by Mr. J. P. Sen dated 30th April 1934. On considering the arguments advanced by the respective Advocates I am of opinion that the position taken by the petitioners is sound.

The relevant facts are these. The plaintiff opposite party instituted a suit for recovery of a sum of Rs. 145 said to be due to him from the defendants. At the time when the plaint was filed, there was a Munsif at Kishoreganj having Small Cause Court powers up to the sum Rs. 150. The suit was accordingly filed as a Small Cause Court suit and was numbered Small Cause Court Suit No. 2368 of 1933 and it was registered as a Small Cause Court suit. Subsequently, the officer before whom the suit was filed was transferred to another place and was succeeded by Mr. J. P. Sen who had powers to try Small Cause Court suits up to the value of Rs. 100 only. As there was no Court of Small Causes at Kishoreganj then having jurisdiction to try suits of Small Cause Court nature, the value whereof exceeded Rs. 100 under the provisions of S. 35, Provincial Small Cause Courts Act, the Small Cause Court suit which I have mentioned above was transferred to the Court of Mr. J. P. Sen. If nothing further had occurred, Mr. J. P. Sen would have tried the suit in his ordinary file as a munsif and his decree would have been an appealable one. But certain other events occurred. They are, that before the hearing commenced, Mr. J. P. Sen was invested with the powers of a Small Cause Court Judge to try suits up to the value of Rs. 150. At the date of the trial and at the date of the judgment, he had the powers to try this particular suit, which was originally instituted as a Small Cause Court suit, as a Small Cause Court suit. He gave effect to the pleas taken by the defendants and dismissed the suit. The plaintiff made an application to the learned Dis-

trict Judge for a reference to the High Court and in the said application he stated as he must state that the decree passed by Mr. J. P. Sen was not an appealable decree. The Additional District Judge before whom this application came on for hearing however was of opinion that an appeal lay before him and he converted the application for reference into a memorandum of appeal and transferred the case to be decided on the merits to the Court of the Subordinate Judge of Mymensingh. The learned Subordinate Judge went into the merits of the case, reversed the finding of Mr. J. P. Sen and came to the conclusion that the plaintiff's claim was a valid claim and not barred by limitation. A decree was accordingly made by the said Subordinate Judge.

As I have already stated, the jurisdiction of the District Judge is questioned on the ground that the decision of Mr. J. P. Sen was a final decision not open to challenge by way of appeal. For the purpose of deciding this question some of the provisions of the Provincial Small Cause Courts Act has to be noticed. S. 32, sub-S. (1) says that if a suit is tried by a Court invested with the powers of a Small Cause Court, the decision must be taken to be the decision of a Small Cause Court and the decree passed would be a final decree not subject to any appeal or revision save as provided for in the Provincial Small Cause Courts Act. Sub-S. 2 of the said section then provides

> Nothing in sub-S. (1) with respect to Courts invested with the jurisdiction of a Court of Small Causes applies to suits instituted or proceedings commenced in those Courts before the date on which they were invested with that jurisdiction.

This sub-S. (2) is in the nature of a proviso to sub-S. (1) of S. 32 and therefore its operation must be limited expressly to the cases mentioned therein. The plain meaning of this sub-section is that if a suit is instituted in the ordinary civil Court or proceedings are commenced in such a Court the subsequent investment of such a Court with the powers of a Small Cause Court would not make the provision of sub-S. (1) applicable. The words "suits instituted or proceedings commenced" have a definite meaning. They mean, "when the plaint is presented or the application is put in." If at that time there is no Court of Small Causes in the locality and the suit or the application is filed in any civil Court that sub-section would apply even if the presiding Judge of the civil Court be later on invested with Small Cause Court powers. If a suit, therefore, is instituted in a Court of Small Causes, and if that Court in subsequently abolished, the case will have to be sent to the ordinary civil Court having jurisdiction under the provisions of S. 35 of the said Act. If the Court to which the case is sent under the provisions of S. 35 of the said Act acquires before the date of the trial the powers to deal with the said suit as a Small Cause Court Court suit the provisions of sub-S. (1) of S. 32 would be applicable. This interpretation of the relevant sections to which I have referred receives considerable support from the provisions of S. 16 of the Act. The said section, namely S. 16, says that a suit cognizable by a Court of Small Causes shall not be tried by any other Court having jurisdiction within the local limits of the jurisdiction of the Court of Small Causes by which the suit is triable, that is to say, if at the date of the trial there is a Court of Small Causes in the locality which could try the suit which is admittedly of a nature cognizable by a Court of Small Causes, the ordinary Courts would have no jurisdiction to try the same.

My judgment, therefore, is that as Mr. J. P. Sen who tried the suit had the power at the date of the trial of a Small Cause Court Judge to try suits of a Small Cause Court nature of a value more than Rs. 145, his decision must be taken to be a decision of a Small Cause Court Judge under the law final and only open to revision under S. 25 of the said Act. I accordingly hold that the order and decree complained of are ultra vires and must be set aside. The result is that the decree of the learned Munsif is restored. But inasmuch as the learned District Judge of his own motion converted the application made before him by the plaintiff for a reference to the High Court into a memorandum of appeal, it would be open to the plaintiff to move this Court if he is so advised against the decree of Mr. J. P. Sen under the provisions of S. 25, Provincial Small Cause Courts Act. It would be for the Court to which such an application is made to consider the said application on

its own merits. The Rule is accordingly made absolute but in the circumstances of the case I make no order for costs.

K.S. *Rule made absolute.*

A. I. R. 1935 Calcutta 558

HENDERSON AND R. C. MITTER, JJ.

Bibhuti Bhusan Khan— Claimant— Petitioner.

v.

Birendra Nath Roy, Official Receiver —Opposite Party.

Civil Rule No. 669 of 1935, Decided on 13th June 1935, from order of Addl. Dist. Judge, Howrah, D/- 27th May 1935.

(a) Insolvency— Annulment of transfer— Application for adjudication admitted and opposite party appointed interim receiver— Before order of adjudication is made, Court cannot inquire under S. 4 of Provincial Insolvency Act, whether transfers made to third persons are genuine or not.

Where an application for adjudication is admitted and the opposite party is appointed interim receiver, the insolvency Court cannot inquire, before the order of adjudication is made, whether a transfer by the applicants to a third person is a genuine one or not. And it is premature for the receiver to start proceedings under S. 4 before the order of adjudication.

[P 558 C 2]

(b) Insolvency—Interim receiver — Order to him to enter upon third person's property is not one under Provincial Insolvency Act, S. 4.

An order to an interim receiver to enter upon the property of third person is clearly not one within the scope of S. 4. [P 559 C 1]

Sarat Chandra Basak and *Sarat Chandra Janah*—for Petitioner.

Sarat Chandra Bose, Sitaram Banerjee and *Apurba Charan Mukherjee*—for Opposite Party.

Henderson, J.—This is a rule calling upon an interim receiver appointed by the Additional District Judge at Howrah in connexion with certain Insolvency proceedings to show cause why an order directing him to enter upon certain property and make an inventory should not be set aside. The relevant facts are these : Certain members of firm applied to be adjudicated insolvents. The petition was admitted and the opposite party was appointed interim receiver and directed to take possession of the property of the applicants. Accordingly he attempted to take possession of a Mill in the District of Balasore. This Mill had been purchased by the present petitioner on 4th Jannary 1934. He accordingly objected to the action of the receiver and the learned Judge upheld his objection. About five months later on 24th May 1935 the receiver applied to the Court with a prayer that " a case may be started under S. 4, Provincial Insolvency Act." Next day he asked that an inventory might be made. It appears that the contention of the receiver is that the transfer to the petitioner was a mere sham transaction, the applicants for insolvency being still the real owners, and he desired the Court to determine the matter under S. 4. The Judge had already come to the conclusion that prima facie the conveyance to the petitioner was a real one. He refused to alter his opinion on this point, but he held that the proceedings under S. 4 should be maintained and directed the receiver to enter on the property and make an inventory.

In support of the rule Dr. Basak has contended that that order was passed without any legal justification and that the proceedings taken under S. 4 were premature. On behalf of the receiver Mr. Bose argued that it is open to a Court to take proceedings under S. 4 even before an order of adjudication is made and that the order of the Judge is one properly made under O. 39, R. 7, Civil P. C. There can be no question that if the view taken by the learned Judge is correct, the proper procedure would be an application for annulment under S. 53. On the other hand it would no doubt be open to the Court to determine under S. 4 whether the Mill is still the property of the insolvents. But we are not at all clear how such a question would be entered into before an order of adjudication is made. At any rate this much is clear : that such proceeding would be entirely futile in the event of the petition being dismissed, and yet under S. 4 (2) the decision in such futile proceedings would be binding. In our opinion the intention of the legislature was to enable the Court to determine all questions necessary for the proper settlement of claims of the various creditors of the insolvent's estate. Before an order of adjudication is made, it is not necessary to inquire whether transfers made in favour of third persons are genuine or not.

Mr. Bose relied on two cases, viz., 55 Cal. 1053 (1) and 97 I. C. 174 (2). In the former the point at issue here was not even discussed. In the latter the point for decision was whether the alleged act of insolvency had been committed by one Wazir Singh and whether the property, in connexion with which the alleged act of insolvency was said to have been committed was his property. Neither of these autorities throw any light on the present case and in our opinion the application of the receiver to start proceedings under S. 4 was misconceived. Then in the second place the Judge has not in fact determined any question under S. 4; on the contrary he has come to conclusion that prima facie title is with the petitioner, and it does not appear that he is going to carry the investigation any further. An order to an interim receiver to enter upon the property of third person is clearly not one within the scope of S. 4.

With regard to Mr. Bose's contention that the order was one properly passed under O. 39, R. 7, Civil P. C., it is only necessary to say that there was no application before the learned Judge, which would have given him jurisdiction to proceed under that rule. This rule must therefore be made absolute and the order of the District Judge directing the interim receiver to enter on the Mill and make an inventory must be set aside. The petitioner will get his costs from the receiver, hearing fee one gold mohur. It is clearly desirable that the question, whether an adjudication order should be made be determined without any further delay.

R. C. Mitter, J.—I agree.

K.S. *Rule made absolute.*

1. Laxmi Industrial Bank Ltd., v. Dinesh Chandra Roy, 1928 Cal 609=113 I C 105=55 Cal 1053.
2. Wazir Singh v. Janki Das, 1926 Lah 679=97 I C 174.

A. I. R. 1935 Calcutta 559

R. C. MITTER, J.

Manorama Debi — Plaintiff — Petitioner.

v.

Wajadi Acan and *others* — Defendants—Opposite Parties.

Civil Rules Nos. 989 and 1017 to 1020 of 1934, Decided on 25th January 1935, from orders of Munsif, First Court, Madaripur.

(a) Practice—Relief — Suit on bond—Defendant not disputing amount—Decree cannot be passed for less amount.

Where in a suit on a bond the defendant does not dispute the amount due, the Court cannot decree the suit for lesser amount.

[P 559 C 2]

(b) Decree — Instalment decree — Even Small Cause Court should give reasons for granting instalments—Condition of debtor and other circumstances like date of loan, amount, instalment etc., should be considered—Interest of creditor also should be guarded.

Even a Small Cause Court in granting instalments is required under provisions of O.20,R. 11, C. P. C., to state its reasons for granting the prayer. Simply because instalment is prayed for and the claim is not contested, that does not entitle a debtor to get an instalment decree as a matter of course. In making orders for instalments not only the condition of the debtor and his ability to pay must be considered, but also all other circumstances must be taken into consideration, namely, the date when the loan was incurred, the amount of the loan, the amount of the instalments ordered and the number of years in the course of which it is to be satisfied. An instalment decree spreading the instalments over a large number of years is a thing oppressive to the creditor and the Court should, in passing instalment decree be careful to guard also the interest of the creditor. Too much pity on a debtor is not consideration which is to prevail over all other claims: 11 C *L J* 431, *Rel. on.*

[P 560 C 2]

Amarendra Nath Bose and *Urukram Das Chakravarty*—for Petitioner.

Santosh Nath Sen—for Opposite Parties.

Revision Cases Nos. 989, 1018 & 1019.

Order.—In these cases the plaintiff instituted suits for recovery of money due on bonds. Defendants did not dispute the amount of claim. Still the Munsif has granted decrees in part. It is very difficult to follow how in these circumstances when there was no dispute as to the amount due the Munsif could have decreed the plaintiff's suit for amounts lesser than those claimed. The decrees will have to be modified accordingly and the plaintiff's claim decree in full. The defendants in these cases, as I have stated, admitted the claims but prayed for instalments spreading over a very long time as for instance, in Civil Revision Case No. 989, which corresponds to Suit No. 401 the claim was laid at Rs. 40 but the decree given was for Rs. 36 and this amount was directed to be paid in instalments of Rs. 3 in each quarter, that is to say, Rs. 3 in Ashar, Rs. 3 in Aswin, Rs. 3 in Pous and Rs. 3 in Chait. In making decrees for instalment the lower Court should not

only look into circumstances and means of the defendants but should also look into the position of the plaintiff. If an instalments of very small amounts is granted it may be that the decree-holder would have to spend a good portion thereof for the purpose of withdrawing the instalments if deposited in Court. Having regard to all the circumstances of the cases, I modify also the order for instalment. The defendants are to pay the balance that may be found due on the basis that the plaintiff's claim is to be decreed in full in two equal instalments, one to be paid by the end of Chait 1341 and the other by the end of the month of Aswin 1342. In default of the payment of any one instalment the whole amount will become due with interest at 6 per cent per annum. There will no order for costs. Suit No. 401 is decreed for Rs. 40 with costs Rs. 5-8-9 total Rs. 45-8-9. Suit No. 351 is decreed for Rs. 30 with costs Rs. 4-8-9 total Rs. 34-8-9 and Suit No. 366 is decreed for Rs. 55 with costs Rs. 7-8-9 total Rs. 62-8-9.

Civil Revision Case No. 1020.

The only question in this case is the question of instalment. The order for instalments which I have made in the rules just now disposed of will also govern this rule, that is to say, in lieu of instalments passed by the Court below the defendants are directed to pay the balance of the decretal amount in two equal instalments, one to be paid by the end of Chait 1341 and the other by the end of Aswin 1342. In default of payment of the first instalment, the whole amount will be recoverable with interest at 6 per cent per annum.

Civil Revision Case No. 1017.

In this case the plaintiff instituted a suit to recover a sum of Rs. 200 from the defendant on a bond executed as far back as 1925. Small payments were made and at the date of the institution of the suit on a calculation of the interest in terms of the bond a sum of Rs. 404-4-0 was due to the plaintiff. The plaintiff remitted Rs. 204-4-0 and sued for Rs. 200, the balance. The defendant did not contest the claim, but he prayed for instalments. In his deposition he says thus: "I want kist for 12 or 14 years in Aswin. I have a jama of Rs. 10-6-0." A preposterous prayer was made by the defendant when he wanted to repay the money borrowed as far back as 1925 in respect of which the creditor had given up a large amount by way of remission in 12 or 14 years. The learned Munsif ought to have come to the conclusion from the absurdity of the claim that the prayer for instalment was really not bona fide but only intended to harass the creditor. But however the learned Munsif simply records his order in this form: "Decreed on admission with costs." Then the decretal amount with costs is set out. This amounts to the sum of Rs. 230-5-6. Then the instalments are given in these words: "Rs. 25 in each Aswin, Rs. 15 in each Chait 1341 to 1345 B.S., Rs. 30-5-6 in Aswin 1346," that is to say, on a bond executed in the year 1332 on which a suit was instituted in the year 1340, the decree is to be satisfied by instalments spreading over upto the year 1346. Even a Small Cause Court in granting instalments is required under the provisions of O. 20, R. 11 to state its reasons for granting the prayer. Simply because instalment is prayed for and the claim is not contested that does not entitle a debtor to get an instalment decree as a matter of course. In making orders for instalments not only the condition of the debtor and his ability to pay must be considered but also all other circumstances must be taken into consideration, namely, the date when the loan was incurred, the amount of the loan, the amount of the instalments ordered and the number of years in the course of which it is to be satisfied. An instalment decree spreading the instalments over a large number of years is a thing oppressive to the creditor and the Court should, in passing instalment decrees, be careful to guard also the interest of the creditor. Too much pity on a debtor is not the consideration which is to prevail over all other claims. Inasmuch as the Small Cause Court Judge has given no reasons for allowing instalments, I have the power to interfere with the decree and I do interfere with the same.

In the observations that I have made I am supported by the principles formulated in the judgment of Mookerji, J., and Teunon, J., in 11 C. L. J. 431 (1). Having considered all the circumstances

1. Balgobindram Bhakat v. Chhedilal Saha, (1910) 11 C L J 431=6 I C 552.

of the case, I think in the interest of justice in substitution of the instalments ordered by the Court below the following order should be passed and I pass it accordingly, namely the defendant must pay the balance of the decretal amount to the plaintiff in two equal instalments, the first instalment to be paid within the month of Sravan 1342 and the second instalment to be paid within the month of Aghrahan 1342. In default of the first instalment, the entire unpaid decretal amount will fall due with interest at 6 per cent. In the circumstances of the case, I do not grant any hearing fee to the petitioner. But he will have other costs of this Rule.

K.S. *Order accordingly.*

A. I. R. 1935 Calcutta 561

(Special Bench)

DERBYSHIRE, C. J., MUKERJEE AND COSTELLO, JJ.

Emperor

v.

Bhawani Prosad Bhattacharjee and *others*—Accused.

Death Ref. No. 23 and Appeals Nos. 747 to 749 of 1934, Decided on 3rd December 1934.

(a) Bengal Criminal Law Amendment Act (as amended up to 1934), S. 6 — Penal Code (1860), S. 307—Attempt by one of conspirators to fire with revolver at Governor with intent to murder—Sentence of death held proper.

Where one of the conspirators in a conspiracy formed to murder the Governor attempted to fire at the Governor with a loaded revolver with intent to murder him and somebody by the side of the Governor was injured:

Held: that the case came within S. 307, I. P. C., and the Bengal Criminal Law Amendment Act as amended and that sentence of death on such person was proper. [P 568 C 1]

(b) Bengal Criminal Law Amendment Act (as amended in 1934), S. 6 — Penal Code (1860), Ss. 307, 109 and 115—Conspirator aiding others who attempted murder of Governor, but himself not actually taking part in such attempt—He cannot be sentenced to death under S. 6.

Where a member of a conspiracy formed to murder the Governor only aids others who actually attempt the murder, but himself does not take part in it, he cannot be sentenced to death under S. 6 of Bengal Criminal Law Amendment Act. The maximum sentence that can be awarded for this offence is only 14 years imprisonment under S. 307 read with S. 115. [P 569 C 1]

(c) Bengal Criminal Amendment Act—Interpretation.

The Bengal Criminal Law Amendment Act being a penal enactment, has to be strictly construed. [P 569 C 1]

(d) Criminal Trial—Person should not be convicted of offence with which he has not been charged or tried—Nor will High Court do this in exercise of its appellate powers.

A person should not be convicted of an offence with which he has not been charged at his trial, on which he had never stood his trial and on which he had had no opportunity of making his defence, and the High Court will not use any power that it may have as an appellate Court to substitute such a charge and convict accused of that offence. [P 570 C 2]

(e) Criminal Trial—Confession—Retracted—Court can look at it though it cannot be given same credance as to unretracted one.

A Court is entitled to read and look at a retracted confession. But the Court should not give same credance to it that it would have given if it had not been retracted. [P 566 C 2]

A. K. Roy and *Probodh Gopal Mukherjee*—for the Crown.

Sudhansu Sekhar Mukherjee, *Surajit Chandra Lahiri*, *Suresh Chandra Talukdar*, *Ajit Kumar Dutt* and *Farhat Ali*—for Accused.

Derbyshire, C. J.—In this case which has been known as the Lebong outrage my brother Judges and myself are of one mind and they have asked me to deliver the judgment of the Court. On May 8th of this year Sir John Anderson —the Governor of this province, visited the races at the Lebong race course at Darjeeling and at about half past three in the afternoon, after the races had finished and the horses were coming in, a man stepped up in front of His Excellency's box with a pistol in his hand, steadied his arm and shot from a distance of about 10 feet at Sir John Anderson. Almost at the same time,—perhaps a second or two later — another man standing somewhat to the side of His Excellency's box also raised a pistol and also fired a shot at Sir John Anderson from a distance of about six feet. It was a miracle that Sir John Anderson was not killed; one can only say it was an act of Providence. Unfortunately a by-stander, one Miss Beulah Thornton, was injured in the ankle from a bullet which had been fired by one or other of those pistols. The Police immediately opened fire on the assailants and at the same time two gentlemen—Mr. Tandy Green in one case and the Raja of Barwari in the other—very gallantly threw themselves on the assailants and prevented further damage being done. The assailants were both wounded by the Police fire.

They were overpowered and they were taken to the hospital and later on the next day, or the day after, they made confessions which were recorded, and from those confessions it appears that this attempt on the life of the Governor was the result of a conspiracy to murder him which had been hatched some time previously and in which a number of people were concerned. Some of those people were arrested, two of them within a day or two and the rest some time later in June and July. A great deal of evidence had to be collected and eventually in August and in September seven persons were charged before a Special Tribunal appointed to deal with this case. They were charged with various offences — conspiracy to murder and conspiracy to possess arms, and two of them with possessing arms with intent to murder—I think that is the phrase used in the particular Act under which these two persons were charged. The persons concerned were those who are appealing in this case together with another who has not appealed. The persons charged were Bhawani Prosad Bhattacharji, Rabindra Nath Banerjee alias Samarjit Banerji, Monoranjan Banerji alias Naresh Choudhury, Ujjala alias Amiya Mozumdar alias Malaya alias Malina Devi alias Lila, Madhusudan Banerji alias Amiya Banerji alias Sunil Sen, Sukumar Ghose alias Lantu and Sushil Kumar Chakravarti alias Ajit Kumar Dhar. They were tried before the Special Tribunal the proceedings lasting over some weeks and eventually the first two that I have mentioned, Bhawani and Rabindra, were found guilty of an attempt to murder and were under the law to which I shall advert presently sentenced to death. Monoranjan Banerji was found guilty of conspiracy to murder and conspiracy to possess arms, and he was, under the charge of conspiracy to murder, sentenced to death. Ujjala a girl of nineteen, was found guilty of conspiracy to murder and conspiracy to possess arms and she was sentenced to transportation for life. Madhusudan Banerji was found guilty of conspiracy to murder and conspiracy to possess arms and he was sentenced to fourteen years' rigorous imprisonment. Sukumar Ghose was found guilty of the like offence and was given a like sentence. Sushil Kumar Chakravarti was found guilty of conspiracy to murder and was sentenced to twelve years' rigorous imprisonment.

The first six have appealed in this case; Sushil has not appealed. Bhawani, Rabindra and Monoranjan have appealed against sentence only and not against conviction. They have been represented here by Mr. Mukherjee, Mr. Lahiri and Mr. Talukdar. The others who are appealing—Ujjala, Madhusudan and Sukumar alias Lantu—were not represented by counsel, but we thought it was essential that they should have their cases presented to us with fullness and with forensic knowledge, and we asked Mr. Mukherjee and Mr. Lahiri if they would be good enough to undertake their defence, and they, acting in accordance with the highest traditions of the Bar, agreed to give their services, and did give their services, in this appeal on behalf of Ujjala, Madhusudan and Sukumar without any fee or reward. This Court is very much indebted to them for what they have done. I ought to point out that at the trial before the Commissioners each of these accused was represented by a Pleader and the funds to provide fees to the Pleaders were paid by the Crown.

Now, as regards this case we of course have to come to the conclusion before doing anything that the conviction in this case and sentences in this case are right and proper. If we come to the conclusion that they are, it is our duty to confirm them. If we come to the conclusion that some of them are not, it is our duty to deal with them in such a way as we think proper and in accordance with law. I said at the outset that this shooting was not a mere spontaneous affair. A great deal of evidence was given and that evidence was reviewed in detail by the Commissioners who have given their judgment, and it is not necessary that this Court should deal with all that evidence in detail to the same extent as the Commissioners did. I said there was a conspiracy behind this attempt to murder, and the conspiracy, it appears, as far as the evidence shows, is this:

In 1932 a citizen of Dacca, Suresh Mozumdar had a daughter Ujjala who was then aged 17; he had a son who was generally known as Gopal who was two years younger. Suresh lived in Dacca.

His first wife—the mother of these two children—was dead, and he married a second wife who was two years older than Ujjala. He spent a good deal of his time in Calcutta where he had a rick-shaw business. Apparently he had some other property in another part of this province and he spent some of his time there. The result was that he was not a great deal at Dacca and was not able to supervise and keep an eye upon those two children Ujjala and Gopal, as he otherwise would have done, and as he no doubt realizes now, would have been much better. The two children were reading for the Matriculation Examination. In 1932 Suresh looked for a tutor to help Ujjala with her studies and one Sukumar Ghose alias Lantu offered himself. Suresh however declined his services on the ground that he did not know enough Sanskrit. Lantu thereupon introduced another man Madhusudan Banerji (he did not introduce him by the name of Madhu Sudan but introduced him under the name of Amiya Banerji) and Suresh engaged him as tutor for his daughter. Madhu Sudan Banerji had a brother whose name was Monoranjan Banerji ; he was introduced into Suresh's household not under his proper name but under the name of Naresh. Madhu Sudan seems to have tutored Ujjala for some time—about six months, and then Suresh dispensed with his services on the ground that his attendance was irregular ; but unfortunately for Suresh and his family, Madhu Sudan Banerji continued to visit the house together with his brother Monoranjan and Lantu from time to time.

According to Suresh, at some later period, probably in 1933—he is not clear about it—he found his daughter Ujjala reading two books which he considered to be undesirable—books of revolutionary character. He asked her where she had got them from and she said she had got them from her tutor Madhu Sudan. He took the books from her, said it was wrong, advised her to mend her ways and forbade Madhu Sudan to come to his house again. He spent a part of his time in Calcutta with the result that when he was away the same three young men—Madhu Sudan, Monoranjan and Lantu—continued to visit Suresh's house. There is no doubt whatever from confessions that have been made (Lantu did not confess, but Monoranjan and Madhu Sudan confessed)—there is no doubt whatever, from those confessions and from the evidence of other people, which I shall refer to presently, that all these three young men were members of a revolutionary party whose object it was to murder members of the Government. Sometime in March—it may be in February—of this year those two children Ujjala and Gopal sat for the Matriculation Examination and they both passed. After the examination, when they were not occupied with their studies, then one notices that the conspiracy begins. Some time at the end of March or the beginning of April, Lantu got into touch with a youth called Prithwish. It was suggested to Prithwish by Lantu that as he was a member of the party he should be prepared to do what is called an "action"—to shoot some body. It was suggested that he should go to Shillong to do it and Prithwish says that following the discipline of the party he agreed to do it; but Prithwish, fortunately for himself, decided that he would not do it, and he betook himself off to another part of the province to one of his relatives. So Lantu did not get his services. A little later than that, in the beginning of April, we find that Lantu, Madhu Sudan and Monoranjan were going very frequently to the house of Suresh and talking to the daughter. According to Gopal they would go on to the roof with the daughter and they discussed matters there in private. Gopal who was called as a witness said that he was enlisted into the revolutionary party although he was only a boy of 16 or 17. He does not appear, however, to have been asked at that time in the beginning of April to take any part in any plot that was being hatched.

A little later in April things began to get a little warmer in point of view of the conspirators and one finds that the girl had it suggested to her that she should do some work for the party and the suggestion seems to have come from Monoranjan Banerji. She agreed that she would, with the result that she and Monoranjan Banerji at a later period towards the end of April or beginning of May—I think it was on 3rd May—went down to Calcutta. Before doing that they had to hoodwink the father Suresh, and the way in which

they did it shows considerable cunning. Suresh had a business in Calcutta, but at that time he was at Dacca, and it was desired to get him out of the way so that Ujjala could go out without his interference. One finds that a man visited Suresh's business premises in Waliulla Lane in Calcutta and asked Bhelu, who was Suresh's brother-in-law and apparently his business manager, if Suresh was there. Bhelu said he was not, and this person told Bhelu that Suresh was wanted by a member of the Special Branch of the Police force. In order to get Suresh down to Calcutta it was suggested by Monoranjan who suddenly came on the scene that a telegram should be sent saying that his son Gopal who happened to be in Calcutta at the time was ill. Bhelu thought that that was probably the best way of doing it, and Bhelu gave a rupee to Monoranjan who went off and sent a telegram to Suresh saying that Gopal was ill. A telegram was sent in reply asking how Gopal was and the next day or the day after Suresh came down to Calcutta. He asked what the matter was ; he found Gopal quite well and they said that the telegram was sent because he was wanted by some one of the Special Branch of the Police force. The man who purported to have come from the Special Branch of the Police force never turned up again. Suresh waited there for some days ; he did not go to the Special Branch. Eventually he came to the conclusion that the matter was a hoax. But while he was there something else happened.

The two children discovered that they had got through the Matriculation Examination, and then the girl Ujjala suggested to her brother that they should go on a visit to a relative named Nanibala. A telegram was sent to the father in Calcutta asking for his permission that they might go. He was not in a position to make any further enquiry and he agreed that they might go. They did go, but they did not go to Nanibala's house. Ujjala and Monoranjan went together to Calcutta and the boy Gopal was taken by Madhusudan to Madhusudan's own home which is a place called Hashail, a considerable distance away. May 3rd is the date when Monoranjan took Ujjala down to Calcutta. He brought her to Calcutta to do some work for the party and on the way, according to her statement, she was told that the business was the shooting of His Excellency the Governor of Bengal. She was one day in Calcutta, and then she was picked up in a taxi by Monoranjan from the lodging where she was staying, and taken to the Sealdah Railway Station. When she got on the taxi she noticed that there were two suit cases there and Monoranjan told her that they were taking "things" which means arms and ammunition with which the attempt on the life of the Governor was to be made. The girl realized that it was a very dangerous piece of work because she pointed out that if they were found with arms on them they would be under the law that had been passed very recently at that time liable to the death penalty. Monoranjan replied that the train would be searched before they got to Darjeeling and if the luggage were hers and if she was travelling with him there would be less suspicion. He was not taking the responsibility of carrying the arms and ammunition on himself ; he was taking Ujjala with him to be used as a shield against any Police suspicion. He said that if there was any trouble they would say that they were not the owners of the suit cases. She agreed and they went to Darjeeling and they put up at an hotel which is known as the Snow View Hotel. At the railway station at Darjeeling they met an uncle or a relative of Ujjala's who seemed a little suspicious to find Ujjala travelling with this man. The suspicion of the relative was somewhat allayed and the two, Ujjala and Monoranjan, appear to have gone—there is no doubt that they did go to the Snow View Hotel and there they occupied one room together.

There appears to be no doubt about it that Ujjala was Monoranjan's mistress. Monoranjan not only seems to have inculcated criminal tendencies into Ujjala, but he seems to have debauched Ujjala as well, and made her his mistress. He seems to have taken her there partly for his amorous purposes, but mainly as a shield and a blind for the work that he proposed to do. When they got to the hotel they were visited in this room by two young men who were afterwards identified as Bhawani and Rabindra, and there was a discussion between

them. There is no doubt about the fact that the girl knew why those two boys Bhawani and Rabindra had come there and she seems to have taken herself off for the time being to the room of her relative who was staying at the same hotel. We are told by the confession of Rabindra that while those two young men were there in that room Monoranjan handed over an automatic pistol and a revolver and ammunition to Bhawani and Bhawani took them back to the hotel where he was staying, the Sanatorium, and kept them there. One notes that it was the purpose of Monoranjan to take Ujjala with him as a blind so that he might carry the weapons. When they got to the hotel he got rid of the weapons. He seems to have known and appreciated more than the others the danger of having such weapons with him.

The next day Monoranjan and the girl Ujjala visited these two young men and during the course of the visit the two young men went out of the room (this is according to Monoranjan's confession) and the girl and Monoranjan between them cleaned the arms. The next day they went there and they had a discussion with the two young men. It was suggested that that afternoon would be a suitable time to make an attempt on the life of the Governor as he would be going to a " flower show " and the two young men were asked to go there. They asked how they would recognize the Governor, and Monoranjan replied that the Governor rode on a big horse, that he himself would go to the "flower show" and point out the Governor to them. Bhawani and Rabindra went to the " flower show ;" they went there before the time of opening and were told that tickets were not being issued then. They then wandered in a park nearby where they found Ujjala and Monoranjan sitting some distance from them. Monoranjan and Ujjala shortly after left the place without giving them any signal or sign of recognition. Seeing that they could not get in Bhawani and Monoranjan went home. The other two went to the "flower show " and had a good view of the Governor but the people who had the pistols and who were intended to do the mischief were not there; so that nothing happened on that day.

That afternoon the two young men were upbraided by Monoranjan and Ujjala for their lack of courage or lack of initiative, and they were told not to make any mistake on the day following. On the morning following Monoranjan and Ujjala visited the room of Rabindra and Bhawani at the Sanatorium and they seem to have taken every precaution that they could. The pistols were cleaned and the ammunition which was to be used was warmed up. It was warmed up over a fire made by burning papers. According to the first confession of Monoranjan the paper was burnt by the girl and then the ammunition was warmed in that way. It is a significant fact in corroboration of that confession that afterwards some paper ash was found in that room screwed up in a piece of paper under the carpet. That being done Monoranjan and the girl went back to the Snow View Hotel and then in the afternoon they all took their way to the race course. Bhawani and Rabindra first took two tickets for the Totalizator, but finding that they would not be admitted into the enclosure with those tickets they went back and bought two 4 rupees tickets. Then Monoranjan and the girl came along. Bhawani and Rabindra took up a position in the general stand close to the Governor's stand and according to Rabindra, Monoranjan pointed out the Governor to Bhawani and Rabindra and then he and Ujjala went away and left Bhawani and Rabindra to do the work. As I have said at 3-30 the shots were fired.

About the guilt of Bhawani there can be no doubt. He was recognized by several witnesses as being one of the men who fired. He was the man whom the police shot ; he was the man who was taken to the hospital and who made a confession, and in the confession he said that he had done the deed. About his guilt there can be no doubt whatever. He was guilty of an attempt to murder Sir John Anderson, an attempt which is an offence under S. 307, Penal Code. About Rabindra equally there can be no doubt. He too was the man recognized by the by-standers who have given evidence. He was a man who made a confession. The difference between him and Bhawani is that he expressed some contrition, but about his offence in law, there can be no doubt.

He was guilty of an attempt under Section 307, Penal Code, to murder the Governor.

Now we come to Monoranjan. Monoranjan's part is probably the biggest played by any one of these conspirators. Monoranjan appears to have been a member of a revolutionary society; for some time he was a frequenter at the house of Suresh Mozumdar in Dacca; he was one of the people who was seen by several witnesses to go up to the roof of the house of Ujjala from time to time and engage in secret conversations with her; he was seen by several witnesses going down to Calcutta with Ujjala on 3rd May, and he was seen by his own brother about that time in Calcutta. He was recognized by a relative of Ujjala's as being the man who was with Ujjala when she came to the Snow View Hotel; he was recognized by the waiter of the Sanatorium Hotel as being the man who along with Ujjala had come and had tea two days before the attempt on the life of Sir John Anderson with Rabindra and Bhawani at the Sanatorium Hotel. The bill has been produced in which four teas were charged against those two young men on that day. He was recognized as being with Ujjala in the train going down to Calcutta two days after the outrage. He was recognized by one Police Inspector who said that he had given a false name; he was recognized by another Police Inspector who said that he had given a false name. About Monoranjan's part in this affair and his complicity in the conspiracy there can be no doubt. There is his own confession which he afterwards retracted in part; there is the confession of Bhawani and of Rabindra and there is the corroboration of the whole evidence by those witnesses who saw him in association with Bhawani and Rabindra at Darjeeling, who saw him with Ujjala coming back from Darjeeling and who heard him give a false name. There can be no doubt about Monoranjan's guilt. We think he was properly convicted of conspiracy to murder the Governor of Bengal and we think he was properly convicted of conspiracy to possess arms contrary to certain sections of the Arms Act.

Then there is the case of Ujjala. The position is quite clear from Ujjala's own confession which she has afterwards retracted. We are entitled to read and look at it although it is retracted but we may not give the same credence to it that we should have done if it had not been retracted. She says that she was a party to this conspiracy; she also gives an account of it which is almost identical with that given by Monoranjan. She was recognized going down to Calcutta with Monoranjan on 3rd May, recognized going to Darjeeling at the time with Monoranjan, and recognized in the hotel and at the Sanatorium with Manoranjan when they went there to have tea with Bhawani and Rabindra. We have no doubt that she was in the conspiracy and that she has been properly convicted of conspiracy to murder and to possess arms under certain sections of the Arms Act.

Then comes the case of Madhusudan Banerji. Madhusudan Banerji was not at Darjeeling at the time of the outrage. He was somewhere else. But one has to look at it to see why he was somewhere else, and it is quite clear, according to Gopal's evidence, that Madhu Sudan took Gopal away to his own house on 3rd May and kept him there until about 15th May when the outrage was over. He kept him there to give an appearance of truth to the tale that Ujjala and Gopal had gone to visit a relative. Gopal was to be kept out of the way in order that no complication might arise so that Suresh should not get alarmed, and get to know what was happening, and then search for Ujjala and spoil the conspiracy. The witnesses who speak to that are several and one has to regard not only their evidence but one has to look to the doings of Madhusudan after the outrage. On the 15th he came down to Calcutta and went to lodge in a quarter that was mainly inhabited by Mahomedans and when he was arrested it is significant that he was not wearing the sacred thread although he was a Brahmin. Why was he taking those steps to secrete himself? Why was he taking those steps to make it appear that he was not a Brahmin and what was it that he was afraid of? We, like the Tribunal below, have to use our judgment and we have come to the conclusion, like the Tribunal, that Madhu Sudan did play a part in the conspiracy,

and his part was, once matters were set in movement, to take away Gopal so that Suresh might not come along and spoil the conspiracy, and so that Monoranjan might use Ujjala as a shield and protection against police suspicion in taking arms and ammunition to Darjeeling. Madhusudan was not present in Darjeeling to take a part in the conspiracy but he was taking a part in the conspiracy somewhere else. We have no doubt, nor had the Tribunal, of Madhusudan's guilt in this conspiracy to murder. We do not think however that he can on the evidence be convicted of that part of the charge which alleges that he conspired to possess arms.

Then there is the case of Sukumar Ghose whom we have referred to as Lantu. Sukumar Ghose is a very cunning man who seems to have kept himself in the background. We have got the evidence of Monoranjan in his confession that Lantu had suggested the buying of arms at some previous time. We have got the evidence of Prithwish that Lantu had suggested that he should play a part in the conspiracy. We have got the evidence that he was seen round about Suresh's house at the time in March, April and May when this conspiracy seems to have been first hatched. We have evidence that Lantu was seen visiting Madhusudan who was in hiding at a Mahomedan quarter in Calcutta; we have got evidence that he visited him on many occasions. We have also got the evidence of the girl Ujjala herself that after she and Monoranjan had come back to Calcutta on 15th May after the failure of the attempt, she and Monoranjan met Lantu at a place in Calcutta and they discussed this outrage and Lantu said that he was sorry that the job was not successful. Lantu, as I have said, is a very cunning man who managed to keep himself in the background and to thrust Monoranjan forward to do the work. Monoranjan in his turn thrust Bhawani and Rabindra forward to do it. There is evidence in the confessions that have been made and also there is evidence of other persons as to Lantu's behaviour before the outrage, after the outrage and at the time of the outrage. We are of opinion that the evidence in the confessions is substantially corroborated so that in our mind, as in the mind of the Tribunal, there is no doubt that he was guilty of taking a part in the conspiracy to murder Sir John Anderson. We do not find that he was actually engaged, as far as the evidence shows, in the conspiracy to possess arms, therefore we are not able to agree with that part of the Tribunal's finding.

I think I ought to mention the part that was played by Sushil who has not appealed. Sushil was a boy not of the same standing as the others in this case. He was a boy who at one time was workless and was unemployed, and used to sell soap. He was enlisted into the revolutionary party. Sometime in the end of April or beginning of May while he was living in his native village he was asked by Monoranjan Banerji to come to Calcutta for a job of work. When he got there Monoranjan told him that he had a job for him, and the job was to shoot the Governor of Bengal. Sushil was sent up to Darjeeling and told to make himself familiar with the place. He went and did make himself familiar with the place. He was there at Darjeeling until 6th or 7th May when Monoranjan arrived. By that time it appears that Monorajan was satisfied that he had got two men Bhawani and Rabindra to do the deed and there was no need to have a third man Sushil, so he sent Sushil back to Calcutta. Sushil has been convicted, and we think properly convicted, of conspiracy to murder and has been sentenced to 12 years' rigorous imprisonment against which he has not appealed. We have no further concern with Sushil except to say this: that it shows the pains the conspirators took to have somebody in Darjeeling (where as they said the police supervision was rather slack) to do the deed. When they found they had Bhawani and Rabindra there, Monoranjan sent Sushil back. Sushil has not appealed and so he goes out of the case.

That being the position what are the sentences which should be imposed in this case? The charges are at p. 157 of the paper-book. All the seven accused persons were charged with conspiracy to murder the Governor and conspiracy to possess or have under their control arms and ammunition in contravention of the provision of S. 14, Arms Act, and thereby to commit an offence punishable under S. 120-B read with S. 302, I. P. C., and

Ss. 19 (f) and 19-A, Arms Act. Then there is a charge against Bhawani that on 8th May being armed with a loaded revolver he did an act, to wit, attempted to fire with such revolver at the Governor with intent to murder. We find that Bhawani has been proved guilty of that charge-attempt to murder. An attempt to murder is punishable under S. 307, I. P. C., which is as follows :

> Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and, if hurt is caused to any person by such act, the offender shall be liable either to transportation for life, or to such punishment as is hereinbefore mentioned.

I want to point out here that in this attempt to murder the Governor, somebody was hurt, and that has some bearing on the sentence. Under S. 307 this attempt to murder might be punished in this case with transportation for life; but the legislature sometime ago as a result of attempts to murder passed a series of Acts—the Bengal Criminal Law Amendment Acts. The first Act—the main Act is Act 9 of 1925 which has been modified from time to time. It has now been modified by the subsequent Acts of 1932 and 1934. S. 6, Bengal Criminal Law Amendment Act of 1925, as now amended, reads as follows:

> The Commissioners may pass upon any person convicted by them any sentence authorized by law for the punishment of the offence of which such person is convicted: Provided that where the Commissioners convict any person of any offence punishable under para. 1, S. 307, I. P. C., committed after the commencement of the Bengal Criminal Law Second Amendment Act, 1932, they may pass on such person a sentence of death or of transportation for life.

As I have said, Bhawani's offence of attempted murder clearly comes within S. 307, I. P. C., and by the Bengal Criminal Law Amendment Act of 1925 as amended by the subsequent enactments the Commissioners may pass on him the sentence of death. They have passed on him the sentence of death subject to confirmation by this Court. We can only say that no more serious offence than Bhawani has committed, could be committed under this section and we confirm the sentence that has been passed by the Commissioners on Bhawani, the sentence of death. Exactly the same conditions apply to the case of Rabindra. He was equally guilty with Bhawani in this attempt on the life of the Governor. It is quite true there is a difference in his case. The difference is something that happened after the incident. Bhawani said that he was sorry that the Governor was living unhurt, and Rabindra said that he was sorry that he made an attack on the life of the Governor and we believe he was sincere in his contrition. In our view, sitting here as a Court of justice administering the law that makes no difference in his offence. It was a very serious one. The Commissioners were justified in passing the sentence of death on him, and we confirm the sentence. It may be, as the Commissioners remark, that the contrition of this prisoner is something which those who exercise the prerogative of mercy will take into account.

Now we come to the case of Monoranjan Banerji. Monoranjan is the man who was the main spring of the working out of this outrage. He was the man who had ingratiated himself into the household of Suresh Majumdar. While Suresh was away, he had seduced and debauched his daughter, he used her for carnal purposes and he proceeded to use her as a screen for his criminal purposes. We can think of no conduct in this case more heinous than that of Monoranjan. The Commissioners have sentenced Monoranjan to death and their power to do so has been challenged in this Court. It is said that Monoranjan was not one of the men who attempted the life of the Governor; at the most he was only a conspirator and an aider or abettor and is only liable to be punished as an abettor and the maximum punishment of all abettors is not either death or transportation for life, but 14 years' rigorous imprisonment. We have given that argument a very careful consideration. The position at first sight is complicated by the fact that this offence, the offence particularly against Monoranjan is one which is compounded by reading Ss. 307 and 109, I. P. C., and then as the Commissioners have done, reading those two sections together with S. 6 of the amended Bengal Criminal Amendment Act of 1925. It is just as well to consider what the provisions in those sections are. S. 307, I. P. C., as I have just read makes a person who actually attempts to murder where hurt

is caused to any person liable to transportation for life. S. 109, I. P. C., makes a person who abets an office if the act abetted is committed in consequence of the abetment liable, to be punished with the punishment provided for that offence. But the section which confers very rigorous powers upon the Tribunal is S. 6, Bengal Criminal Law Amendment Act of 1925 as amended and that section reads as follows:

Provided that where the Commissioners convict any person of any offence punishable under para. 1, S. 307, I. P. C., committed after the commencement of the Bengal Criminal Law Second Amendment Act, 1932, they may pass on such person a sentence of death or of transportation for life.

Now, as we have held, the Commissioners were quite right in passing the sentence of death upon Bhawani and Rabindra. They were the doers of the act which was an attempt to murder. But they purported to pass the sentence of death on Monoranjan under the same S. 6, and that cannot be done. If S. 6 had read :

Provided that where the Commissioners convict any person of any offence punishable under the first paragraph of S. 307, I. P. C., and S. 109, I. P. C.,

if these words had been added, we think the Commissioners would have been able to pass the sentence of death; but the Bengal Criminal Law Amendment Act 1925, S. 6 does not say that. It is a penal enactment and as a penal enactment it has to be construed strictly. It is not open either to the Commissioners or to this Court to read S. 6 as if it says :

Provided that where the Commissioners convict any person of any offence punishable under the para. 1, S. 307, I. P. C., and S. 109, I. P. C.

It is not permissible to do that. That would be making the abettor in this case liable to the same punishment as would be passed on the persons abetted. It may be an oversight on the part of those who drafted the Bengal Criminal Law Amendment Act. Neither this Court nor any other Court has power to pass a sentence of death under the Bengal Criminal Law Amendment Act, 1925, on the facts found against Monoranjan. As far as we can see the maximum sentence that can be passed against Monoranjan with regard to that part of the charge which relates to conspiracy for an attempt to murder is one of 14 years' imprisonment. That is the power given by S. 307, I. P. C., read with S. 115, I. P. C. S. 115, I. P. C., reads as follows:

Whoever abets the commission of an offence punishable with death or transportation for life, shall, if that offence be not committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine.

Then follows the important part :

And if any act for which the abettor is liable in consequence of the abetment and which causes hurt to any person is done, the abettor shall be liable to imprisonment of either description for a term which may extend to 14 years and shall also be liable to fine.

So that on this part of the charge where the Commissioners, and we too, have found Monoranjan Banerji guilty of conspiracy to murder, the maximum sentence is one of 14 years' rigorous imprisonment. We are of opinion that the sentence of death cannot stand. That does not complete the charge against Monoranjan. The Commissioners have also found him guilty of conspiracy to obtain and to have possession of arms contrary to Ss. 19 (f) and 19-A, Arms Act. I think we have to deal with this in detail. The Indian Arms Act, 1878, S. 14 provides :

No person shall have in his possession or under his control any cannon or firearms or any ammunition or military stores except under a license and in the manner and to the extent premitted thereby.

Section 19, Cl. (f) provides :

Whoever has in his possession or under his control any arms, ammunition or military stores in contravention of the provisions of S. 14 or S. 15 shall be punished with imprisonment for a term which may extend to three years or with fine or with both.

That is the Indian Arms Act as it was passed in 1878. As we have said we have come to the conclusion that the Commissioners have properly found Monoranjan guilty of conspiracy with regard to the contravention of S. 14, Arms Act. "Conspiracy" is dealt with in the Indian Penal Code in S. 120-B which provides :

Whoever is a party to a criminal conspiracy to commit an offence punishable with death, transportation or rigorous imprisonment for a term of two years or upwards, shall where no express provision is made in this Code for the punishment of such a conspiracy be punished in the same manner as if he had abetted such offence.

Now comes the Bengal Criminal Law (Arms and Explosives) Act, 1932, (Bengal Act 21 of 1932) which adds an offence to the Indian Arms Act, 1878.

S. 3, Bengal Criminal Law (Arms and Explosives) Act 1932 says :

After S. 19, Arms Act, 1878, the following section shall be inserted, namely 19-A. Notwithstanding anything contained in S. 19, whoever commits an offence under Cl. (c) or Cl. (e) or Cl. (f) of S. 19 shall, if the offence is committed in respect of a pistol, revolver, rifle or shot gun, be punished with transportation for life or any shorter term or with imprisonment for a term which may extend to 14 years, or with fine.

In our opinion that section applies here, and we think there is ample evidence on which the Commissioner could come to the conclusion, as they did, that one of the offences committed by Monoranjan was one under S. 3, Bengal Criminal Law (Arms and Explosives) Act 1932 adding S. 19-A to the Arms Act. 1878, which makes him liable to transportation for life. The Commissioners did not pass this sentence upon him. We think the offence is so serious that a sentence ought to be passed under that section and we pass on him the sentence of transportation for life.

It was suggested to the Court that the guilt of Monoranjan was so great that he merited the sentence of death and it was suggested to this Court that as the sentence of death under the conspiracy to murder charge could not be upheld, this Court should under its powers as an appeal Court make a charge under S. 20-A Arms Act, against Monoranjan and convict him of that charge and sentence him to death. S. 20-A, Arms Act, 1878, is added to it by S. 4, Bengal Criminal Law Amendment Act, 1934, (that is Bengal Act 7 of 1934). S. 4 of that Act reads thus:

After S. 20, Arms Act, 1878, the following section shall be inserted, namely 20-A. Notwithstanding anything contained in this Act, whoever goes armed with a pistol, revolver, rifle or other fire-arms in contravention of the provisions of S. 13, or has any such fire arm in his possession or under his control in contravention of the provisions of S. 14 or S. 15, under circumstances indicating that he intended that such fire-arm should be used for the commission of any offence of murder shall, if he is tried by Commissioners appointed under the Bengal Criminal Law Amendment Act, 1925, be punished with death or with transportation for life or any shorter term of imprisonment for a term which may extend to 14 years, to which fine may be added.

Now, that section, of course, would allow a Court to pass a sentence of death. It is a curious thing in this case that the Commissioners alleged against Bhawani Prosad Bhattacharji and Rabindra Nath Banerji an offence under that new S. 20-A, Arms Act, but they did not allege it against Monoranjan Banerji. Why, we do not know. It was said by the Advocate-General that it was competent for us to substitute the charge under S. 20-A, Arms Act. We have considered that matter very carefully but we do not feel that we are in a position to do so. If that were done it would mean that Monoranjan Banerji would be convicted of an offence with which he was not charged at his trial, on which he had never stood his trial and on which he had had no opportunity of making his defence. We think that if we do that we should be infringing what seems to us to be one of the most important principles in the administration of criminal law, namely that a man should not be charged, tried and convicted without being heard in his defence, and therefore we do not propose to use any power that we may have as an appellate Court to substitute a charge under S. 20-A, Arms Act, against Monoranjan Banerji and convict him and sentence him to death.

As regards Ujjala, the position as regards her is a very sad one. Here is a girl, 19 years of age at the time of the commission of the offence, left to her own resources by her father and at the mercy of a step-mother who was a little older than herself, put in charge of a tutor Madhusudan Banerji and under the influence of his younger brother, Monoranjan Banerji who completely debauched and debased her for his own sexual purpose and his criminal purposes as well. We think she was under the domination of Monoranjan Banerji but we think at the same time that she knew what she was doing and that she was a consenting party thereto and that she meant evil. We think in her case a sentence of 14 years' rigorous imprisonment is the proper sentence and therefore we reduce the sentence of transportation for life passed upon her to one of 14 years' rigorous imprisonment. Costello, J., reminds me that Ujjala is in the same position as Monoranjan Banerji with regard to the conviction for conspiracy to murder and we set aside the sentence of transportation for life as being excessive and we substitute therefor a sentence of 14 years' rigorous imprisonment. We also sentence her under that part of the charge which alleges that

she was a party to a criminal conspiracy to possess arms, to 14 years' rigorous imprisonment, this sentence to run concurrently with the other sentence. With regard to Madhusudan Banerji we think he has been properly convicted of conspiracy to murder, the maximum sentence for conspiracy to murder is 14 years' rigorous imprisonment and he has been given that sentence. That sentence will stand. At the same time although the Commissioners have convicted him of conspiracy to possess arms we are of opinion that there is no evidence to justify that conviction and we quash that conviction. That will make no difference in the sentence. Madhusudan Banerji has to undergo 14 years' rigorous imprisonment.

As regards Sukumar Ghosh alias Lantu we confirm the conviction against him of conspiracy to murder. We do not confirm his conviction of conspiracy to possess arms. The sentence of 14 years' rigorous imprisonment for conspiracy to murder that has been passed by the Commissioners will stand. The result is that we confirm the sentence of death on Bhawani Prosad Bhattacharji; we confirm the sentence of death on Rabindra Nath Banerji; we set aside the sentence of death on Monoranjan Banerji and in lieu thereof sentence him to 14 years' rigorous imprisonment, and under the charge against him of conspiracy to possess arms under Ss. 19 (f) and 19-A, Arms Act, we sentence him to transportation for life. The two sentences on Monoranjan Banerji are to run concurrently. As regards Ujjala Mazumdar the sentence of transportation for life is quashed, and in lieu thereof we substitute a sentence of 14 years' rigorous imprisonment. The sentence under S. 109 read with S. 307, I. P. C., and S. 6, Bengal Criminal Law Amendment Act, 1925 of transportation for life is quashed and in lieu thereof a sentence of 14 years' rigorous imprisonment is passed under S. 120-B read with S. 302, I. P. C. This sentence of 14 years' rigorous imprisonment will run concurrently with the sentence of 14 years' rigorous imprisonment that has been passed on her for being a party to a criminal conspiracy to possess arms. As regards Madhusudan, as we have said, we find him guilty of conspiracy to murder and sentence him to 14 years' rigorous imprisonment. As regards Lantu we find him guilty of conspiracy to murder and pass on him a sentence of 14 years rigorous imprisonment.

Mukerji, J.—I agree.

Costello, J.—I agree.

K.S. *Order accordingly.*

A. I. R. 1935 Calcutta 571

LORT-WILLIAMS AND JACK, JJ.

Saroda Deyi — Complainant— Petitioner.

v.

Satyeswar Santra and *another* — Accused—Opposite Parties.

Criminal Revn. No. 278 of 1935, Decided on 23rd May 1935.

Criminal Trial — Barring of fresh complaint — Compiaint disclosing several offences — Accused summoned for one of offences acquitted—Fresh complaint in respect of other offences is not barred.

A complaint filed disclosed several offences. Accused were summoned for one of the offences, but for default in appearance of complainant they were acquitted. Subsequently a fresh complaint in respect of other offences though filed on the same facts is not barred. [P 572 C 1]

Manmatha Nath Das—for Petitioner.

Sarat Chandra Janah and *Hiran Kumar Roy*—for Opposite Parties.

Lort-Williams, J. — In this case the petitioner instituted a complaint against the accused and several others upon the allegation that on 11th November 1934, the accused persons, in collusion and conspiracy with each other induced the petitioner to go to a certain house and forced her to put her thumb impression on a number of stamp papers and blank demi papers. In doing so they abused her, and pushed her neck down, and forcibly kept her sitting there for an hour and slapped, pinched and threatened her.

The Subdivisional Magistrate of Tamluk ordered an inquiry by the President of the Panchayat, who reported that the case was true. Thereupon the accused were summoned under S. 352. On 24th January 1935 which was the date fixed for hearing, the petitioner did not arrive in time and the accused were acquitted under S. 247, Criminal P. C. She filed a petition explaining that she lived 16 miles away from Tamluk Court, and had to come walking from her house to Court, and was a little late. The affidavits put by the accused lead one to think that the petitioner's story was not true, because it seems clear that there is

a bus service running from the Tamluk Court to a place on the road only two miles away from her house. There is further evidence contained in the affidavits to show that her witnesses stayed at Tamluk the night before the case was called on, and it is alleged that she also stayed at a hotel in Tamluk. The Magistrate, on the petition for revival, said that the accused have been acquitted under S. 247, and nothing could be done. The petitioner then filed a fresh complaint on the same facts on 7th February 1935. The Magistrate made the following order, namely, that the accused persons had been acquitted on the same facts under S. 247, and a prayer for revival had been rejected. As such, no further action could be taken under S. 403. On a petition for revision, the Additional District Magistrate of Midnapur, on a 21st February 1935 made the following order:

The petition is misconceived. The offence being triable under summons procedure the S.D.O. was competent to dismiss the case under S. 247, Criminal P. C. Petition rejected.

Now the argument for the petitioner is that though further proceedings under S. 352 are barred, this does not prevent the petitioner from making a fresh complaint under sub-S. (2) of S. 403. The same facts disclosed other offences beyond the offence under S. 352, for example offences under Ss. 341, 347, 384 and 509 are possibly disclosed in the petitioner's complaint. These offences, though arising on the same facts, are distinct offences, and under sub-S. (2) a fresh trial in respect of a complaint under these sections would not be barred. This argument is sound. The result is that the order of the Magistrate, Mr. A. K. Dutt, dated 7th February 1935 must be set aside, and the case sent back to him for disposal according to law.

Jack, J.—I agree.

K.S. *Order set aside.*

A. I. R. 1935 Calcutta 572

R. C. MITTER, J.

Hasanali Mirja and *others*

v.

Nushratali Mirja and *another*

Appeal No. 353 of 1932, Decided on 14th November 1934.

Mahomedan Law — Marriage — Term of Muta marriage can be extended.

Term of a muta marriage can be extended. Hence where two persons have married under muta form for a fixed period but they continue as husband and wife till death of husband, the inference is that the marriage has been extended from time to time till his death. [P 572 C 2]

Radhikaranjan Guha — for Appellants.

Urukramdas Chakravarty — for Respondents.

Judgment.—Subject to the modification hereinafter indicated, this appeal must be dismissed. The suit was instituted by two plaintiffs who are the respondents before me for a declaration that plaintiff 1 is the legitimate son of one Syed Azmut Ali Mirza, a political pensioner, and plaintiff 2 is his wife. There were other prayers in the plaint but having regard to the provisions of the Pensions Act they have been refused to the plaintiffs by the lower appellate Court. The plaintiffs have not preferred any cross-objection and therefore it is unnecessary to consider the reliefs which they claimed and which have been rejected by the lower appellate Court. The plaintiffs' case is that Syed Azmut Ali Mirza married defendant 4 as his first wife and by her he left surviving him three issues, namely defendants 1 to 3, and that the said gentleman also married plaintiff 2 whose legitimate son is plaintiff 1. Syed Azmut Ali Mirza died sometime in October 1927 and the plaintiff 1 was born on 3rd December 1927.

The defence that has been set up is that plaintiff 2 is not the lawfully wedded wife of the said gentleman and plaintiff 1 is not his legitimate son. The Subordinate Judge on a consideration of a document, namely, Ex. 1, Kabinnama, has come to the conclusion that Aziz Saheb did marry plaintiff 2 in the muta form for a period of 3 or 5 years in December 1920. The Subordinate Judge then takes into consideration the evidence of Dr. Nag, who was the family physician of the late pensioner. He deposed that till his death in October 1927 Aziz Saheb treated plaintiff 2 as his wife. Taking into consideration these two pieces of evidence he has inferred that the marriage although muta in form must have been extended from time to time and was subsisting at the time of the death of Aziz Saheb. Under the law the term of muta marriage can be extended and I cannot see how it can be said that the Subordinate Judge has committed an

error in law by inferring from the evidence and the circumstances which I noticed that plaintiff 2 continued as the muta wife of Syed Azmut Ali Mirza alias Aziz Saheb till his death and plaintiff 1 is his legitimate son.

I would accordingly dismiss the appeal, but so far as the ordering portion of the decree of the Court below is concerned it has to be modified. Plaintiff 1 is only entitled to a declaration that he is the legitimate son and heir of late Syed Azmut Ali Mirza alias Aziz Saheb. The rest of the declaration being beyond the plaintiff's prayer must be deleted. With regard to the declaration made in favour of plaintiff 2 that must stand. Subject to this modification, the appeal is dismissed with costs.

K.S. *Decree modified.*

* A. I. R. 1935 Calcutta 573

HENDERSON AND KHUNDKAR, JJ.

Haru Bepari and *others*—Petitioners.

v.

Roy Kshitish Bhusan Roy Bahadur and *others*—Opposite Parties.

Civil Rule No. 172 of 1935, Decided on 21st May 1935.

*** Court-fees—Suit by 73 persons for declaration that each has raiyati, jote interest in one out of 73 plots of land and for declaration that certain compromise decree was void—73 groups of facts held had to be established, each group forming a distinct and separate subject of claim and as such 73 separate amounts of court-fee should be paid.**

The word "subject" in S. 17, Court-fees Act, covers a multitude of matters which cannot be confined within a precise formula. Distinct causes of action cannot form one subject within S. 17. But the converse also is not necessarily true. A suit based on one cause of action alone may embrace more than one subject within the meaning of S. 17.

Where 73 persons filed a suit in which they prayed for a declaration that each plaintiff had a raiyati-jote interest in one out of 73 plots of land and for a declaration that certain compromise decree was void and inoperative:

Held: that there were in effect prayers for 73 declarations affecting 73 separate titles and that therefore the proceedings embraced 73 distinct subjects within the meaning of S. 17. Hence 73 separate amounts of court-fee were payable: 27 *All* 186 and 16 *All* 401, *Diss from*; 4 *P L J* 195, *partly Appr. and partly Diss. from*; *Case law discussed.* [P 575 C 2; P 576 C 2]

S. C. Lahiri—for Petitioners.

A. C. Gupta and *Jitendra M. Banerji*—for Opposite Parties.

Basak—for Government.

Khundkar, J.—This is a Rule to show cause why an appellate order of the learned District Judge of Pabna and Bogra, dated 22nd February 1934, disposing of an objection to the sufficiency of court-fees in connexion with the plaint in a suit, and the memorandum of the appeal, which arose out of that suit, should not be set aside. The suit was instituted by 73 persons who averred that they held each a separate jama as in Sch. "Ka" of the plaint, consisting of 73 items, but that certain lands of each of these jamas as in Sch. "Kha", also containing 73 items, were included within the subject matter of a suit under Bengal Act 5 of 1920, which was decreed on the basis of a compromise entered into by certain persons whom the 73 plaintiffs interpleaded as defendants in their suit. It was alleged that by virtue of the compromise decree to which the plaintiffs were not parties the defendants were trying to oust the plaintiffs from their holdings, and they prayed for the following reliefs:

(1) A declaration that the plaintiffs had raiyati jote interest in Sch. "Kha" lands as appertaining to Sch. "Ka" jotes; (2) a declaration that the compromise decree was illegal, ultra vires, void, and inoperative against the plaintiffs.

The court-fee paid on the plaint was Rs. 20 as for a suit for a declaration without consequential relief under Art. 17 (iii), Sch. 2, Court-fees Act, and on the Memorandum of Appeal also a court-fees of Rs. 20 only was paid. The District Judge held, that as the plaintiffs were in reality praying for 73 different sets of declarations, the suit embranced 73 subjects within the meaning of S. 17, Court-fees Act, and 73 separate amounts of Rs. 20 should have been paid both in respect of the plaint and of the memorandum of appeal. It has been argued that "subject" means distinct kinds of relief and that therefore S. 17 does not apply to the present case. Distinct reliefs are certainly subjects within the meaning of S. 17, but we cannot agree that the connotation of the word "subject" is co-extensive with that of the expression "kind of relief." No authorities have been cited to show that a suit in which one kind of relief only is asked for cannot be a suit embracing more than one subject within the meaning of S. 17.

In the alternative, it has been submitted that the word "subject" in S. 17 means cause of action, and that in so far as the joinder of so many plaintiffs is permissible by the operation of O. 1,

R. 1, Civil P. C., the suit is based on one cause of action only. It seems to us that one infirmity of this argument is the assumption, that the conditions which O. 1, R. 1 requires to be fulfilled, amount in their totality to the elements which constitute one cause of action, and that O. 1, R. 1 excludes by its force the joinder of plaintiffs in a suit based on more causes of action than one. The advocate for the petitioner cited 22 Cal 833 (1). That decision was concerned with the construction of S. 26 of the Code of 1882 (now O. 1, R. 1) and the passage relied upon at p. 840 is as follows:

> Following the ordinary canon of construction that a clause in a statute should be construed, so as to give some meaning to every part of it, and bearing in mind that the expression "cause of action" has not been defined anywhere in the Civil Procedure Code, except indirectly for the purposes of S. 17, and that so far as that section goes it is used in a restricted as well as in some respects in an elastic sense, we think the proper way to construe S. 26, so as to give the words in the alternative some meaning, is to hold that the expression "cause of action" occurring in it is used, not in its comprehensive, but in its limited sense, so as to include the facts constituting the infringement of the right, but not necessarily also those constituting the right itself, so that the qualification implied in the words "in respect of the same cause of action" will be satisfied if the facts which constitute the infringement of the right of the several plaintiffs are the same, though the facts constituting the right upon which they base their claim to that relief in the alternative may not be the same. S. 26 of the Code of 1882 was thus expressed:
>
> All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist whether jointly severally or in the alternative in respect of the same cause of action.

Even under the Code of 1882 the decisions of the meaning of the expression "cause of action" were not uniform: see 6 Bom 266 (2) at p. 275; 8 Mad 361 (3); 18 All 131 (4); 18 All 219 (5) and 18 All 432 (6). O. 1, R. 1 is much wider and the words "in respect of the same cause of action" do not occur. In 45 Cal 111 (7) it was held that O. 1, R. 1 applies to questions of joinder of parties as well as causes of action. Hence it follows that the conditions which render the joinder of several plaintiffs permissible under O. 1, R. 1, do not necessarily imply that there can be only one cause of action in the suit in which the several plaintiffs join. The Advocate for the petitioner contended however that the present suit was based on one cause of action alone, in so far as the plaintiffs were seeking for no more than the removal of the cloud upon their titles occasioned by the compromise decree.

In support of this branch of the argument reliance was placed upon a number of authorities now to be considered, 8 Cal. 593 (8). That was a decision of a Full Bench of this Court, in which it was held, that in a suit for possession and mesne profits, the claim was to be taken as one entire claim for the purpose of determining the stamp fee under S. 17, Court-fees Act. It was pointed out in this judgment, that S. 10, Civil P. C. 1859, enacted, that for the purposes of Ss. 8 and 9, which provided for causes of action, a claim for possession and mesne profits should be deemed to be distinct causes of action. This decision has been uniformly followed, inasmuch as for the purpose of S. 17, Court-fees Act, a claim for possession and mesne profits has come to be regarded as one entire claim. 16 All. 401 (9).—This decision adopted the considerations set forth in 8 Cal. 593 (8). It also, upon a consideration of certain earlier cases of the Allahabad Court, viz., 1 All. 552 (10), 2 All. 676 (11) and 2 All. 682 (12), formulated the view that two or more distinct subjects in S. 17, Court-fees Act, are equivalent to "two or more distinct causes of action," that S. 17, refers to "multifarious suits," and that it is ap-

1. Haramony Dassi v. Hari Churn, (1895) 22 Cal 833.
2. Nusserwanji Merwanji v. Gordon, (1881) 6 Bom 266.
3. Ramanuja v. Devanayaka, (1885) 8 Mad 361.
4. Salima Bibi v. Shaikh Mahomed, (1896) 18 All 131=1896 A W N 2.
5. Rahim Bakhsh v. Amireen Bibi, (1896) 18 All 219=1896 A W N 33.
6. Rajjo Kaur v. Debi Dial (1896) 18 All 432=1896 A W N 139.
7. Ramendra Nath v. Brojendra Nath, 1918 Cal 858=41 I C 944=45 Cal 111.
8. Kishore Lal v. Sharut Chunder, (1882) 8 Cal 593=10 C L R 359.
9. Reference under the Court-fees Act, (1894) 16 All 401=1894 A W N 124.
10. Chameli Rani v. Ram Das, (1876) 1 All 552 (FB).
11. Mulchand v. Shib Charan Lal, (1879) 2 All 676.
12. Chedi Lal v. Kirath Chand, (1879) 2 All 682 (F B).

plicable only to suits in which two or more distinct causes of action have been joined.

With great respect to the Judge who decided that case, we are not in agreement with this proposition. 4 Pat. L. J. 195 (13).—In this case it was held that in a suit for recovery of possession of immovable property. for mesne profits, and for malikana the plaintiff was not liable to pay a court-fee assessed separately on each claim, but was entitled to add them together and regard them as one claim for the purpose of assessment. In this judgment it was observed, that one possible view as to the meaning of the word "subject" in S. 17, Court-fees Act, was that it related back to S. 7 of the Act, where the various subjects of suits are divided under various heads. This observation is entitled to respect in view of the difficulties which so constantly present themselves when a precise definition of the word "subject" is sought. The decision followed however 2 All. 676 (11) in which "subject" was interpreted as meaning "cause of action." In so far as it did so, we are constrained as already indicated to respectfully dissent.

27 All. 186 (14).—This case related to a suit for pre-emption of shares in two villages, included along with others, in one sale, to vendees who were strangers to the co-pracenary body of co-sharers of the village. The court-fee paid by the plaintiffs was calculated on the basis of the aggregate amount of the Government revenue assessable on 'the two villages, and the question was, whether they were not liable to pay court-fees calculated separately on the basis of the revenue of each village. It was held that the plaintiffs had only one cause of action made up of their right to pre-emption and of the same by the other co-sharers to persons who were strangers. This decision followed the view with which we are not in agreement in the earlier Allahabad cases that "distinct" subject in S. 17 must be taken to mean "distinct cause of action."

30 Cal. 788 (15), was a case in which the only prayer made was for a declaration that a certain decree was ineffectual and inoperative against the plaintiff. It was held that all that the plaintiff was asking for a declaratory decree without any consequential relief. In our judgment these cases have no application. It is contended that the plaintiffs are asking for in the present case, is a declaration which will dissipate the cloud cast upon their titles by the compromise decree from which alone their cause of action flows. Now looking at the plaint, it is apparent that there are at least two prayers, viz. (1) for a declaration that each plaintiff has a raiyati jote interest in one out of 73 plots of land, (2) for a declaration that the compromise decree is void and inoperative. Each of the plaintiffs in this suit would be under the necessity of establishing a prima facie title in respect of one plot, and those who failed would not be entitled to the declaration prayed for. There are in fact 73 plaintiffs praying that 73 titles should be recognized and that the cloud upon them be removed. The fact necessary to establish a particular title are peculiar to the particular plaintiff who alleges it. There are indeed 73 groups of facts to be established, each group forming a distinct and separate subject of the claim advanced.

In 4 Pat. L. J. 297 (16) where 78 tenants sued in respect of 78 separate holdings for declaration that the rents recorded in the khatian were higher than those actually payable, and that 59 rent decrees obtained by the landlord were contrary to law, it was held that there were 78 separate causes of action in respect of the holdings, and 59 separate causes of action in respect of the decrees, and that a court-fee of Rs. 10 was payable in respect of each.

4 Pat. L. J. 299 (17) arose out of a suit by a landlord against 25 sets of tenants for a declaration that their lands were held under the batai system, and that they were wrongly recorded as paying cash rent and here it was held following 4 Pat. L. J. 297 (16) that the rent of each holding was distinct subject within S. 17, Court-fees Act, and that a

13. Nauratan Lal v. Stephenson, 1922 Pat 359=50 I C 470=4 Pat L J 195.
14. Durga Prasad v. Purandar Singh, (1904) 27 All 186=1904 A W N 210.
15. Limatunnessa Khatun v. Govindra Nath, (1903) 30 Cal 788.
16. Chethru Mahton v. Muhammad Karim, 1919 Pat 479=50 I C 328=4 Pat L J 297.
17. Lachman Sahu v. Abdul Karim, 1919 Pat 468=51 I C 767=4 Pat L J 299.

court-fee of Rs. 10 was payable in respect of each of the 25 holdings. 16 All. 308 (18) was a Full Bench decision, which arose out of a suit instituted by a person whose claim to certain property attached in execution of a decree, under the provisions of S. 278, Civil P. C. 1882, had been disallowed. The decree-holders and the judgment-debtors were both impleaded as defendants in the suit. It was held that inasmuch as the plaintiff was asking for a declaration of his title to the property as against the judgment debtor, and also for a declaration in denial of the decree-holder's right to bring that property to sale in execution of a decree, there were two substantial declarations asked for in respect of each of which court-fee was payable. At p. 311 of the report there occurs the observation:

> The rights of the two separate sets of defendants would have to be adjudicated upon, and declarations if the plaintiff's prayer was acceded to, given in denial of the right of each defendant....

18 Mad. 459 (19) was a case in which plaintiffs sued as reversionary heirs for a declaration that certain alienations, 42 in number, made by the defendant who was the widow of the last male holder, were invalid as against them. It was held that each alienation was a separate subject within the meaning of S. 17, Court-fees Act. In the words of the judgment:

> Each alienation creates a distinct right vesting in the alienee, and therefore when the reversioner seeks for a declaration that a number of distinct alienations are invalid, he must be held to be suing for that number of declarations.

The last case to which reference need be made is 54 Mad. 1 (20). Here again the question which arose was whether, in a suit for possession of immovable property and for mesne profits, the court-fees should be paid on the aggregate value of both the reliefs, or on the value of each of the reliefs separately, and it was held following 8 Cal. 593 (8) that the two claims should be treated as one entire claim. As to the question whether separate causes of action would invariably be the criterion for treating the claim based on them as distinct subjects within the meaning of S. 17, Court-fees Act, Sundaram Chetty, J., observed very appositely that this does not appear to have been taken as the deciding test in 8 Cal. 593 (8). On the meaning of the word "subject" in S. 17, Court-fees Act, his Lordship observed that its meaning was somewhat obscure, and that it had been held in some decisions to be not capable of precise definition, and that any doubt or obscurity as to its precise meaning should be cleared by the legislature in due course.

With these observations we are in respectful agreement. The expression "cause of action" may be capable of definition. Indeed, definitions have been often formulated in the past, although the terms of one definition have not always been identical with those of another, the elements varying to suit the particular exigency which evoked the attempt. Be that as it may, we are of opinion that the word "subject" in S. 17, Court-fees Act, covers a multitude of matters which cannot be confined within a precise formula. We find it difficult to see how distinct causes of action can ever be one subject within the meaning of S. 17. But the converse does not necessarily hold good, for it may well be that a suit based on one cause of action alone may nevertheless embrace more than one subject within the meaning of S. 17, Court-fees Act. In the result we are of opinion that in the suit and in the appeal to which it gave rise there were in effect prayers for 73 declarations affecting 73 separate titles, and that therefore the proceedings embraced 73 distinct subjects within the meaning of S. 17, Court-fees Act.

Henderson, J.—I agree and have little to add. There can be no question that apart from the provisions of O. 1, R. 1, Civil P. C., each of the plaintiffs would have been compelled to institute a separate suit on a properly stamped plaint. O. 1, R. 1 merely provides for procedure and has nothing to do with the payment of court-fees and the point for our decision has to be determined with reference to S. 17, Court-fees Act. Although it is impossible to give any precise or complete definition of the word "subject" as used in that section, I have no doubt that in the present case each of the tenancies claimed by the various plaintiffs is a distinct subject and that the decision of the learned

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18. Moti Singh v. Kaunsilla, (1894) 16 All 308= 1894 A W N 109.
19. Daiva Chilaya Pillai v. Ponnathal, (1895) 18 Mad 459.
20. In re Parameswara Pattar, 1930 Mad 833= 130 I C 742=54 Mad 1 (F B).

District Judge was correct. In one matter the order is not very clear; but it was not disputed by the learned Government Pleader that the petitioner cannot be made jointly and severally liable to pay all the court-fees: any plaintiff who pays the fees is necessary for the determination of his own claim will be entitled to prosecute his appeal. The result is that this Rule must be discharged with costs to the Government Pleader. We assess the hearing-fee at two gold mohurs. The petitioners will be given one month from the arrival of the record in the lower Court to pay the court fees. The appeal of any petitioner who complies with this order will be heard.

K.S. *Rule discharged.*

A. I. R. 1935 Calcutta 577

R. C. MITTER, J.

Panchu Charan Addak and *another*—Defendants—Appellants.

v.

Benode Behari Haldar and *others*—Plaintiffs—Respondents.

Appeal No. 24 of 1932, Decided on 13th November 1934, from Appellate decree of 2nd Addl. Sub-Judge, Alipur, D/- 5th October 1931.

Landlord and Tenant—Notice — Two tenancies created, one by plaintiff alone in respect of his property and another by plaintiff and his co-owners in respect of joint property—Notice to quit by plaintiff's agent requiring tenants to vacate both — Notice held invalid as regards latter property, but valid regarding former.

Two tenancies were created in favour of the defendants: one in respect of property belonging to plaintiffs alone and another in respect of property of which plaintiff was only one of the co-owners. Plaintiff's agent served a notice to quit requiring the defendants to vacate both the properties:

Held: that the notice was invalid in so far as the joint property was concerned as the relation created by contract with joint landlords continues till all of them determine it, but that it was valid in so far as plaintiff's own property was concerned, and he could not be deprived of what he was entitled to simply because he preferred a claim to something more: 1918 *P C* 102, *Rel on*; 25 *Cal* 36 and 33 *C L J* 513 and 516, *Dist.*

[P 577 C 2; P 578 C 1]

Surajit Chandra Lahiri—for Appellants.

Pannalal Chatterji—for Respondents.

Judgment.—The suit out of which this appeal arises is one for ejectment of the defendants-appellants from a piece of bastu land and an adjoining tank on the basis of a notice to quit served on them by the plaintiffs-respondents on 5th October 1928. In the original plaint the bastu and the tank had been defined by one set of boundaries, but by an amendment of the plaint the bastu and the tank were shown as separate parcels in two schedules.

The appellants press only one point, namely that the notice to quit is invalid, all other points raised by them in the Courts below and on which they got adverse decisions being properly abandoned, they being concluded by findings of fact binding on me in second appeal. The material facts bearing upon the question pressed are the following. The plaintiffs are the owners of the bastu, but only co-owners of the tank. They let out the bastu to the defendants separately, but joined with their co-sharers (who are not parties to the suit) in letting out the tank. Thus two tenancies were created: one in respect of which the plaintiffs are the sole landlords and the other in respect of which they are only co-sharer landlords. The notice to quit was signed by an authorised agent of the plaintiffs and required the defendants to vacate the bastu and tank by a certain date. The description of the demised premises is given in the notice in these terms:

Within District Twenty-four pergunahs P. S. Budge Budge, Mouza Nandanpara, in one plot about 2 bighas 4 cottahs 10 chittaks 13 gundas 1 kara more or less; bastu and tank;

Boundaries: North—Lands of Sridhar Malakar and kali Halder: East—Pattas Road, South—Land of Nabin Mandal: West—Lands of Hariday Adak, Bhutnath Bairagi and Manik Mandal.

The learned Subordinate Judge from whose judgment and decree the appeal has been taken to this Court held that the notice to quit so far as the tank is concerned is invalid, but that the plaintiffs respondents are entitled to eject the defendants from the bastu on the basis of the said notice. In my judgment the notice in question is invalid so far as the tank is concerned as the view taken by the Subordinate Judge is well supported by the decisions of this Court. The principle that a joint tenant may put an end to his own demise, as far as it operates on his share, whether his companions join him or not, has no application in India. The relation created by contract with joint landlords

continues till all of them determine it: 35 Cal 807 (1) & 24 C W N 1064 (2). The appellants have urged that the notice so far as the bastu is concerned is invalid as the lands of two tenancies have been lumped together. They say that they being required to give up the tank, which they are not bound to give up, along with the bastu, the notice is bad. Both the Courts below have found that the defendants knew that the bastu and the tank formed respectively two tenancies. The plaintiffs expressed their desire in unambiguous terms to determine the tenancy in respect of the bastu and the tank also, but it is only because their co-sharers did not join in giving the notice they cannot have possession of the tank. In my judgment the case comes within the principles formulated by the Judicial Committee in 45 I A 222 (3). The defendants knew precisely what lands formed their two tenancies, and there is no question of surprise. The landlords required the tenants to give up the bastu. They cannot be deprived of what they are entitled to simply because they preferred a claim to something more : 25 Cal 36 (4). The cases cited on behalf of the appellants, namely 33 C L J 513 (5), 33 C L J 515, (6) and 33 C L J 516 (7) have no bearing on the question at issue. In these cases the landlord by his notice to quit required the tenant to give up only a portion of his tenancy, which he could not clearly do. These cases only lay down the principle that a tenancy can be determined as a whole; the landlord cannot treat the tenancy as extinguished as to a part and subsisting as to the rest. I accordingly dismiss the appeal with costs.

K.S. *Appeal dismissed.*

1. Gopal Ram v. Dhakeswari Prosad, (1908) 35 Cal 807=7 C L J 483.
2. Motilal v. Chandra Kumar, 1920 Cal 866=60 I C 312=24 C W N 1064.
3. Haribar Banerjee v. Ram Soshi Roy, 1918 P C 102=48 I C 277=45 I A 222=46 Cal 458 (PC).
4. Shama Charan Mitter v. Wooma Charan Halder, (1898) 25 Cal 36=2 C W N 106.
5. Ram Kanie v. Ganesh, (1921) 33 C L J 513=64 I C 550.
6. Atal v. Kedar, (1921) 33 C L J 515=64 I C 551.
7. Bhimram v. Maharanee Hura Soondary, (1921) 33 C L J 516.

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GUHA AND BARTLEY, JJ.

Giribala Debi — Defendant — Appellant.

v.

Nirmalabala Debi—Respondent.

Appeal No. 76 of 1934, Decided on 27th November 1934, against appellate order of Addl. Dist. Judge, Hooghly, D/- 13th December 1933.

Maintenance—Arrears of—Order of Criminal Court allowing arrears of maintenance—If only personal right is created, they are not attachable.

Arrears of maintenance payable under order of a criminal Court cannot be attached if the right to receive maintenance is only a personal right created by the order. It cannot be said that the amount cannot be attached merely because the order is passed by a criminai Court. The true test is whether a purely personal right is created by the order for maintenance or not : 7 *I C* 80 and *In re Robinson*, (1884), 27 *Ch D* 160, *Rel on*; *Case law referred.*

[P 579 C 2 ; P 580 C 1]

Bijan Kumar Mukherjee and *Sanat Kumar Chatterjee*—for Appellant.

Radhalinode Pal and *Dhirendra Nath Ghose*—for Respondent.

Judgment.—The question arising for decision in this appeal relates to the legality or otherwise of the orders passed by the Courts below holding that arrears of maintenance allowed by a Criminal Court under S. 488, Criminal P. C., were not liable to be attached and sold in execution of a decree for costs passed by a civil Court. The orders were passed on an application made by the decree-holder under S. 60, Civil P. C. on the footing that the arrears of maintenance were debts within the meaning of the aforesaid provision of the law, and were attachable as such. The application for attachment was resisted by the judgment-debtor. The Subordinate Judge, by whom the question was dealt with in the first instance, came to the conclusion that maintenance allowance allowed by a Court was not assignable and was not liable to be attached in execution of a decree for money. The Additional District Judge, in the Court of appeal below, was of opinion that the case before the Court must be governed by the special provisions of the Criminal law, in which arrears of maintenance do not amount to debts or saleable property at all; and in that view of the case agreed with the primary Court in holding that the objec-

tion raised by the judgment-debtor was valid under the law.

The facts of the case giving rise to this appeal were not in dispute. The maintenance allowances payable to the judgment-debtor, and which were sought to be attached were in arrears; and there was no question that the arrears were legally due from the person held liable to pay the same by the order of the criminal Court under S. 488, Criminal P. C. The question that falls to be decided in the case before us is a question of first impression: whether arrears of maintenance payable under the order of a criminal Court does or does not constitute either debt or saleable property within the meaning of S. 60, Civil P. C.

It may be stated at the outset that the view presented by the Court of appeal below, that arrears of maintenance in the case before us were not attachable, for the reason that the order for payment of maintenance was passed by a criminal Court, does not commend itself to us. There appears to be no principle or authority in support of the position thus indicated by the Judge below, regard being had to the fact that there was no question that the arrears of maintenance were due, and were payable by the person against whom the order for maintenance was made by the criminal Court; there being no question whatsoever of enforcement of an order for maintence as contemplated by sub-S. (3) of S. 488, Criminal P. C. The only matter for consideration then is whether, in view of the nature of the order for maintenance allowed in the case before us, could it be said that the arrears of maintenance were attachable property within the meaning of S. 60, Civil P. C., and closely connected with that question is the other question whether the order for maintenance in the case before us was a purely personal right to recover a sum of money. The right to receive maintenance was a purely personal right created by an order of a competent Court, it was inalienable. There was no charge created in property, by the order for maintenance in the case before us, and the maintenance could not therefore be held to be alienable property. In our judgment, the right created by the order of the criminal Court was a personal one, a right which was not assignable and consequently not liable to be sold in execution of a decree for money, in view of the provision of S. 60, Civil P. C. In the case before us, the monthly allowance directed to be paid by the criminal Court was to be paid by the husband for maintenance of his wife; it was not in the nature of property, but only money to be paid by the order of the Court personally to the wife for her maintenance; it was not therefore assignable by the wife.

It may be mentioned that a number of decisions by this Court were placed before us for consideration, during the course of argument of this appeal, but we are unable to see that those decisions as they stand are of real assistance to any of the parties to this case. We are unable therefore to base our decision on any of the decisions cited before us: 6 W R (mis.) 61 (1); 8 W R 41 (2), 27 Cal 38 (3); 38 Cal 13 (4); 8 Cal 736 (5) and 41 Cal 88 (6); and we have given our decision as indicated above on general principles applicable to the facts of the case. So far as those principles go, we are supported by the observation of eminent Judges contained in the decision in 27 Ch. D 160 (7) where Cotton, L. J. expressly held that alimony as an allowance which the Court thinks right to be paid as the wife's maintenance from time to time, was not in the nature of property and not alienable. It may also be noticed that in 12 C L J 146 (8), Sir Ashutosh Mukherji, J., observed in the course of his judgment that the true test to be applied in a case like the one before us, in which the question is raised whether maintenance allowance is attachable in execution of a decree for money, under the Code of Civil Procedure, is whether a purely personal right was created by

1. Mahatab Chand Bahadur v. Pearee Dossee, (1866) 6 W R (Mis) 61.
2. Hoymobuty Debia v. Koroonamoyee Debia, (1867) 8 W R 41.
3. Haridas Acharjia v. Boroda K. Acharjea, (1900) 27 Cal 38=4 C W N 87.
4. Asad Ali v. Haidar Ali, (1911) 38 Cal 13=6 I C 826.
5. In the matter of Luddun Sahiba, (1882) 8 Cal 736=11 C L R 236.
6. Ead Ali v. Lal Bibi, 1914 Cal 172=20 I C 138 =41 Cal 88=14 Cr L J 378.
7. In re Robinson, (1884) 27 Ch D 160.
8. Tara Sundari Debi v. Saroda Charan, (1910) 12 C L J 146=7 I C 80.

an order for maintenance or not; if the right to receive maintenance allowance was only a personal right, as it is in the case before us, it was not assignable, and could not be held liable to be seized and sold in execution of a decree for money.

In the above view of the case, the orders passed by the Courts below, have to be affirmed and we direct accordingly. The appeal is dismissed with costs. The hearing fee in the appeal to this Court is assessed at two gold mohurs.

K.S. *Appeal dismissed.*

A. I R. 1935 Calcutta 580

(Special Bench)

MUKERJI, PATTERSON AND GUHA, JJ.

Pran Krishna Chakravarty and *others* —Accused—Appellants.

v.

Emperor—Opposite Party.

Death Ref. No. 7 and Criminal Appeals Nos. 192, 193 and 195 of 1934, Decided on 6th September 1934.

(a) Penal Code (1860), S. 120-B — Conspiracy—Proof.

Mere evidence of association is not sufficient for an inference of conspiracy. [P 585 C 2]

(b) Penal Code (1860), Ss. 395 and 396—Dacoity—Each gunner having light-man attached to aid him in firing—No shot fired on upper part of body—Injury caused by one of such shots on stomach and death resulting from it—Accused held had no intention to kill but only to disable victim from offering resistance — Offence held only punishable under S. 395 and not under S. 396.

Where in the course of a dacoity, as a result of injury on the stomach received from a gunshot by one of the dacoits, the deceased died and it was found that each gunner had a light-man attached to him to aid him in spotting people and all the shots fired were only on the lower part and not even one on the upper part of the body:

Held: that the intention of the dacoits was not to kill but only to disable people from offering resistance either by their acts or by their shouts and as such they were guilty not under S. 396, but only under S. 395. [P 590 C 1, 2]

(c) Penal Code (1860), S. 395 — Dacoity planned and of worst description—Deterrent punishment is necessary.

Where the dacoity planned and committed is of the worst possible description, deterrent punishment is necessary. [P 590 C 2]

Pugh, Nirmal Chandra Chakravarti, Bijali Bhusan Sanyal, Girija Prosanna Sanyal, Sourindra Narayan Ghose, Sures Chandra Talukdar and *Radhika Ranjan Guha*—for Appellants.

Ramani Mohan Banerji — for the Crown.

Mukerji, J.—There are before us four criminal appeals and a reference under S. 3 (2), Bengal Criminal Law Amendment (Supplementary) Act, 1925 read with S. 374, Criminal P. C., which have arisen out of a trial held by a Tribunal consisting of three Commissioners with Mr. E. S. Simpson, I. C. S., as President. The Tribunal was constituted for the trial of thirteen persons who were accused of offences falling within the First Schedule to the Bengal Criminal Law Amendment Act, 1925. Of these accused persons we are concerned with only ten, and their numbers and names as also their convictions and sentences will appear from the following list: [*on the next page.*]

It will be noticed that in the numbering of the accused persons given above, Nos. 5, 8 and 10 have been omitted. These three numbers were those of Asoke Ranjan Ghose, Sasadhar Sarkar and Lalu Pande respectively, who after the charges were framed, pleaded guilty to the two charges, one under Ss. 395/396, I. P. C., and the other under Ss. 395/120-B, I. P. C., that were framed against each of them and were convicted on their own pleas and were sentenced to undergo rigorous imprisonment for 5 years on each of the said charges, the sentences to run concurrently.

At the very outset and before dealing with the case itself we desire to acknowledge the immense assistance we have derived from the judgment which the Commissioners have recorded in this case. The case involved consideration of a multitude of events and incidents, which on account of their diversity, complexity and ramifications are not quite easy to arrange or remember in their order, and spreading as they do over a wide area with simultaneous happenings at different places and as concerning different individuals or groups of individuals, present no inconsiderable difficulties as regards their proper and correct appreciation. But the learned Commissioners have been able, in their judgment, to present the case in all its details with perfect accuracy and perspicuity and to note every point in it, which may conceivably be worth considering, in its true perspective and with an amount of fairness and reasonableness which deserves to be highly commended. For the purposes of the case,

No. 1.—Pran Krishna Chakravarti ... Death, under Ss. 395/396, I. P. C. Also convicted under Ss. 395/120-B, I. P. C.

No. 2.—Satyabrata Chakravarti ... do.

No. 3.—Hrishikesh Bhattacharjya ... do.

No. 4.—Saroj Kumar Basu ... ... do.

No. 6.—Hari Pada Basu ... ... 10 years' rigorous imprisonment, under Ss. 395/396, I. P. C. Also convicted under Ss. 395/120-B, I. P. C.

No. 7.—Prafulla Narain Sanyal ... Transportation for life under Ss. 395/396, I. P. C. Also convicted under Ss. 395/120-B, I. P. C.

No. 9.—Kali Pada Sarkar ... ... 10 years' rigorous imprisonment, under Ss. 395/396, I. P. C. Also convicted under Ss. 395/120-B, I. P. C.

No. 11.—Abdul Kader Choudhury ... Transportation for life, under Ss. 395/120-B, I. P. C.

No. 12.—Kiron Chandra De ... ... Transportation for life, under Ss. 395/120-B, I. P. C. Also convicted under Ss. 201 and 216-A, I. P. C.

No. 13.—Ram Krishna Sarkar ... ... 10 years' rigorous imprisonment, under Ss. 395/396, I. P. C. Also convicted under Ss. 395/120-B, I. P. C.

in the form in which it has come up for consideration and in view of the limited nature of the controversy that exists at the present stage, only a bare outline of the prosecution case and not too many of the details need be set out.

For our present purposes it would be sufficient to give the following account of the locality with which this case is concerned. Hili is an important station on the Eastern Bengal Railway, Northern Section, crossing the Padma in the course of its upward journey—the Up Darjeeling Mail passes through stations, some of which in their order are Paksey, Santahar, Akkelpur, Jamalganj, Joypurhat, Panchbibi, Hili, Charkai, Phulbari and Parbatipur. Charkai is the Railway Station for Birampur which plays a considerable part in this case. Between Hili and Charkai the railway line is crossed E to W by a road called Ghoraghat Road which then proceeds for a certain distance in a north-westernly direction, then northwards and finally north-westwards again to the river Jumna which is crossed by a ferry. Before reaching the ferry-ghat the Ghoraghat Road meets another road which runs northwards and eastwards from the junction point, crosses the railway line and leads to the village of Palasbari. After crossing the ferry the Ghoraghat Road runs in a north-westernly direction and passing through several villages, of which one is Chintamon, leads to a village called Samjia and reaches a ghat in that village where there is a ferry for crossing the river Atrai.

In the charge of conspiracy on which all the accused persons were tried, the venue of the conspiracy was stated as Birampur, Palasbari, Panchbibi and other places, and the object of the conspiracy was set out as being to commit dacoity at Hili Railway Station, and the period was stated as between 24th October and 28th October 1933. The charge of dacoity with murder was against eight out of the ten accused persons, viz. with the exception of Kiran Chandra De and Abdul Kader Choudhury, related to an incident of 28th October 1933, viz. a dacoity at the Hili Railway Station in the course of which one Kali Charan Mahali, mail peon of the said station, was alleged to have been killed with a shot gun. The other two charges framed at the trial were against the accused Kiran Chandra De alone and were under S. 216-A, I. P. C., and S. 201, I. P. C., the former charge relating to the harbouring of some of the offenders both before and after the dacoity, and the latter charge alleging that the said accused had caused the disappearance of a bundle containing daggers, shirts and other articles, with the intention of screening one of the offenders, namely Sasadhar Sarkar, from legal punishment.

So far as the charge of conspiracy is concerned, put quite briefly, the prosecution case is the following: The object of the conspiracy was to commit for certain revolutionary purposes a dacoity at the Hili Railway Station with a view to secure the contents of the postal mail chest in which the mail bags which arrive by the Down and the Up Darjeeling Mails are deposited and remain until day-break when they are despatched or distributed ; the scheduled time for such arrivals being 00.25 hours and 02.15 hours respectively. (His Lordship then dealt with the prosecution story leading to the occurrence and the judgment proceeded.) We shall now, in a few words, give an idea as to the nature of the occurrence which forms

the subject matter of the charge of dacoity with murder. The topographical details of the Hili Railway Station and of its immediate surroundings, together with the distances between some of the main spots of the occurrence are to be found in the map Ex. 69. The platform runs north and south and lies by the east of the station building and a passenger shed, the latter being adjacent to the south of the former. On the north and east of the station building and covering a part of the width of the platform is a verandah. There is an entrance to the passenger shed on the side of the platform and an exit on the side opposite leading to a road called the Station Road which lies on the west of the station and runs north and south and leads up to the quarters of the Station Master and of the Assistant Station Master on the north, the quarters of the former standing on the east of those of the latter. By the west of this road there is a slope, and on the land on the lower level on the west of the slope there are some huts.

The story is that the raiders advanced towards the station at a double march, the gunners opening fire, and entered the platform at its northern end. The mail bags had been put into the mail chest — a large box secured by two locks—placed just outside the station rooms and underneath the verandah. The mail peon Kali Charan was lying on a cot to the immediate east of the mail chest, and his assistant Jitendra Kumar De was lying on the mail chest itself. Kali Charan was seized, and the keys were demanded of him and a struggle ensued and somehow or other Kali Charan freed himself and shouted in the name of the Government that the mail chest should not be opened and began to run towards the south. At this time one of the gunners who had taken up a position on the platform to the south of the station building aided by the flash of a torchlight cast by his lightman shot at him with a shot gun. Kali Charan ran out of the platform by the entrance gate of the passenger shed and went out to the road and continued running northwards. He staggered down the slope and fell in front of the hut of one Algu Bunia, but got up again and ran forward a further distance of 40 feet and then dropped unconscious. The assistant Jitendra Kumar De was attacked and Pran Krishna presenting a pistol at him demanded of him the keys and on his refusal to part with them was beaten and kicked into the Station Master's room where he fell down, the keys being snatched away from him. A cooly Satis Sheik who was asleep in the booking office was seized and pushed out into the verandah and struck with an iron rod, and when he was inside the passenger shed in his attempt to run out was shot on the left leg.

Another cooly Panchu Biswas who was also sleeping in the booking office was roused from his sleep, beaten and pushed out into the platform and then out of the passenger shed, and while there, was shot at with the aid of the light of a torch. A third cooly Harijuddin Mondal, who was sleeping on the verandah and close to the mail chest was awakened, threatened with a dagger and told to go away, and while he was yet on the platform, the beam of a torchlight was flashed on him and he was shot at, at close quarters. Ismail Sheikh, another cooly, was sleeping on the north of the mail chest. He was awakened before Kali Charan was shot and so was able to see the struggle between Kali Charan and his assailants. He cried out, and on that he was fired at by somebody from the north of where he was, torchlight being similarly cast upon him as in the case of the others. Another Railway employee, one Jadubangshi Singh, was sleeping in his quarters on the west of the Station Road. He was awakened by the reports of guns and thinking that an accident had occurred was about to proceed to the station when at a point on the Station Road close to his house a torch was flashed on his face and he was fired at from the direction of the platform a pellet striking him on his left eye. The signal cabin is situated immediately to the north of the station building, and in it were the cabinman Ram Lakshan Tewari, a pointsman and a porter. Ram Lakshan suggested that he and his companions should go out, but two of the raiders, one with a gun and the other with a torchlight threatened to kill them if they failed to remain quiet. The Station Master who was asleep in his quarters was awakened by a watchman and on going outside saw the beams of torches

and heard the reports of guns. He brought out his gun and fired three cartridges whereupon 4 or 5 shots were fired towards him from the direction of the platform and some of the pellets fell upon the walls of the Assistant Station Master's house. The mail chest was rifled, the mail bags and other articles in it were taken out, and the forms-almirah and the ticket chest were broken open, and the cash which was in the iron safe was removed. Some of the instruments of communication were damaged and put out of action. With the booty, which in cash and property is said to have been valued at Rs. 4,624, the raiders then left, marching towards Charkai.

The party after proceeding along the railway track up to a certain point halted and threw away superfluous articles of no value, and then proceeded by the Ghoraghat Road for a certain distance and thereafter again halted and changed themselves into ordinary clothing and packed up their things in bundles. One of the 14 men who had formed the party had in the meantime dropped out and the party consisting of the remaining 13 then split itself into three groups, viz. (1) Pran Krishna, Satyabrata, Hrishikesh, Saroj, Hari Pada, Prafulla and Asoke ; (2) Lalu, Bejoy, Ram Krishna and Sajadhar ; and (3) Kali Pada and Anil. Group (1) was to proceed towards Samjia with a view to go to Dinajpur. Group (2) was to be led by Sasadhar who was to send Lalu, Bejoy and Ram Krishna to Patiram by cart, and a small amount of money was paid to Bijoy for his labours. And as regards group (3), Kali Pada was to send Anil, who was too much fatigued, to Gour Pal's house at Birampur.

The entire party then proceeded along the Ghoraghat Road, short distance, when Pran Krishna having remembered that he had left his shoes at the place where he had changed his clothing Kali Pada was sent back to fetch the shoes. At some point where the Ghoraghat Road meets the Palasbari Road, the three groups separated. Group (1) proceeded towards Samjia; Group (2) proceeded towards Palasbari where Sasadhar had a residence ; and of group (3) Anil was left sitting and to await the return of Kali Pada with the shoes. It would be a long history to pursue the thread of the narrative in order to set out the details of the events that happened in the journeys of these three groups of accused persons. Besides, for the purposes of the questions that we have to consider such details, though interesting in the extreme, would hardly have any relevancy. It would be quite sufficient for our purposes to state only a few of the events that ultimately transpired. Information of the occurrence having in the meantime been communicated to the proper authorities, a trap was laid and very cleverly managed, with the result that the seven persons who formed group (1) together with the articles they were carrying including the bundle containing the Hili Railway Station cash, were captured on the evening of 28th October 1933 at the Samjia ferry-ghat when the said persons were about to cross the river. Amongst the articles found with them and seized were the two shotguns, the revolver, the pistol, cartridges, daggers and some postal and other articles. Group (2) arrived at Sasadhar's residence at Palasbari and there the idea of sending the other three to Patiram was abandoned. Ram Krishna left in the afternoon for Chak Basanta where he had a relation named Debendra Nath Choudhuri. Lalu and Sasadhar met Kiran in the afternoon. Satyabrata had made over to Sasadhar a bundle containing some Khaki shirts, daggers, torches, etc., and this bundle was now made over to Kiran by Sasadhar who also made over Lalu to the charge of Kiran. Later on the same day Anil having arrived, Kiran put Lalu and Anil at the Charkai Railway Station into a train which took them towards Santahar. Bijoy also took a down train from Charkai. Lalu was arrested at Naogong on the morning of the 29th.

He led the Police to Sasadhar's house at Palasbari where Sasadhar was arrested on the 30th. Anil and Bijoy, as already stated, are absconding. As regards group (3) it is only necessary to state that Kali Pada and Anil had been to Birampuri early in the morning of the 28th and that Kali Pada was arrested at Phulbari on the morning of 1st November. To complete the chain of narrative, a few more facts require to be stated. Lalu's confession was recorded by the Magistrate on 1st November and Sasadhar's on 2nd November. Lalu and

Sasadhar were taken by the police to Panchbibi and there Sasadhar led the police to the house of Abdul Kader which was searched. Abdul Kader was not present there at the time and was eventually arrested on 14th November in the town of Bogra. Asoke's confession was recorded on 5th November. The bundle which Sasadhar had made over to Kiran was found on a search, and Kiran was arrested on 30th October at Birampur and his confession was recorded on 17th November. Ram Krishna is said to have made an extra-judicial confession to his relation Devendra Nath Choudhuri and later on again to one Sashi Bhusan Sarkar ; and the latter thereupon turned him out of his house. Information received from these two persons led the police to go to Ram Krishna's house at Noapara on 24th November and on the same day he was arrested. On 26th November Ram Krishna made a confession. Asoke, Sasadhar and Lalu stuck to their confessions at the trial and were, as already stated, convicted and sentenced ; and thereafter they were examined as witnesses on behalf of the prosecution. At the trial Kiran and Ram Krishna retracted the confessions they had made. It is necessary to state now what happened to Kali Charan and the other five injured men. On the morning of 28th October they were all taken on train to the Railway Hospital at Parbatipur and there they arrived, Kali Charan in an unconscious condition.

The Medical Officer in charge of that hospital examined and gave the first treatment to the injured persons. Jadubansi was found to have two lacerated punctured wounds just below the lower lid of the left eye and an ecchymosis near about the spot. On the next day he was sent to the Railway Hospital at Saidpur where he remained until 26th November. Thereafter he was sent to the Medical College Hospital in Calcutta, and there, after receiving treatment as an outdoor patient for three days, was admitted into the eye ward on 1st December and was discharged on 29th December. He has completely lost the sight of his left eye. At the Parbatipur Railway Hospital, Panchu and Satis were each found to have got a punctured wound on the left leg and from it an S. S. G pellet was extracted in the case of each. They were sent to the Civil Hospital at Dinajpur on the next day and after being treated there were discharged on 17th and 3rd December, respectively. The injuries on Kali Charan, Harijuddin and Ismail were found to be more serious than those of the others. The Parbatipur Hospital Medical Officer found Kali Charan suffering from multiple punctured wounds and extracted 2 S. S. G. pellets from his person. Harijuddin was found to have 53 punctured wounds and from his person 4 B. B. pellets were extracted. Ismail had two punctured wounds on the right thigh and from him was extracted 1 S. S. G. pellet. At 11 a. m., that is to say after being in hospital for about three hours, Kali Charan regained consciousness and then his dying declaration (Ex. 80) was recorded by the Sub-Registrar of Parbatipur. At 8 p. m. the same evening these three injured persons were sent to Calcutta by the down North Bengal Express in a third class compartment emptied of passengers, and on arrival in Calcutta the next morning were taken to the Campbell Medical Hospital. At 10-40 a. m. on the 29th an operation was performed on Kali Charan, but he succumbed at 7 p. m. the same evening. Harijuddin and Ismail were X-rayed and though in the body of the former a large number of pellets were detected it was considered risky to try to extract them. They remained in the Campbell Medical Hospital as indoor patients till their discharge on 25th November.

The above in a skeleton form is the case for the prosecution, and this case with the exception of a few matters, which are of very minor importance and do not really affect the question of the guilt or innocence of the accused persons has been considered by the Commissioners as proved. Before us it has not been disputed on behalf of any of the accused persons that there was a dacoity of the nature alleged, or that the mail chest was rifled and railway cash, etc., were taken away by the culprits. Furthermore, most of the findings of the learned Commissioners on which they have based their order as regards the convictions of the accused persons have been expressly admitted on behalf of the accused persons as unassailable, and this Court as a Court of appeal, has not been asked to go behind those findings.

This position, which the advocates for the accused have thus adopted, has relieved us of the necessity of dealing with the case in all its details and has immensely reduced its compass. We propose therefore to deal only with such points in controversy as are relevant at the present stage.

An argument which was put forward by Mr. Girija Prasanna Sanyal for the first time in the course of his reply has got to be noticed at the outset, because it purports to suggest that the procedure adopted was vitiated by a fundamental irregularity. The argument is that the Commissioners were not justified in convicting and sentencing the three confessing accused, Asoke, Sasadhar and Lalu, on their own pleas and then allowing them to be examined as witnesses for the prosecution. It was said that when the charges were framed and the accused persons were called upon to plead, there was really no evidence on which a charge under Ss. 395 and 396, Penal Code, could rest, and that the pleas of the said three persons should not have been accepted and on such pleas their conviction should not have followed. It was also said that by accepting the pleas the Commissioners held that the offence of dacoity with murder was established and so the present accused persons were prejudiced. We find that the charges were framed after the first 63 witnesses for the prosecution had been examined. It appears however that at that stage sufficient evidence had already been recorded to make out a prima facie case that there was a dacoity and that Kali Charan had received in the course of the dacoity injuries which resulted in his death. In our opinon therefore it cannot be said that the charge under Ss. 395 and 396, Penal Code, was framed on no evidence. So long as that is so, the accused persons whose cases are before us can have no grievance, for it is no concern of theirs whether the other three accused persons should or should not have been convicted on their own pleas.

Amongst the general arguments addressed on behalf of the accused persons we shall now notice two: First, about the necessity of independent corroboration in material particulars in respect of the evidence of the three persons, Asoke, Sasadhar and Lalu, and also of the evidence of such persons, who although they may not have participated in the actual offences with which the accused persons have been charged, are persons who in the eye of the law are regarded as accomplices or are no better than accomplices; and second, about the caution to be used in basing a conclusion as to conspiracy upon the evidence of witnesses who speak to the association of different accused persons, because it is manifest that mere evidence of association is not sufficient for an inference of conspiracy. The view which the Commissioners have taken as regards these matters is absolutely sound, and nothing in their judgment has been shown to which any the slightest exception may be taken. The law has been correctly stated and also rightly applied.

Indeed, the elaborate arguments that have been addressed on these matters have ultimately resolved themselves into a question of sufficiency of evidence to sustain some particular charge against some particular accused and nothing else. The association at the bases at Bairampur and at Panchbibi, the journey of Asoke and Saroj on bicycle to Birampur on 24th October, the association of Satyabrata and Ram Krishna at Jamalganj and their departure from Jamalganj on that night for Hili, the boarding of the train to Hili at Panchbibi by Abdul Kader Choudhury and several others, the assembly on the bank of the tank at Sukra, the journey back to Panchbibi after the idea of raid was abandoned, and the events of 25th, 26th and 27th October up to the point when the dacoity was actually committed have all been discussed by the learned Commissioners in great detail, pointing out what corroboration there is and what corroboration is wanting and the effect of such corroboration or its absence. The conclusions arrived at by them are clear and convincing to a degree. The significance and importance of each single fact or circumstance have been noted with meticulous care and appreciated at its real worth. The finding of the Commissioners that the conspiracy alleged on behalf of the prosecution has been satisfactorily established and that the overt acts alleged to have been committed in pursuance of the conspiracy have also been proved beyond

doubt is a finding which cannot and indeed has not been challenged.

By far the most important argument that has been addressed to us on behalf of the accused persons was that Kalicharan and the other five persons were not shot at by any of the persons who committed the dacoity or on the platform itself, but that the gunshot injuries inflicted upon them were caused by shots fired from the gun which was fired by the Station Master. This argument was at times elaborated a little further by suggesting that several other persons also residing in the locality had guns in their possession and they must have fired them in order to scare away the dacoits who were on the platform and who, if they fired at all, did in fact fire only blank cartridges. In putting forward this argument the parties have really asked us to ignore the positive evidence on the record, which is neither unreliable nor in fact improbable but is on the other hand highly probable, and to proceed upon certain suppositions in support of which there is not an iota of proof but which are said to be items of probabilities which should not be overlooked. The argument, put in a nutshell is as follows: Kalicharan had two wounds on the upper part of the right forearm, which might have been caused by one shot, one being the wound of entry and the other of exit. He had 15 other wounds, 8 on the right side in the lower part of the chest and abdomen distributed in a circular group over an area of $4\frac{1}{2}$" x $3\frac{1}{2}$" and 7 on the back of the right side similarly distributed over an area of 5" x 4," the group of 8 being wounds of entry and the group of 7 being wounds of exit. And the doctor who performed the autopsy extracted an S. S. G. shot which had been lodged in the large intestine. There are 17 such shots in a cartridge. The Arms Expert, when the spread of the 8 shots was put to him in his examination-in-chief, said that he would opine that Kali Charan had been fired at at a range of 30 yds.; certain other answers were given by him later on, some to the Court and others to the cross-examining advocate, which have been recorded in the following words:

To Court.—A group of 8 shots on the right side of the lower part of the chest and abdomen and a group of 7 shots on the back of the right side of the loin could not be caused by the firing of the same cartridge unless the latter were wounds of exit.

Cross-examined.—They could have been caused by the firing of the same cartridge if the firing took place from the side.

(The witness is here asked to open a 12 bore S. S. G. cartridge and count the number of shots. He does so and it is found that there are 17 shots in the cartridge).

To Court.—If it be taken that the two groups mentioned above plus a further group of 2 shots were all caused by the firing of the same cartridge, the range, in my opinion, must have been less than 15 yds., whether the barrel through which the shots were fired was within cylinder or choke. It is possible at that range to find shots in two groups. One being 8 and the other 7 shots, with 2 shots in between, not forming a part of either group.

Cross-examined.—If the two groups, one of 8 and one of 7 were caused by different cartridges then the group of 7 would have been caused from a range of 30 yds. I would not say that they could have been caused from a range of more than 40 yds. I cannot give even an approximate range. They could have been caused from any range. Unless I know where the remaining shots went I can't give a definite answer.

To Court.—The effective range of a shot gun is about 100 yds. Had the victim been more than a 100 yds. from the fire, the grouping described to me would not be found.

Relying on the statement made by the witness in his examination-in-chief, to which reference has already been made, it has been argued that having regard to the disposition of the raiders on the platform, the position of the mail chest, and the place at which the entrance gate to the passenger shed stood near which the gunner who shot at Kalicharan was stationed, there was not enough space nor any situation from which Kali Charan could be shot from a range of 30 yds. It has also been argued that it was apparent that Kali Charan must have, if the prosecution story is true, been shot when he was very near the said entrance gate, for it is next to impossible that he would run after being shot in the very direction from which the shot had proceeded. It has been argued further that with the injuries such as were caused to him, it was impossible for Kali Charan to have continued to run, and to have run such a long distance till he fell in front of Algu Nunia's house and that such running can hardly be accounted for on the theory of reflex movement. Absence of blood-marks and of bullets on the platform was also strongly relied upon in support of this argument. The witnesses who

have spoken to the occurrence have been characterized as false, and their evidence has been subjected to a series of scathing criticisms in order to destroy its effect. And on the constructive side it has been shown that the Station Master's gun was not taken charge of by the police nor any of the other guns that were in the village near about and it was argued that the account which the Station Master has given of the ammunition he had at the time or used on the occasion should be rejected as untrustworthy. We have considered these arguments with all the care they deserve, and are firmly of opinion that they must be discarded.

The evidence of the Arms Expert is extremely unsatisfactory. It is not at all clear to us that in making the statement that he did in his examination-in-chief, to which reference has been made above and in which he said that the firing must have been at a range of 30 yds., he was taking into account the 17 shots that went out of the cartridge, only 8 of which had struck the area, description of which was put to him. The discovery that the cartridge consisted of 17 shots appear to have been made by him at a a subsequent stage in his deposition. Again, in the answers that he subsequently gave and which have been quoted above we find it difficult to understand how he could say that the range must have been less than 15 yards.

These statements appear to us to be in conflict with what is stated in Taylor on Medical Jurisprudence, Edn. 8, Vol. 1, p. 516, from which it would seem that the range in the present case, having regard to the pattern, must have been very much less. We do not wish however to lay too much stress on this matter as obviously we shall not be justified in posing our opinion as against what has been given by an expert examined in the case. But we think we are entitled to say that we do not regard the points arising in his evidence as having been sufficiently cleared up and that his evidence is not such as can be legitimately or reasonably taken as outweighing the positive testimony of witnesses and the overwhelming force of circumstances which point to the contrary. That there was firing on the platform cannot be disputed and the story that only blank cartridges were fired there cannot be accepted, unless the whole story of the find of used ammunition in the station and its precints immediately after the dacoity as also afterwards is discarded as a huge concoction.

The evidence as regards the find has remained unchallenged and the correspondence between the said ammunition and those found with some of the accused persons afterwards is too singular and striking to be accounted for on any other supposition than that shots, and not merely blank cartridges were fired by the raiders. To accept the defence theory one will have to assume that the gunners stood at one and the same place all along and never moved at all, and that Kali Charan could not have been shot at a short range from the south while he was running away from the platform after shouting out protest in the name of the Government. The whole of the medical evidence in the case is to the effect that notwithstanding the injuries received by him he could have power of locomotion; and the defence assertion to the contrary is based on no evidence and we have been asked to accept such assertion as well founded merely on the ground that it is more in accord with common sense. Absence of pellets is a matter on which we are not prepared to attach any importance because unless a search for the specific purpose of finding them was made they would hardly catch the eye; and in this case there is no suggestion that such a search was ever made. Nor is the absence of blood marks, so important, because it is not unlikely that Kali Charan received the shot when he was running. It is true that some of the other injured persons remained on the platform after they were shot; but here again no attempt has been made to establish that blood in sufficiently large quantities must have oozed or spurted out to create stains which must necessarily be detected, even though no search for them was made. The constructive portion of the defence argument, so far as this matter is concerned is built upon very slender foundation, and the materials upon which that foundation rests bear no scrutiny. The whole of the positive evidence in the case is clearly in support of the case which the prosecution has put forward as regards the fir-

ing of Kali Charan and the other injured men on the station itself.

In this connexion, Kali Charan's dying declaration must be regarded as evidence of the greatest importance. It is true that in this declaration Kali Charan spoke an untruth in saying that the keys were with him and were snatched away from him by the use of force; but that is explained by the fact that he expected, when he made the declaration that he would live and would therefore guard against saying something which would go to establish that he was negligent and so would make him lose his job. That, however, is no reason for disbelieving his statement in the declaration as regards the way in which the raiders dealt with him He spoke of a dao and of weapons resembling a trisul or trident. At that hour of the night, and rudely roused from sleep, a man of his stamp was not unlikely to make a mistake of this description: what is most important is that he definitely said that the raiders after threatening him "at once" began to fire on him. His statement that the shots having hit him he fell down unconscious was meant only to narrate the sequence of the two events, namely of the shot having hit him and of his falling down unconscious, and was not meant to indicate that no time elapsed between the two. Indeed, it would have been strikingly singular if he could, having regard to the injuries that he had received, realise and remember that he had run out of the station and upto a certain distance, and then gone down the slope and thereafter had fallen down and again risen and run a further distance of 40 feet and finally dropped down unconscious. Jitendra Kumar De has of course concealed the fact that, overpowered and cowed down at the point of a revolver, he had to open the keys of the mail chest, but this fact is hardly enough to condemn him as untruthful so far as the rest of his evidence is concerned.

The evidence of the five other injured men, namely Ismail, Harijuddin, Satis, Panchu and Jadubansi all establish that shots were fired on the platform, and the evidence of Pashupati who appears to be unconnected with the railway staff is to the same effect. The evidence of this last-mentioned witness has been criticised on the ground of improbability, having regard to the hour at which he said he had taken the train at Ranaghat, and also because the story which he gave as regards the treatment accorded to him was somewhat strange. On a close examination of the matters involved we have come to the conclusion that there no such improbability is made out. He gave the time of his departure only by guess and the error that he made was at the outside one of about 50 minutes or so; and the special treatment that was meted out to him was not altogether unlikely because he was a passenger not connected with the Railway Staff and from whom no interference was expected. The evidence of Algu Nunia is also of importance inasmuch as he has deposed that when Kali Charan fell down he asked him whether he was a thief and on that Kali Charan replied that he was not a thief but the mail peon Kali Charan and that he had been shot by the dacoits at the station. There is also other evidence consisting of the testimony of a very large number of witnesses too numerous to mention, corroborating the version of the occurrence as given by the witnesses named above. We can see no reason whatever to regard as untrustworthy the prosecution version of the occurrence in so far as it is to the effect that Kali Charan and the other injured men received their injuries from the gunshots fired by the raiders from the platform. We think Kali Charan was running towards the Station Master's quarters under an impulse which prompted him to go in that direction and that while nearing Algu Nunia's quarters he got down the slope and fell down the slope and then getting up made another and after proceeding a little further finally dropped down unconscious.

As against the entire body of evidence supporting the prosecution case as to the occurrence, the defence has set up their theory upon the dubious statement of the Arms Expert and upon what they regard as following from the evidence of the Station Master. But the Station Master has only said that he possesses a gun, that he fired three shots, that the police had not taken his gun or empty cartridge cases into custody, that in January 1932 he had purchased 50 rounds of No. 4 shot of which he spent 40 in the interval and that he does not know if

he had in stock cartridges with shot of a size other than No. 4. No conclusion such as the defence has asked us to deduce from these statements would, in our judgment, be justified. Another argument addressed to us is that it should be held that Kali Charan did not die as the result of the gunshot wounds inflicted on him, but that his death was due to the effects of a surgical operation performed unnecessarily, wrongly, slovenly and in an incompetent manner, and upon a wrong diagnosis made of his condition. As a part of this argument it has also been urged that he would not have died if he had been allowed to remain at Hili or at Parbatipur even without treatment and that the fatigue of a long railway journey such as he was unnecessarily made to undergo was responsible for his death. The argument we may be permitted to say, is preposterous, and its hollowness has been most effectively demonstrated by the learned Commissioners. Even a cursory reading of the evidence of doctors examined in the case who had dealt with Kali Charan at the different stages would satisfy anybody that the argument in both its branches should be rejected in its entirety.

It would be mere repetition of what the learned Commissioners have so elaborately observed in their judgment were we to give our reasons for the view that we take in agreement with them, namely that as Kali Charan's condition was bad he was removed to Parbatipur so that he might get hospital aid and hospital treatment, that at Parbatipur two pellets were extracted from his body and he was then sent to Calcutta because a qualified doctor in charge of the hospital was of opinion that he might die within 48 hours and that it was necessary to extract other pellets which were inside and which if not soon extracted would cause risk of life, that he was sent to Calcutta in order that he might get the best possible treatment within the shortest time, and that a fully qualified doctor holding a responsible appointment and in charge of a ward in the Campbell Hospital diagnosed his ailment as acute peritonitis and considered an operation essential as the only course open if any attempt at all was to be made to save his life. The charges of incompetency and wrong diagnosis and error in operation that have been levelled against the doctor last mentioned are entirely unfounded and unjustified. Equally unfounded is the suggestion that Kali Charan would have lived if he was not removed from Hili or from Parbatipur. Such removal, we are satisfied was imperatively necessary. The journey was made as comfortable as under the circumstances it was possible to make it, and we do not at all appreciate what was meant by arguing that it was only a third class compartment that was used and only a compounder who was sent with Kali Charan.

Whatever fatigue had to be encountered was a necessary consequence of the injuries because of the journey had to be undertaken as the only course left to be adopted to save his life, as it most certainly was in this case, the fact that the fatigue contributed to the death is inconsequential. The evidence such as it is leads to one inference only namely that Kali Charan died from acute, peritonites caused by the perforation of the gut by a shot which entered into his body when he was fired at in the course of the dacoity; or in other words, that he died as the result of bodily injuries inflicted on him in the course of the dacoity. The next question to be considered is whether the act of firing at Kali Charan, the result of which was his death, amounted to "murder" within the meaning of the Penal Code. No account of the firing is to be found in any of the confessions or in the evidence of any of the three confessing accused who have been examined as witnesses in the case. In the evidence of Sasadhar the following statement appears:

> While deputing the gunners, Koka (meaning Pran Krishna) instructed us to shoot down mercilessly any person who might come forward to interfere with the work.

Such a statement is not to be found in Sasadhar's confession, nor indeed in the evidence or confession of Lalu or Asoke or anywhere else. We do not therefore think we shall be right in relying upon the said statement, which if accepted would go a long way to indicate an intention to kill Kali Charan in the act of firing of the gun at him. As regards the shooting on Kali Charan, the direct evidence that we have of the act is that of Esmail Sheikh who has said that there

were two men further south of Kali Charan, and one of them focussed the rays of the electric torch upon him and the other fired at him with a gun. That the torchlight was flashed upon a victim before he was shot with a gun or threatened at the point of the gun or the pistol or revolver is the evidence of the whole body of witnesses which can hardly be discarded. And the evidence also is that each of the gunners had a lightman attached to him to aid him in his operations. It is contended on behalf of the Crown that this arrangement was made in order that the shooting might be deliberately made at a vital part of the victim. We are unable to accept this suggestion because none was shot on the upper part of his body, and on the other hand such shots as were inflicted were directed towards a comparatively lower part. The flash of the torchlight was intended to spot out the victim and for no other purpose.

Asoke in his confession stated that the gunners began to fire in all directions so that people might not approach. Moreover the fact that the revolver or the pistol were not made over to those who were charged with the duty of firing and were not used for shooting at any body also affords an indication that killing was not the intention of the party. It is equally difficult, in the circumstances referred to above, to hold that the intention of the person who fired at Kali Charan was to cause such bodily injury as he knew would be likely to cause Kali Charan's death. The intention clearly was to cause some injury as would disable Kali Charan from going out of the platform or from offering resistance either by his acts or by his shouts. The first two clauses of S. 300, I. P. C., must therefore be excluded. The firing was done with the intention of causing bodily injury to Kali Charan, but it is not possible to hold that such bodily injury was sufficient in the ordinary course of nature to cause death. On opening the abdominal cavity the Surgeon who performed the operation found a rent in the large gut where a shot had penetrated and through this rent there leaked out gas and faeces into the abdominal cavity and this according to the Surgeon caused acute peritonitis. In answer to a question put by the commissioners the said Surgeon said "Peritonitis is not invariably caused by perforation of the gut." The injury, therefore cannot be said to be such as would in the ordinary course of nature be sufficient to cause death. Cl. 3 of S. 300, I. P. C., therefore does not apply. A gun was fired with an S. S. G. cartridge and it was certainly a dangerous act. But the Surgeon who performed the autopsy said that Kali Charan's death was due to exhaustion as the result of the injuries. He explained this opinion by saying that

> By death due to exhaustion he meant continued external irritation, peripherical stimuli affecting the nervous system in such a way as to depress the normal function of respiration and circulation.

If exhaustion is to be taken into account it is difficult to see how the exhaustion which superimposed as the result of the journey can be excluded. Moreover the said Surgeon has also said:

> A shot of the kind found by me might remain in the abdominal cavity capsuled without causing harm.

In the circumstances to which we have referred we are unable to hold that the man who fired the gun knew that the act was so imminently dangerous that it must in all probability have caused death or that the act would cause such bodily injury as was likely to cause death, elements which are contemplated by Cl. 4 of S. 300, I. P. C. In our opinion, therefore the act did not amount to "murder" within the meaning of the Indian Penal Code. The result is that the conviction which the learned commissioners have recorded under Ss. 395 and 396, I. P. C., cannot be sustained and such of the persons who may be found guilty of the offence of dacoity will have to be convicted under S. 395, I. P. C. instead. (His Lordship then considered the case of each of the accused and the judgment proceeded). As regards sentences we cannot overlook the fact that the dacoity planned and committed was of the worst possible description. The gravity of the crime cannot be over-stated and deterrent punishments are therefore called for.

No. 1, Pran Krishna Chakravarty (29 years) and No. 3, Hrishikesh Bhattacherjya (19 years) were the two leaders in every sense of the term. They must have the maximum sentence of trans-

portation for life under S. 395, I. P. C.; No. 2, Satyabrata Chakravarty (18 years), No. 4, Saroj Kumar Bose (17 years) and No. 7, Prafulla Narain Sanyal (20 years)—inspite of all that has been said on behalf of accused 7 to show that he took a minor part in the dacoity itself, we are of opinion that there is enough to indicate that though he was not a leader such as accused 1 and 3 he was certainly an active member of the party and that he and Nos. 2 and 4 should go in the same category as regards sentence. We sentence each of these accused to rigorous imprisonment for 10 years under S. 395, I. P. C.; No. 6, Haripada Basu (20 years) and No. 10, Ram Krishna Sarkar (19 years)—these two accused took a comparatively subordinate part in the conspiracy and in the dacoity and we sentence each of them to undergo rigorous imprisonment for seven years; No. 11, Abdul Kader Chowdhury (28 years)—he was not present at the dacoity but was one of the more important members of the conspiracy. He should undergo rigorous imprisonment for seven years under S. 395/120-B, I. P. C.; No. 12, Kiran Chandra De (20 years)—he was not present at the dacoity. We think in his case a sentence of five years' rigorous imprisonment under Ss. 395/120-B, I. P. C. will meet the requirements of the case; No. 9, Kalipada Sarkar is acquitted and discharged. No separate sentences are passed upon the other charges on which the accused persons have also been convicted.

Patterson, J.—I agree.

Guha, J.—In this reference under S. 3 (2), Bengal Criminal Law Amendment (Supplementary) Act, 1925, read with S. 374, Criminal P. C., and in the four appeals by ten accused persons, who have been convicted and sentenced by the commissioners of a Special Tribunal at Dinajpur, I agree with the decision of my brother Mukerji, J., and in the orders passed by him in regard to the accused Satyabrata Chakravarty (alias Moni) Hrishikesh Bhattacherjee (alias Anukul), Pran Krishna Chakravarty (alias (a) Pran, (b) Kaka, (c) Kalada and (d) Mohendra); Haripada Basu (alias Ram Babu); Profulla Narayan Sanyal (alias (a) Kamal, (b) Amal); Abdul Kader Chowdhury (alias Doctor Da); Kiron Chandra De; Ram Krishna Sarkar (alias Mondal): Saroj Kumar Basu (alias Ketu) and Kalipada Sarker.

K.S. *Order accordingly.*

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PATTERSON AND CUNLIFFE, JJ.

Emperor

v.

Mominuddi Sardar—Accused.

Criminal Ref. No. 20 and Appeal No. 577 of 1934, Decided on 19th September 1934.

(a) Criminrl Trial — Murder case — That eye-witnesses not disposed at first to disclose what they knew is no ground to discredit their evidence.

The fact that the alleged eye-witnesses were disposed at the outset not to disclose what they knew, is one which should not in any way be regarded as tending to discredit their evidence.

[P 594 C 1]

(b) Penal Code (1860), S. 302—Sentence—That accused is only son of his widowed mother or is sincerely penitent and filled with remorse for his conduct is no ground for not inflicting death sentence.

Neither the fact that the accused is the only surviving son of his widowed mother nor the fact that the accused was sincerely penitent and filled with remorse for what he had done can be put forward as a reason for imposing the lesser sentence, so far as Courts are concerned, though it might be a circumstance which might induce the local Government in exercise of its prerogative to remit death penalty.

[P 594 C 2; P 595 C 1]

(c) Penal Code (1860), S. 302—Sentence—Accused overcome with passion at insults heaped on him by his brother — Planning to murder him and concealing a dao for killing him—Period between idea of killing getting into his head and actual killing very short—Provocation though not sufficient to convert offence into culpable homicide held sufficient to inflict less penalty.

The accused was overcome with passion at the insults which his brother had heaped on him in the presence of his friends, and it was under the influence of a passion almost amounting to insanity that he procured and concealed a dao, made his preparations for the crime, and actually committed the crime. The crime was in a sense, premeditated, inasmuch as the accused appeared to have thought it out carefully beforehand, and to have procured and concealed the dao for purpose of killing his brother. At the same time, the period that elapsed from the moment that the idea of killing his brother entered the accused's mind to the time when he actually carried out his purpose, was very short, perhaps only one or two hours, and during this period the accused must still have been smarting under the insults which his brother was said to have heaped upon him in the presence of friends ;

Held : that the accused clearly had some provocation, although that provocation was not such as could operate to take the offence out of the section, that is to say, to convert the offence from one of murder to one of culpable homicide not amounting to murder. At the same time the fact that the accused did commit the murder under the influence of such provocation, was one on which great weight ought to be attached in considering the question of sentence and that the lesser penalty may properly be inflicted.

[P 595 C 1, 2]

Sudhansu Sekhar Mukherjee and *Abdul Hossain*—for Appellant.

Nirmal Kumar Sen — for the Crown.

Patterson, J.—This Reference relates to the case of one Mominuddi Sardar who has been tried on a charge of having murdered his brother Amiruddi. The jury returned a unanimous verdict of guilty, and the Judge, agreeing with the verdict, convicted the accused under S. 302, I. P. C., and sentenced him to death. The matter has now come to this Court on a reference for confirmation of the death sentence and also by way of appeal. The facts according to the prosecution are briefly as follows : On the afternoon of 2nd April 1934, Aminuddi, the murdered man, went to the house of one Mehr Sardar of Kukrail to listen to some singing. He was accompanied by Sahar Ali Sardar and Sahar Ali's brother Belatali Sardar. Accused Mominuddi Sardar joined the party later in the afternoon. While the singing was going on, a quarrel arose between Mominuddi and Aminuddi over a sum of money which was said to be owing by Aminuddi to Mominuddi. As a result of the quarrel Mominuddi left the place in an angry mood, but returned at nightfall and suggested to his brother Aminuddi that they should go home.

According to the case for the prosecution and the confession of the accused himself, Mominuddi had, during the interval that elapsed between his departure from Meher's house after his quarrel with Aminuddi and his return, obtained a dao from the house of one Samir Sardar and had concealed it in a drain pipe by the side of the road leading from Meher's house to his own house. When the moon rose, that is to say, at 7 or 8 p. m., Aminuddi, Mominuddi, Sahar Ali Sardar, Belatali Sardar and one Ramjan, who is the uncle of Sahar Ali and Belatali, left Meher's house together. After they had gone a distance of some 7 or 8 rasis, that is to say about 300 yards, Mominuddi sat down on the road beside the drain pipe in which he had concealed the dao ostensibly for the purpose of relieving himself. The other four went on, Ramjan being in front, Aminuddi coming next, and Sahar Ali and Belatali last. Presently, Mominuddi ran up from behind and gave Aminuddi a cut on the neck with his dao. Aminuddi at once fell to the ground, and his companions ran away. They re-assembled at Meher's house almost immediately after ; and there they informed Belatali and Sahar Ali's father Nabu, (who it may be added, is the brother of the third eye-witness Ramjan) of what had occured. They also informed two persons named Jonab and Omar Ali who were with their father, as well as two other persons known as Bajtulla and Dildar. All these persons, except the last named, have been examined as witnesses. The party at Meher's house then broke up and the alleged eye-witnesses, as well as the persons whom they had informed of the occurence, went away to their respective homes without saying anything further to anybody about what had happened, and without taking any steps to have information given to the deceased's relatives or to the police.

Later in the evening however a Hindu gentleman named Hemendra Nath Ghose, who lives with his uncle Lalit Mohan Ghose, in a house just beside the place of occurence, was informed by passers by that a man had been killed ; and on going outside he found a man lying dead on the roadside, with cuts on the neck and shoulders. He informed his uncle, Lalit, and the latter too went and saw the dead body, and immediately sent his driver Sachindra Nath Ray Chaudhury to the thana to lodge information. The place of occurrence was only about a mile distant from the thana, and an information to the effect that a man was lying dead by the side of the road was lodged by Sachin at the thana at about 11 p. m. The Sub-Inspector at once proceeded to the spot and took up the enquiry. After holding an inquest, he sent the dead body to the morgue for post mortem examination, and it may here be observed that the accused Mominuddi together with his mother were found by the Sub-Inspector at the place

of occurrence and that Mominuddi was one of the persons sent to the morgue by the Sub-Inspector for the purpose of identifying Aminuddi before the doctor. A small pair of sandals were found by the Sub-Inspector beside the dead body and on enquiry he came to know that they belonged to Belat Ali Sardar, who it appears is a small boy of about 13 or 14. Belat Ali, on being questioned, made a statement to the Sub-Inspector as a result of which the Sub-Inspector sent word to the thana to have Mominuddi arrested.

The Sub-Inspector then proceeded to search Mominuddi's house and there he found a blood-stained shirt, which has been identified as belonging to Mominuddi, lying concealed behind some paddy bags inside the house. Shortly after the search in Mominuddi's house, Mominuddi was brought back from the morgue and was placed under arrest. The dhoti which was on his person was found to be blood-stained, and was accordingly taken possession by the Sub-Inspector. Shortly after, apparently as a result of a statement made to the Sub-Inspector by the accused, the Sub-Inspector went to the house of Samir Sardar, where he took possession of the sheath or cover of the dao with which the murder is said to have been committed; the dao itself has not been found. On his return to the thana in the evening, the Sub-Inspector placed on record a formal first information of murder, according to the information which he had obtained upto 7 a. m. that morning. The substance of this information had actually been recorded by the Sub-Inspector at 7 a. m. on a piece of plain paper, and the record thereof merely set forth the facts which had come tc the knowledge of the Sub-Inspector up to that time. No mention was made therein of the fact that Mominuddi had been suspected of having committed the crime ncr was any mention made of the names of any of the alleged eye-witnesses, the reason being that upto that time Belat Ali and his companions had not been examined. The accused was kept at Satkhira thana that night, that is to say the night of the 3rd April, and on the following day at 1-15 p. m. he was produced before a Deputy Magistrate for the purpose of having his confession recorded. He was carefully questioned by the Magistrate with a view to ascertaining whether or not he was really desirous of making a confession, and he was then given an hour and a half in which to think things over before making any confession. At the end of that time, the accused made a detailed confession which was recorded by the Magistrate and which had been admitted in evidence at the trial. I may say at once that, apart from all other considerations, the very contents of this confession leave no room for doubt that it was made voluntarily, nor has the learned advocate appearing for the accused, suggested that the confession was other than a voluntary one.

When examined by the Committing Magistrate, the accused stated that he had been distracted at the time and that he knew nothing, and when questioned by the Sessions Judge at the close of the trial he stated that he had not been feeling well at the time, and that he did not know what he has said. The confession is thus, in a sense, a retracted confession, and according to the usual practice it would require corroboration before it could be relied on. The Sessions Judge has not, in his charge to the jury, drawn their special attention to the necessity for having corroboration of a re tracted confession before placing reliance on it, but no point has been made on this by the advocate appearing for the accused, presumably for the reason that the other evidence in the case, if believed, not only affords the fullest possible corroboration of the confession, but is of itself sufficient to justify the conviction.

It may further be remarked at this stage, that the advocate appearing for the accused has not attempted to criticise the charge to the jury on the ground of any misdirection. The charge is in fact an admirable one, the law has been carefully and correctly explained, and the evidence has been fully and impartially summed up. The advocate for the appellant has therefore very properly refrained from arguing that the verdict of the jury is vitiated by any misdirection contained in the charge and has contented himself with drawing our attention to certain circumstances which he suggests, throw some doubt on the evidence of the alleged eyewitnesses, and has contended with very great force that whatever view be taken of the

matter this is not a case in which the death penalty ought to be inflicted.

All the persons named above in my summary of the case for the prosecution have been examined as witnesses, as well as the investigating officer, the medical officer and certain other less important witnesses. From what has been said above, it is clear that if the evidence of the alleged eye-witnesses be relied on, there can be no doubt about the guilt of the accused, inasmuch as the medical evidence discloses the fact that the injuries inflicted on the deceased were such as could only have been inflicted with the intention of causing death. As regards the alleged eye-witness, the main contention that has been put forward on behalf of the accused, is that their conduct immediately after the crime was unnatural, and especially their conduct in not disclosing what they knew to any impartial person and in not taking any steps to inform the police of what had occurred. I am unable to accept this contention. The usual reluctance to give evidence, especially in a murder case, which is so very noticeable in this country, must in the present case have been accentuated by the apprehension lest the alleged eye-witnesses should themselves fall under suspicions and by the sympathy which they must have felt towards the mother of the accused. She had lost one son, and the witnesses may well have felt reluctant to disclose anything that might result in her losing her other son. It is probable that it would never have become generally known that these persons had witnessed the occurrence if it had not been for the fact that Belat Ali had accidentally left his sandals behind at the place of occurrence, and the fact that the Sub-Inspector came to the spot almost immediately, and so was able on finding these sandals, to get hold of Belat Ali and his companions. In my opinion, the fact that the alleged eye-witnesses were disposed at the outset not to disclose what they knew is one which should not in any way be regarded as tending to discredit their evidence. It has further been contended on behalf of the accused that his own conduct was that of an innocent man, as he went to the spot after the occurrence and accompanied the dead body to the morgue. It is true that his conduct was consistent with his innocence, but it may well have been that he had no other alternative but to accompany his mother to where the dead body was lying, and that he could not very well refuse to accompany the dead body to the morgue for the purposes of identification. Having regard to the overwhelming evidence of his guilt I am not prepared to hold that the accused's conduct was in any way indicative of his innocence.

In these circumstances, I have no hesitation in accepting the evidence of the alleged eye-witnesses in its entirety and I am clearly of opinion that their evidence, taken together with the medical evidence, establishes the guilt of the accused beyond all reasonable doubt. The facts that the accused was wearing a dhoti with bloodmarks on it and that a bloodstained shirt was found concealed in his house as well as the fact that a dao had disappeared from the house of Samir Sardar immediately after the accused had been there on the evening of the occurrence, these facts and also the fact that the accused made a full confession of his guilt shortly after the occurrence, merely serve to fortify me in my conclusion, based on the evidence of the eyewitnesses, that the accused is guilty of the murder of his brother.

On the question of sentence, various considerations have been urged on behalf of the accused. It has been said that he being the only surviving son of his widowed mother ought not to be sentenced to death. In my opinion that is not a matter in which any Court ought to take any consideration, in deciding whether or not the death sentence should be inflicted. It has also been urged that the accused's confession shows that at that time at any rate he was sincerly penitent and filled with remorse and this has been put forward as a reason for imposing the lesser of the alternative sentences provided by the law. This contention too I am not prepared to accept. Whether or not a man who has committed an atrocious crime like this, is truly penitent, is a matter which ought not to be taken into consideration in deciding the question of sentence, at any rate so far as the Courts are concerned, though it might

perhaps be a circumstance which might induce the Local Government, in the exercise of its prerogative, to remit the death penalty. An argument which ought to carry much greater weight than either of the considerations referred to above is that the circumstances as disclosed by the evidence for the prosecution, and especially the confession of the accused, goes to show that the accused was overcome with passion at the insults which his brother (so he says) had heaped on him in the presence of his friends, and that it was under the influence of a passion almost amounting to insanity that he procured and concealed the dao, made his preparations for the crime, and actually committed the crime.

The crime was, in a sense, premeditated, inasmuch as the accused appears to have thought it out carefully beforehand, and to have procured and concealed the dao for the purpose of killing his brother. At the same time, the period that lapsed from the moment that the idea of killing his brother entered the accused's mind, to the time when he actually carried out his purpose, was very short, perhaps only one or two hours, and during this period the accused must still have been smarting under the insults which his brother is said to have heaped upon him in the presence of the gathering at Meher's house. The accused clearly had some provocation, although that provocation was not such as could operate to take the offence out of the section, that is to say, to convert the offence from one of murder to one of culpable homicide not amounting to murder. At the same time the fact that the accused did commit the murder under the influence of such provocation, is one on which great weight ought to be attached in considering the question of sentence. The accused is a young man of 22 or 23, and considering his age and the class to which he belongs, it may well be that the sudden fury caused by his brother's insults was such as to banish from his mind every idea except the idea of revenge. It may well be that he correctly described the state of his mind at that time when he stated as follows in his confession, in answer to a question put by the Magistrate as to why he had committed such an act. The Magistrate has recorded his answer thus :

(He weeps and says):

How can I say your honour, why it happened to be so on that day ? Everybody knows that we two brothers were on best terms. My brother heaped all sorts of abuses on me. What satanic thoughts possessed me I was not conscious of what happened and how. (He continues weeping).

In view of all these circumstances, I am of opinion that this is a case in which the lesser penalty may properly be inflicted. The reference is therefore rejected, and the appeal is allowed in part. The conviction is upheld but the sentence is altered to one of transportation for life.

Cunliffe, J.—I am of the same opinion and I have little to add. I consider that it is impossible for us to escape confirming the conviction for murder, more specially having regard to the extremely clear evidence of the eye-witnesses which was quite unshaken in cross-examination and which was in no way contradicted by any testimony brought forward on behalf of the defence. With regard to what my Lord has proposed in relation to the reduction of the sentence from that of death to transportation for life I am also prepared to agree that that course should be taken but not without considerable hesitation. It cannot be too strongly insisted, as my Lord has pointed out, that the circumstance that the appellant is the only remaining son of the widow and the circumstance that he afterwards displayed considerable remorse ought not to be taken into consideration at all. What ought to guide us in a question of this character is the ascertainment, so far as we are able to ascertain it, of the state of mind of the appellant at the time when the crime was committed.

There is no doubt that there was considerable provocation and there is also evidence that from the moment the provocation took place the appellant was seized with a kind of blind hatred against his brother. In the study of psychology we so often come across cases of lack of self control in people of the appellant's station of life and that is why a confession is so valuable ; it is valuable here not in recording subsequent remorse but in showing the reaction from the state of mind of the accused at the time when the crime was com-

mitted. It is so often found that blind and hysterical hatred is succeeded by a state of mind as was seen in the present appellant when he made his confession, before the Magistrate of abject self revelation and, as my Lord has pointed out, he described himself as having been seized by some satanic power at the time when the murder of his brother took place. Of course comment might be made though it has not been made by the Crown that the appellant's confession to the Magistrate was a piece of acting. But in view of the carefully recorded remarks of the Magistrate in which he addressed the accused encouragingly by saying " my boy" and so on it appears that the Magistrate was sincerely impressed by the sincerity of what he had said. For these reasons, although I think that this is a borderline case, and the provocation was not such as to take the crime out of the ambit of S. 302, I think we are justified in imposing the lesser penalty.

K.S. *Reference rejected*; *Appeal party allowed.*

A. I. R. 1935 Calcutta 596

COSTELLO AND LORT-WILLIAMS, JJ.

Dinendra Mallick and *another* — Defendants—Appellants.

v.

Pradyumna Kumar Mullick—Plaintiff —Respondent.

Appeal No. 79 of 1933, Decided on 21st June 1934, from Original Suit No. 337 of 1932.

(a) Mortgage— Assignee of mortgage decree— Deed of further security in his favour containing fresh covenant to pay moneys with higher rate of interest—Properties old and new sold under decree—Application for personal decree for surplus dismissed as being barred by time—Subsequent suit on personal covenant in deed of further security held not maintainable — Civil P. C. (1908), S. 47—Estoppel.

Plaintiff who was the assignee of a mortgage decree against the defendants got executed by the defendant a deed of further security by which the defendants mortgaged further properties to secure the decretal amount, costs and further advances. The defendants therein made a fresh covenant to pay the moneys with a higher rate of interest and it was agreed that the plaintiff should be allowed to include the further properties in the order for sale under the decree. The old as well as further properties were sold but the plaintiff's claim was not satisfied whereupon he applied for a personal decree for the surplus. It was dismissed as being barred by time. Then plaintiff instituted a suit on the personal covenant contained in the deed of further security;

Held: that the matter had definitely become one of res judicata and that the suit was not competent; [P 603 C 1]

Held also: that whether or not the arrangement between the parties was of a nature to permit of its being properly described in law, as an adjustment under O. 21, R. 2, all parties treated it as such an adjustment and the plaintiff manifestly acted upon the assumption and took proceeding upon the footing that it was in reality of such a kind that he could enforce it in proceedings of a summary character as he did; and as such the application for personal decree was in the nature of proceedings in execution or at any rate a step in the nature of such proceedings so as to be covered by S. 47; [P 603 C 2]

Held further: that even if it did not, upon the ordinary principles of estoppel, the plaintiff by his earlier proceedings exhausted his remedies as against the defendants and as such the present suit was not competent. [P 604 C 2]

(b) Civil P. C. (1908), S. 11—S. 11 is not exclusive.

The provisions of S. 11 are not exclusive as regards question of res judicata: 1932 *P C* 161, *Rel on.* [P 602 C 1]

(c) Execution—Parties agreeing that money due shall be realised by execution—Court can proceed by way of execution.

Parties by agreement can arrange their own procedure and give jurisdiction to the Court to adopt that procedure and where the parties have agreed that money due shall be realised by execution, the Court has jurisdiction to proceed by way of execution. [P 602 C 2]

(d) Execution— Decree binding — Decree altered by agreement of parties regarding mode of payment—Execution Court is bound to give effect to compromise.

Where a decree is altered, by agreement of the parties with respect to the mode of payment, the Court executing the decree is bound to give effect to the compromise and a decree-holder is entitled to proceed on the terms of the compromise which was executable as a decree. [P 602 C 2]

(e) Civil P. C. (1908), O. 21, R. 2—Adjustment—Decree must be extinguished either wholly or in part.

In order to constitute an adjustment which can be recorded under O. 21, R. 2, it is indeed necessary that the arrangement between the parties should extinguish the decree either wholly or in part. [P 603 C 1]

S. N. Banerjee—for Appellants.

L. P. E. Pugh—for Respondents.

Facts of the case will be clear from the following extract from the judgment of Buckland, J., who heard the original suit:—

This is a suit to recover from the defendant Kumar Dinendra Mallick and from the defendant Kumar Gopendra Mallick to the extent to which assets of

his father Kumar Ganendro Mullick, deceased, may come into his hands, a sum of Rs. 2,67,471-13-3 upon a covenant contained in a mortgage-deed dated 27th June 1934 executed in favour of the plaintiff by the defendant Kumar Dinendra Mallick and by Kumar Ganendro Mullick, deceased, for further interst and accounts, if necessary, and payment of costs. There are very few facts beyond those set out in the pleadings to which it will be necessary to refer, though a reference will have to be made to the contents of the documents there mentioned.

The history of the matter begins with a mortgage executed on 13th February 1920 whereby Kumar Dinendra Mallick and Kumar Ganendro Mullick secured a loan to themselves of Rs. 3,00,000 by a mortgage in favour of Nandalal Roy and Pulin Krisbna Roy of premises 3 and 4, Corporation Street, and 5, Chowringhee Place, Calcutta, which I will call the Chowringhee properties. On 26th July 1921 the mortgagees instituted a suit No. 2350 of 1921, in order to enforce their mortgage, and on 18th August 1921 a Receiver was appointed in that suit in which a preliminary mortgage decree was made on 12th April 1922, and a final decree on 16th April 1923. On 5th January 1924 the property was put up for sale by the Registrar, but that sale was adjourned in circumstances introducing the plaintiff into the matter. The plaintiff in order to have the sale adjourned, at the request of the mortgagors, paid Rs. 1,00,000 to the Roys, and on 27th June 1924 there was due to the Roys from the mortgagors the sum of Rs. 2,87,411-5-6 under the decree and costs estimated to amount to Rs. 6,000. The plaintiff at the request of the mortgagors paid off the Roys and obtained an assignment of the mortgage decree in his favour; he also paid to the Roys the estimated costs subject to taxation. The net result was that the plaintiff at the request of the defendant had paid out Rs. 3,87,411-5-6, which was due under the decree, and a further sum of Rs. 21,923 which he lent and advanced to the mortgagors. Thereupon the document upon which this suit was filed was executed, that being a document whereby Kumar Ganendro Mullick and Kumar Dinendra Mallick mortgaged 73, Muktaram Babu Street and 24 and 25, Upper Chitpore Road, which I will call the Chitpore properties, for the purpose of securing these sums with interest at the rate of 11 per cent per annum, with a provision for compound interest in the event of default. That deed recites the mortgage of 13th February 1920 in favour of the Roys.

It also recites the history of the matter, and contains covenants by the mortgagors to pay the several sums of Rs. 21,923 and Rs. 3,87,411-5-6. The deed also provides that the mortgagee shall be at liberty to include the Chitpore properties so mortgaged which did not form the subject of the mortgage of 1920 within the order for sale as though they had been comprised and included in the mortgage of 13th February 1920. It was also provided that if the mortgagee should receive payment of any money in the hands of the Receiver and any refund from the Roys or their attorney out of the Rs. 6,000 paid as estimated costs, he would, after deducting his own costs, charges and expenses as between attorney and client that might be incurred in receiving such payment, apply the rest towards payment to himself in part reduction of the indebtedness of the mortgagors to himself.

To summarise what I have stated the plaintiff took the place of the Roys in relation to their mortgage decree which covered the Chowringhee properties: he was to receive a higher rate of interest and as security he was to obtain the benefit of certain additional property. The amount secured was that covered by the mortgage decree with the addition of a sum of Rs. 21,923, and he obtained the advantage of the mortgagee's personal covenant to pay the money due under the decree and the further advance. Kumar Ganendro Mullick died in 1928 leaving the defendant Kumar Gopendra Mullick as his heir. All the properties have been sold, and the sale proceeds duly credited in the mortgage suit. The conveyance of premises No. 24 and 25, Upper Chitpore Road, has been exhibited for a purpose for which reference will presently be made. On 14th March 1928 Kumar Dinendro Mullick conveyed to the plaintiff in this suit premises 24 and 25, Upper Chitpore Road. That conveyance recites the history of the matter and

among the recitals is to be found the following subject:

And whereas the vendor did on 13th January 1928 contract with the purchaser for the absolute sale to him of the said premises 24 and 25, Upper Chitpore Road, free from encumbrances at or for the price of Rs. 45,000 which is to be set off against the balance of the purchasers dues from the vendor and the estate of Kumar Ganendro Mullick, deceased, under the decree and orders in the said Suit No. 2350 of 1921, and also under the said Indenture of additional security bearing date the 27th June 1924. And whereas over two lakhs of rupees is now due from the vendor and the estate of the said Kumar Ganendro Mullick deceased to the purchaser as aforesaid. Now this indenture witnesseth that in consideration of the said sum of Rs. 45,000 by the direction of the vendor credited to the vendor and the estate of the said Kumar Ganendro Mullick deceased by the purchaser in the account of moneys due under the said decrees in the Suit No. 2350 of 1921, and the said Indenture of additional security, etc.

This is relied upon for the purpose of saving limitation a point to which I shall come in due course. The plaintiff asks for a decree for Rs. 2,67,471-13-3. No evidence has been gone into with regard to this, and if the sum were not agreed, there would have to be an account. The defendant has admitted most of the facts save and except that he has not admitted, as has been alleged, that payments have been made by the mortgagors or their authorized agents or by the receiver, and that the facts of such payments appear in the handwriting of the parties making the same, or that the mortgagors have acknowledged their liability in writing. Otherwise the matters which I have stated in some detail are admitted. The defendants however state, which is the fact, that after all the mortgaged properties including those comprised in the documents of 27th June 1924 had been exhausted in satisfying the plaintiff's claim, the plaintiff, in December 1931, made an application in the mortgage Suit No. 2350 of 1921 for a personal decree against the defendant for the balance of his claim, viz. Rs. 2,67,513 14-7. That application was heard and dismissed on the ground that it was barred by limitation, the reason being that the three years were thought to run from the date of the allocatur for costs due, but it was held that the decree-holder should have executed within three years from the date of the last sale, and that not having done so, his application was barred. That order was appealed against and affirmed on appeal. In consequence the plaintiff finding himself debarred from obtaining a personal decree in Suit No. 2350 of 1921 has now brought a separate suit upon the personal covenants contained in the document of 27th June 1924 in order to realize from the defendants the amount which is due to him.

Costello, J.—This is an appeal from a judgment and decree of Buckland, J., dated 18th May 1933. The suit was brought by Pradyumna Kumar Mullick to recover from the defendant Kumar Dinendra Mullick and from the defendant Kumar Gopendra Mullick to the extent to which assets of his deceased father Kumar Ganendro Mullick might come into his hands a sum of Rupees 2,67,471-13-3 upon a covenant contained in an instrument described as a deed of mortgage dated 27th June 1924, which was executed in favour of the plaintiff by the defendant Kumar Dinendra Mallick and by the said Kumar Ganendro Mullick. There was also a claim for further interest for accounts if necessary and for payment of such sum as might be found due. The main point for determination at the trial of the suit in the Court below was whether it was in law competent to the plaintiff to bring a suit on the basis of the covenants in the deed of 27th June 1924 having regard to certain events and legal proceedings which had occurred prior to the institution of this suit. This history of the relations between the parties and the facts and circumstances upon which the plaintiff relied are briefly but clearly and sufficiently set forth in the opening paragraphs of the judgment under appeal and it is not necessary that we should recapitulate them. At the trial three points were taken on behalf of the defendants which the learned Judge summarized thus:

Three points have been taken on behalf of the defendants. Firstly, it is urged that the suit is barred by limitation, for the suit being now a suit for a simple money decree upon a bond, the suit would be barred unless instituted within six years from the date of the instrument unless grounds are established extending the period of limitation. It is further contended that the matter is res judicata by virtue of the application made in the mortgage suit for a personal decree, and lastly, that the suit is barred by S. 47, Civil P. C., which requires that all questions arising between the parties to the suit in which a decree was passed or their representatives and relating to execution, discharge or

satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

The learned Judge held that the plea of limitation must fail and that decision has not been challenged in this appeal. Nothing further therefore need be said upon that point. As regards the other two points the learned Judge said that the question of res judicata is not altogether easy to divorce from matters to be considered in relation to the point taken under S. 47, Civil P. C., and he pointed out that authorities had been cited before him in the latter connexion in order to establish the proposition that any subsequent agreement between the parties relating to the subject matter of the decree is incapable of enforcement by a separate suit but must be treated as an adjustment of the decree itself and so dealt with in accordance with the provisions of S. 47, Civil P. C. Upon a careful review of the case as presented before him the learned Judge came to the conclusion that under the covenants contained in the document of 27th June 1924 the plaintiff had acquired fresh rights in addition to those he had obtained under the assignment to him of the original decree and he took the view that the personal covenants contained in that document were distinct and separate and altogether independent of the personal covenant contained in the earlier mortgage upon which it was sought to obtain a personal decree in the former proceedings in the year 1931, and that therefore the plaintiff was entitled to succeed in the suit.

Mr. S. N. Banerjee on behalf of the defendants-appellants has argued before us that what really happened at the time of the assignment of the original decree by the Roy mortgagees to the present plaintiff was that the plaintiff amalgamated the sum originally due to the Roys from the Mullicks as mortgagors with the additional sum advanced by the plaintiff to the Mullicks and that the plaintiff in effect treated the whole sum as a consolidated liability due from the mortgagors to him and accordingly the sum paid to the plaintiff on 23rd August 1925 was taken by him in reduction of the combined debts with the result that when the plaintiff on 4th December 1931 instituted the proceedings which eventuated in the order of dismissal made by my brother Lort-Williams on 7th January 1932, the plaintiff was in essence and for all practical purposes taking execution proceedings in respect of the entirety of the defendants' then outstanding liabilities to the plaintiff and the plaintiff by making that application in the matter of the original mortgage and upon the basis of an account made out upon the footing of both the original and the additional obligations had once and for all and irrevocably exercised the option given to him under the relevant provisions in the deed of 27th June 1924.

Mr. Bannerjee accordingly argued that the arrangement entered into between the parties whereby the present plaintiff for all purposes stepped into the shoes of the original mortgagees, the Roys, must be treated as being in the nature of an "adjustment" of the decree made in the mortgage suit and of such a kind that it clearly fell within the purview of the provisions of O. 21, R. 2 and so attracted the operation of S 47, Civil P. C., which would have the effect of preventing the plaintiff from enforcing his rights against the mortgagors, the Mullicks, otherwise than by execution proceedings in the original suit. Thus the plaintiff would be debarred from instituting any fresh suit and so the present suit ought to have been dismissed. The plaintiff had put himself out of Court as regards a suit, said Mr. Bannerjee, by having definitely elected to treat the whole arrangement between him and the Mullicks as one fit to be effectuated in execution proceedings and that even as regards payment of the additional sum of Rs. 21,923 that must be regarded as having been treated by the plaintiff as being enforceable under the original decree. In any event the whole matter must be looked at as being governed by the principles of res judicata seeing that in the proceedings before Lort-Williams, J., the plaintiff was actually placing reliance upon the material covenants in the deed of 27th June 1924, at any rate for the purpose of saving limitation, moreover seeing that the amount then claimed by the plaintiff had been arrived at upon the basis of a principal sum made up of the original balance plus the additional advances together with interest calculated not at the rate stipulated for in the

original mortgage but at the higher rate agreed upon by the mortgagors as part of the consideration for the plaintiff's forbearance and his consent not to seek to enforce his rights until after the lapse of one year from 1st June 1924. It is true that the points taken by the plaintiff as to the operative effect of the fresh covenants in the deed of 27th June 1924 were not pressed before Lort-Williams, J., or even in the Court of appeal but they had been reiterated in the memorandum of appeal wherein a complaint was made that they ought to have been taken into consideration by the learned Judge on the hearing of the plaintiff's application for a personal decree against the mortgagors. Furthermore although these points were not urged in the Court of appeal they were nevertheless once more put forward in support of the application which the plaintiff subsequently made for leave to appeal to His Majesty in Council.

Mr. Bannerjee further argued that had he so chosen the plaintiff might at the outset have brought a suit such as the one with which we are now concerned or else treat the fresh advances as part of the original loan and the additional securities as if they were part of the original securities and that as he had chosen to adopt the latter course it must be taken that all his rights had, to all intents and purposes, become absorbed in his rights under the original decree. It follows from the line of argument that no fresh suit would lie for the recovery of the sum of Rupees 3,87,411-5-6. The covenants in the deed of 27th June 1924, as regards this sum, fixed no time for payment save in so far as it postponed payment for a period of one year and they merely provided for the enhanced rate of interest and so it was argued that thus far, at any rate, the matter fell within the ambit of S. 47, Civil P. C. As regards the additional sum of Rs. 21,923 it was conceded that that was payable by virtue of a covenant not contained in the subject-matter of the original decree, but it was contended on behalf of the appellants that an option was conferred upon the plaintiff to treat it as if it had, in fact, been part of that decree and the plaintiff rightly or wrongly had elected so to treat it. It was in pursuance of these arguments that Mr. Bannerjee invited us to come to the conclusion that the position between the parties must be dealt with as one within the contemplation and sphere of the provisions of O. 21, R. 2 and that the arrangement made by the assignment and deed of additional security in 1924, must be recognised and given effect to as an "adjustment" within the meaning of that rule. In this connexion Mr. Banerjee cited the case of 56 I A 30 (1) with the object of showing that there need not be any particular form of application on the part of a decree-holder for the purpose of certifying such an adjustment to the Court and getting the Court to record the same, and that there is no time limit for such proceedings. All that is required under the Rule is that the Court should be informed of any arrangement come to by the parties which is relied upon as an adjustment and that the Court should make that adjustment a matter of record: see also 54 Cal 143 (2) per Suhrawardy and Cuming, JJ. The arrangement between the Mullicks and the present plaintiff was in fact brought to the notice of the Court through the medium of the petition filed by the puisne mortgagees on 16th July 1924 when they asked for an order for the sale of some of the mortgaged properties, and again by the notice of motion and the affidavits put in on both sides in connexion therewith in the proceedings before Lort-Williams, J., on the application of Pradyumna for a personal decree against the mortgagors. In the affidavits used by the defendants in these proceedings no objection was taken to the statement of facts relied upon by the plaintiff.

It is to be observed that the present suit was brought to enforce the covenants to pay, contained in the deed of additional security of 27th June 1924, after giving credit for the sums realised in the sales by the Registrar and by private sales of the additional properties. Mr. Pugh on behalf of the plaintiff respondent says that as on the same day the 27th June 1924 the Roys assigned by a separate deed to Pradyumna their decree, their security and the benefit of the ori-

1. Sri Prokash Singh v. Allahabad Bank Ltd., 1929 P C 19=114 I C 581=56 I A 30=3 Luck 684 (P C).
2. Jalim Chand Patwari v. Yusuf Ali Chaudhuri, 1925 Cal 1012=86 I C 1051=54 Cal 143.

ginal mortgage, the plaintiff acquired two separate and distinct sets of rights that is to say his rights in the Roys' mortgage suit transferred to him and his rights under the deed of additional security. In the deed of additional security there were provisions to the effect that the decree in the suit was to be altered and varied by the inclusion thereunder of (1) The sum of one lac paid to the Roys in satisfaction of their decree. That could no longer be claimed in the mortgage suit. (2) The sum of Rs. 21,923. (3) A sum of Rs. 6,000 for costs, agreed to be subject to increase or refund. (4) A higher rate of interest. (5) A condition that the mortgage should not be enforced for a year.

Mr. Pugh however argued that all these provisions except perhaps the last, were inoperative, impossible and indeed illegal and even the last was probably also inoperative as regards the suit because the former decree could not be altered or varied save within very narrow limits, see S. 152, Civil P. C., and O. 28, R. 11, English Rules of Procedure. In support of this contention Mr. Pugh referred to (1896) 1 Ch 673 (3). In order to carry out the projected scheme and give effect to the variation enumerated above there would have to be an amendment of the decree and there would be required a fresh account taken and a new report by the Registrar, a new time to redeem and a new final decree for the sale of the properties not included in the original mortgage. Mr. Pugh argued that this was an impossible position and so the case fell within the provisions of S. 57, Contract Act, and the impossible terms should be disregarded ; the rest of the agreement including the covenant to pay being still binding.

The real position said Mr. Pugh was that as under the assignment of the mortgage the plaintiff could get a sale by the Registrar of the original properties and then proceed under O. 34, R. 6, as the plaintiff in fact did in respect of the amount fixed by the Registrar less the proceeds of the Registrar's sale and less the sum of one lac already paid under the deed of additional security, there was a definite covenant to pay a sum of Rs. 3,87,411-5-6 which included the Rs. 1,00,000, the further sums of Rs. 21,923 and Rs. 6,000 and the higher rate of interest. It was accordingly contended for the respondent that the provisions in the deed of 27th June 1924 were cumulative and not alternative. In answer to the appellants' contention that the arrangement between the parties was in the nature of an adjustment. Mr. Pugh argued that an agreement to be an adjustment within O. 21, R. 2, must be one which extinguishes the decree either in whole or in part and cannot include anything in the nature of a mere executory contract the effect of which is to substitute one decree for another. In 132 I C 670 (4), Sir Shadi Lal held that a compromise which contains some stipulations that have not been carried out but are to be carried out in future, does not amount to an adjustment within the meaning of O. 21, R. 2, following the decisions in 17 M L T 222 (5) and 32 C W N 434 (6) ; see also 50 Mad 897 (7) and 6 Rang 285 (8). Mr. Pugh's argument came to this: that a decree may be dealt with by payment, i. e., satisfaction or by adjustment, i. e., by accepting something other than payment in discharge or by any other agreement which gets rid of the decree and constitutes an entirely new agreement which is enforceable like any other agreement by means of a suit. Mr. Pugh conceded that an agreement to accept payment by instalments or even to pay more than the amount of the decree is not illegal, but insisted that it is not an adjustment which can be recorded and even if it were, a Court executing the decree should pay no attention to it : see 7 All 424 (9). Such an arrangement remains to be enforced by a separate suit for damages.

Mr. Pugh then proceeded to argue that in any event the arrangement made between the parties had never been properly certified to the Court by the plaintiff or recorded by the Court and so as there was no adjustment and no record of it, S. 47, Civil P. C., could have no

3. Ainsworth v. Wilding, (1896) 1 Ch 673=65 L J Ch 432=44 W R 540=74 L T 193.

4. Bakshi Ram v. Lala Desraj, 1931 Lah 608=132 I C 670.
5. Lodd Govindoss v. Ramadoss Vishnudoss, 1916 Mad 604=28 I C 376=17 M L T 222.
6. Azizur Rahaman v. Aliraja Choudhari, 1928 Cal 527=113 I C 9=32 C W N 434.
7. Venkata Lingama v. Venkatadri Rao, 1927 Mad 911=105 I C 248=50 Mad 897.
8. Ahmed Rahman v. A. L. A. R. Chettiar Firm, 1928 Rang 194=110 I C 873=6 Rang 285.
9. Fateh Muhammad v. Gopal Das, (1885) 7 All 424=1885 A W N 76.

application at all. As regards the question of res judicata Mr. Pugh said that S. 11, Civil P. C., did not apply. It is of course clear law that the provisions of S. 11 are not exclusive. This has been laid down repeatedly by their Lordships of the Judicial Committee and we need only refer to the recent case of 59 I A 247 (10), per Lord Russell of Killowen at pp. 254 and 255. Mr. Pugh argued however that in spite of that being the law there could be no question of res judicata in the present case because although in the proceedings before Lort-Williams, J., matters arising out of the deed of additional security were put forward in the petition, they were in fact not relied upon and in any case were not adjudicated upon, because the only point decided by Lort-Williams, J., was the question of whether the application for the personal decree was within time or not and in any case the inclusion of such matters within an application which was made in the original suit was unjustifiable in law and so must be disregarded.

Mr. Pugh was however at a loss to explain how it came about that the same points were again put forward in the Memorandum of Appeal filed in the appeal from the order of Lort-Williams, J., and yet once again in the application made on 19th July 1932 for leave to appeal to His Majesty in Council. The utmost Mr. Pugh could urge was that there was merely an error in procedure and nothing more than a futile attempt to enforce in execution proceedings a claim which properly could only be enforced by suit and therefore a decision rejecting that impossible application could in no sense give rise to a plea of res judicata in a suit based on a different cause of action. Mr. Pugh emphasised his contention that what we are concerned with are two different causes of action entailing two different and distinct remedies.

There is no doubt a great deal to be said for the arguments put forward on behalf of the respondents and it may well be a matter of doubt whether it can rightfully be said in this case that there was an adjustment between the parties within the meaning of O. 21, R. 2. It must be borne in mind however that it has been held on several occasions that parties by agreement can arrange their own procedure and give jurisdiction to the Court to adopt that procedure and where the parties have agreed that money due shall be realised by execution, the Court has jurisdiction to proceed by way of execution : see 57 Cal 789 (11), where B. B. Ghose, J., referred to and followed the decisions in 5 C P 516 (12), 2 I A 219 (13), 20 Cal 22 (14) and 11 All 228 (15), and it would seem that where a decree is altered by agreement of the parties with respect to the mode of payment, the Court executing the decree is bound to give effect to the compromise and a decree-holder is entitled to proceed on the terms of the compromise which was excutable as a decree ; see 10 Pat 173 (16), where a large number of authorities were considered and reviewed. Having regard to the authorities relied upon by Mr. Pugh however it seems to me more than a little doubtful whether the arrangement between the Mullicks and the plaintiff can rightfully be regarded as an adjustment within the meaning of O. 21, R. 2. The arrangement as Mr. Pugh pointed out involved important and substantial variations of and additions to the matters comprised within the compass of the original decree in the mortgage suit, in that there were the further advances—the higher rate of interest, and the provision of additional security.

If the arrangement could properly be regarded as an adjustment I have no doubt that it was sufficiently certified to the Court and became recorded by the Court in the course of the proceedings instituted by the puisne mortgagee on 16th July 1924, and/or the proceedings by the plaintiff in connexion with

10. Mg. Sein Done v. Ma Pan Nyun, 1932 P C 161=137 I C 328=59 I A 247=10 Rang 322 (PC).
11. Hridoy Mohan Sanyal v. Khagendra Nath Sanyal, 1929 Cal 687=127 I C 258=57 Cal 789.
12. Pisani v. Attorney General for Gibralter, (1874) 5 C P 516=22 W R 900=30 L T 729.
13. Sadasiva Pillai v. Ramalinga Pillai, (1876) 2 I A 219=24 W R 193=15 Beng L R 383=3 Sar 519 (PC).
14. Thakoor Dyal Singh v. Sarju Pershad Misser, (1893) 20 Cal 22.
15. Mohamed Sulaiman v. Jhukki Lal, (1889) 11 All 228=1889 A W N 53.
16. Ganga Bishun Marwari v. Raghunath Prosad, 1930 Pat 615=128 I C 786=10 Pat 173.

the notice of motion dated 4th December 1931 and the order of Lort-Williams, J., reciting the affidavits used in those proceedings: cf. 43 Cal 207 (17) and 45 Bom 91 (18). I think it is correct to say that in order to constitute an adjustment which can be recorded under O. 21, R. 2 it is indeed necessary that the arrangement between the parties should extinguish the decree either wholly or in part. In the present instance it may perhaps be said that in effect the original mortgage decree was in part satisfied by the giving of the additional securities. No doubt if there had been a proper adjustment then the provisions of S. 47, Civil P. C., would have come into operation and the plaintiff would have been limited as regards his remedies to proceedings in execution. It can scarcely be said I think that the application for the personal decree made in the original suit was in the nature of execution proceedings for if the application had not been barred by limitation a decree might have been made by Lort-Williams, J., which itself would be enforced by further execution proceedings if the defendants had not complied with the orders thereby made. In the peculiar circumstances of this case however it might be possible to say that the application for the personal decree was in the nature of proceedings in execution or at any rate a step in the nature of such proceedings so as to be covered by the provisions of S. 47.

In that event it would seem clear that the plaintiff had not only made his final election as regards the mode of enforcing his rights but having done so and founded his claim upon provisions of the deed of 27th June 1924 and accounts based upon those provisions, the matter had definitely become one of res judicata in that he had relied on the covenants in the deed of 27th June 1924 as evidenced by para. 12 of his Memorandum of Appeal and para. 12 of the application for leave to appeal to His Majesty in Council. However whether or not the arrangement between the parties was of a nature to permit of it being properly described in law as an adjustment under O. 21, R. 2, it seems clear enough that all parties treated it as such an adjustment and the plaintiff manifestly acted upon the assumption and took proceedings upon the footing that it was in reality of such a kind that he could enforce it in proceedings of a summary character analogous to proceedings in execution and he does seem to have sought to avail himself of the provisions in the deed of 27th June 1924, which prescribed that the mortgagee should be at liberty to include the said properties described in the schedule thereto (the additional securities) within the order for sale contained in and ordered by the said decrees

as if the last mentioned properties had been comprised and included in the said (original) indenture of mortgage of 13th February 1920 without having to institute a fresh suit on the footing of these presents and also to include the amounts due and owing on these presents for the time being as having been included in the said part recited indenture of 13th February 1920 and in the said decrees.

Mr. Bannerjee argued, as I have previously stated, that the conduct of the plaintiff amounted to a final conclusive and irrevocable election as regards the possible remedies open to him. Mr. Pugh objected, and no doubt rightly, to the idea of any assistance being afforded to the defendants based on a doctrine of election exercised by the plaintiff, but I think the matter assumes rather a different aspect if in place of "election" one substitutes "estoppel" as a ground for saying that the plaintiff by his earlier proceedings exhausted his remedies as against the defendants. In 5 C. P. 516 (12) a number of instances were given where jurisdiction had by consent been exercised in a manner which was a deviation from the cursus curiae and it was held that this could be done unless there was an attempt to give the Court jurisdiction which it did not possess or something occurred which was such a violent strain upon its procedure that it put it entirely out of its course. I do not think that what was originally done by the plaintiff in the present case was of such a revolutionary or violent nature as to put the Court "entirely out of its course," but I would prefer to rest our decision in this appeal upon principles analogous to those which were applied by their Lordships of the Judicial Committee of the Privy Council in 2 I. A. 219 (13) where their Lordships treated the matter as one which fell under a

17. Eusuffizeman Sarkar v. Sanchia Lal, 1916 Cal 451=34 I C 606=43 Cal 207.
18. Pandurang Balkissen v. Jagya Bhau, 1921 Bom 411=59 I C 399=45 Bom 91.

section equivalent to S. 47, Civil P. C., but added that even if it did not, they thought that upon the ordinary principles of estoppel the respondent could not be heard to say that the question was not one within that section : see per Sir James Colville, 2 I. A. 219 (13) at p. 233.

It seems to me upon a consideration of all the facts and circumstances of the present case that the plaintiff cannot now be heard to say that he had any remedy available to him as against the mortgagors other than that which he himself selected and upon which he took his stand not only before Lort-Williams, J., but with more or less seriousness both in the appeal and in the application for leave to proceed to His Majesty in Council. That view of the matter applies at any rate, to the main part of the plaintiff's case, that is to say, to so much of it as was directed to the recovery of the balance of the original mortgage money and interest thereon at the rate of 9 per cent stipulated for in the original mortgage deed of 13th February 1920. As regards the additional sums advanced and the extra 2 per cent interest dealt with by the deed of additional security of 27th June 1924 these items must be taken to have been covered pro tanto by the value or rather the amounts received in respect of the additional properties. There is no material before us to show what sum if any is still owing solely by reason of the terms of the deed of 27th June, but whatever it may have been, credit as against that would in any event have to be given for the sum of Rs. 87,500 realised by the sale of the properties described in the schedule to the deed of 27th June 1924. Even as regards the additional advances and the extra interest however I am disposed to hold that the plaintiff by his own acts in the law has precluded himself from reagitating the matter by means of a fresh suit. There is a further point of some substance though of a formal kind, which constitutes such a defect as disentitles the plaintiff to succeed in the present suit. As the suit is constituted it is in the form which is ordinarily described as a mortgage suit, but the relief sought by the plaintiff is merely an order for payment of money and the taking of accounts. Moreover the plaintiff is claiming on the basis of the document of 27th June 1924 which in paras. 8 and 9 of the plaint is described as a mortgage deed though no evidence was given to show that the deed of 27th June 1924 had ever been registered as a mortgage. Leaving this on one side however I hold that the plaintiff by his conduct and by matters of record, was estopped from instituting the present proceedings and therefore I think that this appeal should be allowed with costs both here and the Court below.

Lort-Williams, J.—A comparison of the petition of 10th December 1931, filed in the mortgage Suit No. 2350 of 1921, and the account annexed thereto with the plaint filed in the present Suit No. 337 of 1932, and the account annexed thereto, shows that the sums claimed in the two proceedings are practically identical. The slight difference in the totals is accounted for by the fact that in the first account, there was an error of omission of a payment of Rs. 5,000 made on 13th January 1928, and consequent errors in the subsequent calculation of interest, and by the fact that in the second account an extra sum of Rs. 5,280 has been claimed for interest for a further period of 78 days from 4th December 1931 to 19th February 1932 (namely, the period from the date of the notice of motion for a personal decree, to the date when the present suit was filed), and lastly by the fact that the costs, amounting to Rs. 1,445 of the unsuccessful application for a personal decree have been added.

The petition and the account thereto annexed were based, not only upon the original mortgage decree, but also upon the terms of the subsequent indenture dated 27th June 1924 though the attention of the Court was not drawn to this document, nor was any particular argument directed thereto. But the total sum claimed was arrived at by including the sum of Rs. 1,00,000 paid prior to the assignment of the decree, the further advance of Rs. 21,923 and the increased rate of interest, and by giving credit for the proceeds of sale of the further security, all of which incidents arose out of, and by reason of the indenture, and not upon the original mortgage decree. If there can be any doubt upon this point, it should be resolved by the fact that one of the grounds of appeal,

and of the petition for leave to appeal to the Privy Council was that the Court had failed to take into consideration the covenants contained in this indenture. Therefore, it seems clear that the plaintiff had always treated and regarded, and, for the purpose of the petition, continued to regard, the indenture and the covenants therein contained, as an adjustment of the decree, and asked the Court so to regard them, and to decide the matter accordingly.

It was doubtless for these reasons that the plaintiff decided to file his petition asking for a personal decree in the mortgage suit. In my opinion, his decision was correct. The question was one arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, within the meaning of S. 47, Civil P. C., and could not be the subject of a separate suit. His petition was rejected and the matter cannot now be reagitated. Therefore, the present suit is incompetent and the decree must be set aside. And even if it were arguable that the matters covered by the indenture could not properly have been agitated upon the application for a personal decree in the mortgage suit, and that the Court had no jurisdiction to entertain them, there is no material before this Court to show that anything is due to the plaintiff solely in respect of the covenants contained in the indenture. On the contrary, if those matters are to be excluded which arose by reason of the assignment of the mortgage decree and which were admittedly a proper subject, for, and covered by the application in the mortgage suit, the result of the account seems to be that the plaintiff has received payment in full in respect of those matters which were solely the subject-matter of the indenture. For all these reasons, this appeal must be allowed with costs both here and below.

K.S. *Appeal allowed.*

A. I. R. 1935 Calcntta 605

S. K. GHOSE AND HENDERSON, JJ.

Emperor

v.

Ajahar Mandal and *others*—Accused.

Criminal Ref. No. 107 of 1934, Decided on 7th December 1934.

Criminal P. C. (1898), S. 342—Case triable by Sessions Court—Omission to examine accused in committing Court is not disregard of mandatory provision—Such provision applies only to Sessions Court.

In a case which is triable by a Sessions Court, it is the latter Court which tries the accused and calls upon him to enter on his defence and therefore it is to that Court that the mandatory provisions of S 342 are applicable That being so it cannot be said that the omission to examine the accused in the committing Court is a disregard of an express provisicn of law and therefore illegal : 1921 *Sind* 131, *Rel. on.*; 23 *Mad* 636, *Expl.* and *Dist.*; 1927 *Cal* 250, *Ref.* [P 606 C 2]

Probosh Chandra Chatterji — for Reference.

Anil Chandra Roy Chaudhury — Against reference.

S. K. Ghose, J.—This is a reference by the Sessions Judge of Nadia recommending that the commitment of Ajahar Mondal and others may be quashed under S. 215, Criminal P. C. It appears that after an inquiry in the Court of the Sub-Divisional Magistrate the accused were committed to the Court of Session on charges under Ss. 304 and 323, I. P. C. Before the committing Magistrate the prosecution witnesses were not cross-examined, nor were any defence witnesses examined. The accused were also not examined under S. 342, Criminal P. C. The Judge says that this omission to examine the accused is illegal, and accordingly he recommened that the commitment should be quashed. There is no doubt that it is very desirable that there should be an examination of the accused in the Court of the committing Magistrate. But the point now debated is that there must be an examination of the accused under the mandatory provisions of S. 342, Criminal Procedure Code, before the accused is committed to the Court of Sessions and that the omission to so examine the accused is illegal. It is pointed out that S. 342 occurs in Chap. XXIV of the Code which makes general provisions to inquiries and trials. Sub-S. (1), S. 342 may be divided into two parts. The first part is discretionary and it says that for the purpose of enabling the accused to explain any circumstance appearing in the evidence against him the Court may put such questions to him as it considers necessary. Then there is the mandatory part, which says that the Court shall for the purpose aforesaid question him generally on the case after the witnesses for the prosecution have

been examined and the accused is called upon for his defence. There is no doubt that this mandatory provision will apply to all inquiries and trials provided that the stage mentioned therein is reached, namely after the witnesses for the prosecution have been examined and before the accused is called upon for his defence. This is clear enough, but see for instance 54 Cal. 286 (1). Now the question arises whether such a stage is reached in an inquiry under the provisions of Chap. XVIII. According to S. 208, Criminal P. C., the Magistrate shall take all such evidence as may be produced in support of the prosecution or on behalf of the accused or as may be called for by the Magistrate.

Then according to S. 209 when such evidence has been taken and the Magistrate has, if necessary, examined the accused for the purpose of enabling him to explain any circumstance appearing in the evidence against him, the matter is to proceed further. It will be seen that this latter provision corresponds to the first or discretionary part of sub-S. (1), S. 342. It is contended that this does not mean that the second or mandatory part of S. 342 is excluded from the scope of an inquiry held under Chap. XVIII. But the fact that the discretionary provision occurs in S. 209 and the mandatory provision does not occur is itself an indication that crdinarily in an inqniry in the committing Magistrate's Court, the stage at which the accused is called upon for his defence is not reached. S. 210 provides for the framing of a charge, but it does not follow that the next proceeding is for the accused to enter on his defence. It is not provided that the accused shall be called upon to finish the cross-examination of the prosecution witnesses, and there enter upon his defence such as is provided for in S. 256. All that S. 211 says is that the accused shall be required to give in a list of the persons whom he wishes to summon to give evidence on his trial, that is, his trial in the Court of Session. The Magistrate may in his discretion examine any of these witnesses under S. 212. But at no stage in the inquiry is the accused called upon for his defence. On the contrary, S. 219 provides that even after commitment the Magistrate may summon and examine supplementary witnesses and such examination shall, if possible, be taken in the presence of the accused. Thus it is apparent that in the Court of the committing Magistrate the stage at which the examination of the accused is mandatory is not reached. Obviously that stage is only reached at the trial in the Court of Session. In support of the reference reliance has been placed on 23 Mad. 636 (2). That case was decided in 1900 and it seems to have overlooked the fact that the words "if necessary" in S. 209 did not occur in the Code of 1882, but were introduced for the first time in the Code of 1898, for the view that the effect of S. 209 is that it is not left to the discretion of theMagistrate is not borne out by the words of the section itself. Moreover, as the Advocate for the Crown has pointed out, in this case the provisions of S. 342 were apparently not considered. Out attention has been drawn to 83 I. C. 895 (3) and the view taken therein meets with our approval. It stands to reason that, in a case which is triable by a Sessions Court it is the latter Court which tries the accused and calls upon him to enter on his defence and therefore it is to that Court that the mandatory provision is applicable. That being so, it cannot be said that the omission to examine the accused in the committing Court in this case was a disregard of an express provision of law and therefore illegal. The reference must be rejected. The records must be sent down as early as possible.

Henderson, J.—I agree. Mr. Chatterji made a desperate attempt to persuade us to hold that an accused person is called upon for his defence before the committing Magistrate, that is to say at a time when he has not even pleaded to the charge and when the prosecution have not examined a single witness before the only Court which has power to try him. That argument not only gives the words used an unnatural meaning but also entirely ignores the provisions of S. 289.

K.S. *Reference rejected.*

1. Bechu Lal Kayastha v. Injured Lady, 1927 Cal 250=100 IC 377=28 CrLJ 297=54 Cal 286.
2. Queen Empress v. Pandara Tewan, (1900) 23 Mad 636=2 Weir 253.
3. Dinu v. Emperor, 1921 Sind 131=83 I C 895=25 Cr L J 191=16 S L R 201.

A. I. R. 1935 Calcutta 607

R. C. MITTER, J.

Bhupendra Nath Roy—Appellant.

v.

Narayanpada Adhikari—Respondent.

Appeal No. 844 of 1932, Decided on 13th December 1934.

Res Judicata—Notice to quit and suit for ejectment—Tenancy not proved and suit dismissed—Subsequent suit for rent—Relationship then also not proved and suit dismissed—Subsequent suit for declaration of title and possession on allegation of tenancy and forfeiture held not barred by prior suit.

A suit by a landlord for ejectment of the tenant after notice to quit was dismissed as the alleged relationship of landlord and tenant was not proved. Subsequently the landlord filed a suit for rent against the defendants for the same lands. This also was dismissed as in this also the relationship was not proved. Subsequently the landlord filed another suit in which he stated that the defendants were his tenants but the tenancy had been determined by reason of the denial of the defendants as to relationship of landlord and tenant having been given effect to by the final decision in the prior suits. Plaintiff based his cause of action on the forfeiture of the tenancy on two dates, namely the dates of decision in those two suits and prayed for possession on declaration of title:

Held: that the present suit was not barred by res judicata by decision in the prior suits. The judgments passed therein were no doubt res judicata, but res judicata on a very limited point, viz., on the point that there was no relationship of landlord and tenant between the plaintiffs and defendants at the time when the notice to quit was served or for the period in claim in suit for rent. It was not res judicata on the point of the plaintiffs' title or on the point as to whether there was relationship of landlord and tenant between the plaintiff and defendant at a time prior to the date when the notice was served on the defendants. [P 608 C 1]

S. C. Basak and *Urukramdas Chakravarty*—for Appellant.

Hiralal Chakravarti, *Sitaram Banerji*, *Rabindra Nath Bhattacharjee* and *Prakash Chandra Ghose*—for Respondent.

Judgment.—This appeal on behalf of the plaintiff is in a suit for possession of a piece of land admittedly in the possession of the defendants. The plaintiff's case is that the defendants were their tenants but they denied the relationship of landlord and tenant in two suits, one instituted in the year 1920 and the other in the year 1929 and that by reason of the denials being given effect to in the said suits, there has been a forfeiture of the tenancy. In the prayer portion, the plaintiff asked for possession on declaration of their title. The Court of first instance after overruling the plea of res judicata urged by the defendants found in favour of the plaintiffs on the question of their title and also on the question of limitation and decreed the suit. On an appeal by the defendants the Subordinate Judge has held that the plaintiffs' suit is barred by res judicata. The only question is whether the decision of the Subordinate Judge on the question of res judicata is correct or not. The point arises on the following facts:

The plaintiffs served a notice to quit on the dafendants on 24th Bhadra 1326, requiring them to vacate the lands on the expiry of the month of Chaitra 1326 B. S. This notice was served on the footing that the defendants were ticca tenants of the plaintiffs. The defendants did not act in terms of the notice to quit. The result was that the plaintiffs instituted the suit No. 813 of 1920 for ejectment on the ground that the tenancy of the defendants under them had been determined by the aforesaid notice to quit. In that case the defendants pleaded that there was no relationship of landlord and tenant between them and the plaintiffs, the lands or a good part thereof being their rent free debuttar lands. The Court in the said suit went into the question as to whether there was relationship of landlord and tenant between the parties. A perusal of the judgments delivered by the trial Court, the lower appellate Court and this Court in that suit would indicate that the only question that was decided was whether there was relationship of landlord and tenant between the parties. The Court held that the plaintiffs had failed to prove such relationship and that the said suit as framed could not succeed because the defendants were not the tenants of the plaintiffs at the material point of time, that is to say, just before and during the period of the notice. The plaintiffs kept quiet for some years after they had got the adverse decision in that case. In the year 1929 they instituted a suit for rent against the defendants for self-same lands. The suit was numbered M. S. 64 of 1929. It was not their case then, nor is it their case now that there was fresh letting after 1910 to the defendants by them. In that suit also the plea that was taken by the defendants was that no decree for rent could be

passed against them inasmuch as there was no relationship of landlord and tenant. The plaintiffs in that suit also failed, as they were bound to, but could not prove the relationship of landlord and tenant. The result was that the rent suit was dismissed. The plaintiffs then on 26th September 1929 instituted the suit out of which the present appeal arises. In the plaint they state that the defendants were their tenants but the tenancy had been determined by reason of the denial of the defendants, as to relationship of landlord and tenant having been given effect to by the final decision of the High Court passed in the appeal against the decree in suit No. 813 of 1920, and by the decision in M. S. No. 64 of 1929. They based their cause of action on the forfeitnre of the tenancy on two dates, namely, the date of the High Court Judgment as aforesaid and the date of the judgment in M. S. No. 64 of 1929; in the prayer portion, as I have said, they prayed for possession on declaration of title. The Sub-Judge has held that the judgments pronounced in Suit No. 813 of 1920 operated as res judicata and that the plaintiffs are not entitled to succeed. In my judgment the Sub-Judge is quite wrong in holding that the judgment passed in Suit No. 813 of 1920 and No. 64 of 1929 conclude the case of the plaintiffs.

The judgments passed therein are no doubt res judicata, but res judicata on a very limited point, viz., on the point that there was no relationship of landlord and tenant between the plaintiffs and defendants at the time when the notice to quit was served, that is to say, in or about Bhadra 1326, or for the period in claim in suit No. 64 of 1929. It is not res judicata on the point of the plaintiffs' title or on the point as to whether there was relationship of landlord and tenant between the plaintiffs and defendant at a time prior to the date when the notice was served on the the defendants, that is to say, prior to Bhadra 1326. As I have already stated it is not the case of the plaintiffs that any relationship of landlord and tenant was created between the parties at any period subsequent to the decision in Suit No. 813 of 1920. In fact, the lower appellate Court has found that the Suit No. 64 of 1929 was a baseless suit, a mere device to establish, if possible, the relationship of landlord and tenant between the parties.

The view that I take in this suit is this that the Subordinate Judge has given a much extended scope to the judgments pronounced in Suit No. 813 of 1920. I have indicated above the true scope of those judgments. Those decisions cannot dispose of the plaintiff's suit. The question of the plaintiff's title will have to be gone into. The question of limitation will have to be gone into before the plaintiffs' suit can be disposed of. In deciding the question of limitation the Subordinate Judge would have to take into consideration as to whether there was relationship of the landlord and tenant between the plaintiff and the defendants at a time prior to the date when the notice was served on the defendants, that is to say, prior to Bhadra 1326. If he holds that there was relationship of landlord and tenant it may be possible to invoke Art. 143, Lim. Act. If on the evidence it is found that there was never at any time relationship of landlord and the tenant between the parties, Art. 143 would not apply but in order to succeed the plaintiffs may have to fall back upon Art. 142, or it may be that the defendants may have to fall back upon Art. 144, Lim. Act. Inasmuch as these questions have not been considered, I am not expressing any opinion on the question of limitation, but I am only indicating that these may possibly be the questions which will arise and which will have to be considered before the plaintiffs' suit can be disposed of.

Mr. Hiralal Chakravarty in his reply argued that on the plaint as it stands the plaintiffs cannot succeed. Whether they can succeed or not on the plaint will have to be considered and if the plaintiffs are advised to amend the plaint an applicatien for amendment, if made by them, will have to be considered. But what I am pointing out is that the decision of the Subordinate Judge is entirely incorrect. I accordingly set aside the judgment and the decree of the Subordinate Judge and remand the case to the lower appellate Court in order that the appeal before it may be disposed of in accordance with law. Costs will abide the result.

K.S. *Case remanded.*

A. I. R. 1935 Calcutta 609

R. C. MITTER, J.

Raghupati Chatterjee — Plaintiff — Appellant.

v.

Panchanani Dassi and *others*—Respondents.

Appeal No. 1237 of 1933, Decided on 6th June 1935, from appellate decree of Addl. Sub-Judge, Burdwan, D/- 15th February 1933.

Landlord and Tenant—Tenant cannot terminate tenancy by repudiating tenancy—Such repudiation only gives landlord option to terminate tenancy—Tenant cannot urge, in suit for rent, that another person has superior title to land.

A tenant cannot terminate his tenancy by repudiating the tenancy, or by denying his landlord's title. Such an assertion on his part only gives the landlord a right or option to terminate the tenancy and to recover khas possession. But the landlord need not exercise that option at all. If he ignores the repudiation he can still go on receiving rent or go on suing the tenant for rent and in a suit for rent by the landlord, the tenant cannot urge that another person has a superior title to that of the plaintiff: 117 *I C* 842 and 1921 *Cal* 532, *Rel. on.* [P 609 C 2]

Bankim Chandra Mukherjee and *Baidya Nath Banerjee*—for Appellant.

Bhut Nath Chatterjee—for Respdts.

Judgment.—This appeal is on behalf of the plaintiff in a suit for recovery of arrears of rent for the years 1334 to 1337 B. S. The suit has been dismissed by both the Courts below. Hence the present appeal. It is admitted that the property originally belonged to one Nrisingha Pada Saha. Two rival claimants came upon the field as being purchasers of the interest of Nrisingha Pada Saha, namely Nrisingha Hari Das and the present plaintiff Raghupati Chatterjee. The defendants were tenants on the land. In the year 1913 Raghupati instituted a suit for rent against them. That suit was decreed by consent. The result of this decree was to establish firmly the relationship of landlord and tenant between Raghupati and the defendants. Accordingly Raghupati the appellant before me would ordinarily be entitled to recover rent from the defendants in respect of the suit land. Other circumstances however intervened. The very next year on 2nd January 1914, Nrisingha Hari Das instituted a suit against Nrisingha Pada Saha and Raghupati Chatterjee. In that suit he prayed for a declaration of his title to and possession of the properties in suit. Apparently the position taken by him was that his purchase prevailed upon the purchase by the plaintiff of the right, title and interest of the original owner Nrisingha Pada Saha.

Shortly after the institution of the said suit Nrisingha Hari Das and the present defendant 1 sued for rent. The present contesting defendant 1 without waiting for the result of the title suit of Nrisingha Hari Das, allowed a decree to be passed against her and in favour of Nrisingha Hari Das by consent on 7th August 1914. Since then she has been paying rent to Nrisingha Hari Das. The title suit of Nrisingha Hari Das against Raghupati Chatterjee was however finally dismissed in 1922. The judgment of this Court is reported in 36 C. L. J. 491 (1). The question therefore whether the plaintiff has a title to the land in suit or Nrisingha Hari Das has title to the same, is res judicata between them by reason of this decision, and it must be held that as against the plaintiff, Nrisingha Hari Das has no title to the land in suit. The defence of the defendant was that inasmuch as she had attorned to Nrisingha Hari Das believing bona fide that he had a superior title the plaintiff could not recover rent. Her further defence was that inasmuch as she repudiated her tenancy under the plaintiff and with notice to the plaintiff attorning to Nrisingha Hari Das, the suit for rent is not maintainable. Both these pleas found favour in the Courts below. In my view the Courts below have gone wrong.

It is well settled that a tenant cannot terminate his tenancy by repudiating the tenancy, or by denying his landlord's title. Such an assertion on his part only gives the landlord a right or option to terminate the tenancy and to recover khas possession. But the landlord need not exercise that option at all. If he ignores the repudiation he can still go on receiving rent and go on suing the tenant for rent. In a series of cases this principle has been laid down, and it is discussed in detail in a judgment of this Court in 32 C. W. N. 720 (2). I do not agree with either of

1. Raghupati Chatterjee v. Nrishingha Hori Das, 1923 Cal 90=71 I C 1=36 C L J 491.
2. Bejoy Chand Mahatap v. Gurupada Haldar, (1928) 32 C W N 720=117 I C 842.

the Courts below or with the contention of the advocate for the respondent that the fact that the defendant repudiated her tenancy under the plaintiff and with notice to him attorning over to Nrisingha Hari Das is any defence to the suit for rent.

In order to furnish good defence, it is necessary for the defendant to prove not only the attornment to Nrisingha Hari Das but to prove that Nrisingha Hari Das had a title paramount to the title of the plaintiff who is the landlord of the defendant. The mere fact that she believed that Nrisingha Hari Das had a better title would not be sufficient. Now the result of the suit which Nrisingha Hari instituted against the plaintiff is conclusive on the question of his title as against the plaintiff. The defendant cannot urge that Nrisingha Hari Das is a person who has a superior title to that of the plaintiff in the land in suit. This is a position which has been firmly established in a series of cases and I may refer to one of them, viz., the judgment of N. R. Chatterjee, J., in 26 C. W. N. 143 (3). As the defendant failed to prove that Nrisingha Hari is a person having a better title to the land in suit, I hold that the plaintiff is entitled to rent from defendant 1. The result is that the decrees of the lower Courts are set aside and in lieu thereof a decree is passed in favour of the plaintiff for the rent and damages claimed in the suit. The plaintiff will have costs of this Court as also of the Courts below against defendant 1.

K.S. *Decree set aside.*

3. Banka Behary Ghose v. Madan Mohan Roy, 1921 Cal 532=68 I C 477=26 C W N 143.

A. I. R. 1935 Calcutta 610

D. N. MITTER AND NARASINGA RAU, JJ.

Dhirendra Nath Poddar and *others*—Appellants.

v.

Hemangini Dasi and *others*—Respondents.

Appeal No. 169 of 1934, Decided on 5th June 1935.

(a) Stamp Act (1899), Art. 57—Receiver asked to execute security bond—Words of Art. 57 are wide enough to include not only officer in question but also of sureties who execute security bond for due execution of office by Receiver.

The words in Art. 57 are wide enough to cover the case not only of the officer in question but also of the sureties who executed the security deed for the due execution of the office by the Receiver. Hence where a receiver is asked to execute security bond for a sum of Rs. 10,000, a security bond with a stamp of Rs. 7/8 is properly stamped : 1920 *Mad* 939 (*FB*), *Expl.* [P 611 C 1]

(b) Stamp Act (1899), S. 33—Matter coming before High Court under S. 33—High Court is entitled to see if document is properly stamped.

Where the matter has really come before the High Court under S. 33, the High Court can itself see if the document is properly stamped as it has not delegated its power of examining and impounding any instrument under S. 33 to any officer of the Court. [P 611 C 2]

(c) Interpretation of Statutes—Stamp Act.

The original section cannot be read in any narrower sense than the exemption. [P 611 C 1]

Basak—for Secy. of State.

Romesh Ch. Pal—for Receiver.

Bejoy K. Bhattacharjee—for Appellants.

D. N. Mitter, J.—This is a matter relating to the sufficiency of the stamp with reference to the security bond which we directed should be executed by the Receiver for a sum of Rs. 10,000 (Rupees ten thousand) in a certain appeal from original decree. A Receiver was appointed by this Court and according to the directions given he filed the security bond stamping it with a stamp of Rs. 7/8. After the document had been filed in office the Assistant Registrar on a note from Mr. Ram Taran Chatterjee felt doubtful whether this particular instrument should come under Art. 57, Stamp Act. If Art. 57 does apply to the security bond the stamp paid seems to be sufficient. On the other hand Mr. Mohini Nath Bose, the Stamp Reporter, was of opinion that the stamp was insufficient and he relied on the decision of the Full Bench of the Madras High Court in 43 Mad 363 (1), which held that when a Receiver is appointed and furnishes security in immovable property he is to stamp it as mortgage under Art. 40, Sch. 1, Stamp Act. It was stated that under the Stamp Act, there is no distinction between moveable and immovable properties with reference to the definition of the mortgage deed in S. 2 (5), Stamp Act. The Madras Full Bench in terms related to a case where the mortgage deed comprised immovable property. It has been said however on behalf of the Receiver that the proper

1. Amirthammal v. Maddalakarun, 1920 Mad 939=57 I C 184=43 Mad 363 (FB).

article applicable to this case is Art. 57. Art. 57, Stamp Act, runs as follows :

Security bond or mortgage deed executed by way of security for the due execution of an office, or to account for money or other property received by virtue thereof or executed by a surety to secure the due performance of a contract (a) when the amount secured does not exceed Rs. 1,000 the same duty as a Bond for the amount secured and (b) in any other case rupees five

(Rs. 7/8) as now amended. There can be no question that the security bond and the bond pledging Government securities of the value of Rs. 10,000 was executed by way of security for the due execution of the office of the Receiver. It is contended however by the Senior Government Pleader, whose assistance was required in the present case as the matter concerns Government revenue, that in so far as a Receiver is concerned Art 57, Stamp Act, does apply. But as the sureties have also joined in the bond Art. 40 applies also for according to the contention of the Senior Government Pleader the case of a surety is not contemplated by Art. 57. We are unable to agree in this contention. The language of Art. 57 as appears in the opening lines of the Article, "Security bond or Mortgage deed executed by way of security for the due execution of an office . . . . ." does not suggest that the execution of the deed must be restricted to the case of the officer in question. On the other hand the words there are wide enough to cover the case not only of the officer in question but also of the sureties who executed the security deed for the due execution of the office by the Receiver. That this is the correct view would appear from an examination of the exemption clause in Art. 57, namely, exemption (e). That exemption runs as, follows :

executed by officers of Government or their sureties to secure the due execution of an office or the due accounting for money or other property received by virtue thereof.

The exemption covers the case of officers of Government or their sureties. The original section cannot be read in any narrower sense than the exemption. The exemption in the case of officers of Government suggests that the original Article was intended to cover the case of the officer in question as well as his surety or sureties. We are therefore of opinion that the document in question was properly stamped. The matter has really come before us under S. 33, Stamp Act. It appears that the High Court has not yet delegated its power of examining and impounding any instrument under this section to any officer of the Court. Consequently having regard to S. 33 (1) and proviso (b) to S. 33 (2) we are entitled to see if it is properly stamped. In our view it is properly stamped. On an examination of the relevant provision of the Stamp Act we think that the document is properly stamped and that Art. 57 applies to the case.

Rau, J.—I agree.

K.S. *Order accordingly.*

A. I. R. 1935 Calcutta 611

M. C. GHOSE, J.

Umesh Chandra Goldar — Plaintiff — Appellant.

v.

Shamsur Rahman — Defendant—Respondent.

Appeal No. 1271 of 1933, Decided on 17th June 1935, from appellate decree of Addl. Sub-Judge, Khulna, D/- 13th March 1933.

Bengal Local Self-Government Act (1885 as amended in 1908), S. 13—To be qualified to be member of Local Board, person must have during year, immediately preceding election, his fixed place of abode within sub-division for which Local Board is established —Persons living within sub-divisional town are not excluded — Bengal Village Self Government Act (1919) does not make alteration in S 13.

A person to be qualified to be a member of a Local Board must have had during the year immediately preceeding such election his fixed place of abode within the sub division for which the Local Board has been established and persons who live within the sub-divisional town are not excluded. The Bengal Village Self-Government Act (1919) has not made any alteration in S. 13. What it has done is that when a local area is declared to be an Union under the Act of 1919, S. 13, Local Self-Government Act, 1885, shall not operate within the said area. [P 612 C 1]

Mukunda Behari Mullick—for Appellant.

Gopendra Nath Das and *Sanat Kumar Chatterji*—for Respondent.

Judgment.—This is an appeal by the plaintiff in a suit for declaration that defendant 1 was not qualified to be elected as a member of the District Board of Khulna. The facts are as follows : There was an election for the Local Board at Khulna in 1931. Certain members were elected by the Union Boards of the Sub-

Division and certain members were nominated by the Government constituting the Khulna Sadar Local Board. Then the members of the Local Board proceeded to elect six members to the Khulna District Board. This election took place on 11th August 1931. There were seven candidates for election in the District Board. Defendant 1 was No. 6 and just managed to get elected and the plaintiff was No. 7 who failed to get elected. Thereafter he complained to the District Magistrate that defendant 1 was not qualified to be elected as a member of the District Board and failing there he instituted the present suit.

Upon hearing the learned Advocate for the plaintiff and upon perusing the relevant sections it appears that under S. 13, Bengal Local Self-Government Act 1885, as amended in 1908, a person to be qualified to be a member of a Local Board must have had during the year immediately preceding such election his fixed place of abode within the sub-division for which the Local Board has been established. This means clearly that a person who has a fixed place of abode in the town of Khulna and fulfills the other conditions prescribed by S. 13 will be entitled to be elected. It may be stated that in the Act as originally enacted the relevant words were : "Area under the authority of such Local Board." That expression excluded the Municipal town of the area. To bring Municipal town people in, the amendment was made and the relevant words were changed to "the sub-division for which the Local Board has been established."

It is urged that the Bengal Village Self-Government Act of 1919 has made an alteration in S. 13. It has made no alteration at all. What it has done is that when a local area is declared to be a Union under the Act of 1919, S. 13, Local Self-Government Act of 1885 shall not operate within the said area. Special rules are made in S. 7 of the Act of 1919 declaring qualifications of members. The residential qulification there is that a person to be qualified to be a member must have,a place of residence within the Union Board. It is urged that since the Bengal Act of 1919 it is to be presumed that the residents of the sub-divisional Municipal town have lost their right to be elected to the Local Board. Reading the two Acts together I can see no authority for that proposition. Within area covered by the Union Board, persons will be eligible to the Local Board only if they have a place of residence within the area of the Union Board but that does not exclude persons who live within the sub-divisional town. The defendant in this case it was found by the Courts below has no residence within any Union Board but he has a residence within the town of Khulna and he is otherwise qualified to be a member of the Local Board and as such to be elected to the District Board. In the result this appeal is dismissed with costs.

K.S. *Appeal dismissed.*

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* A. I. R. 1935 Calcutta 612

NASIM ALI AND HENDERSON, JJ.

Jogendra Nath Kundu and *another*— Appellants.

v.

Jogneswar Mandal and *others* — Respondents.

Appeal No. 317 of 1933, Decided on 18th June 1935, from original order of Dist. Judge, Pabna and Bogra, D/- 23rd March 1933.

(a) Provincial Insolvency Act (1920), S. 52 —Petition by debtor admitted—Creditor is not debarred from executing decree—If execution has issued against property of debtor and notice of admission of petition is given to executing Court, such Court is bound to direct property attached to be delivered to receiver.

The mere admission of an insolvency petition does not debar a creditor from executing his decree against the debtor. But where execution of a decree has issued against any property of a debtor and before sale thereof notice is given to the executing Court that an insolvency petition has been admitted the executing Court is bound under S. 52, on application, to direct the property attached to be delivered to the receiver. [P 613 C 2]

(b) Provincial Insolvency Act (1920), S. 52 —Only order, Court can pass, is, that property be delivered to Receiver — Therefore order can be made only if receiver competent to take possession is already appointed.

The only order which the Court can pass under S. 52 is that the property be delivered to the Receiver, so that it follows that the order can only be made if the Receiver has already been appointed and clothed by the Insolvency Court with power to take possession of the insolvent's property : 1935 *Cal* 150 and 1933 *Cal* 561, *Dist.* [P 614 C 1]

(c) Provincial Insolvency Act (1920), S. 52 — Execution sale — No receiver existing at time of sale—Executing Court is not bound to stay execution.

The executing Court is not bound to stay its hand if no Receiver to whom the attached property can be made over is in existence at the time of the sale. [P 614 C 1]

*** (d) Provincial Insolvency Act (1920), S. 28 (7) — Auction-purchaser purchasing property of debtor after admission of insolvency petition but before order of adjudication—Title is not absolute but contingent on application being dismissed.**

By the operation of S. 28 (7) the title of the auction-purchaser who purchases the property of the debtor after the admission of the insolvency petition but before the order of adjudication is not absolute but contingent on the insolvency application being dismissed. If the insolvency application is dismissed he gets an indefeasible title. But if the order of adjudication is made he cannot claim any title as against the Receiver unless he is purchaser in good faith. [P 614 C 2]

Gopendra Nath Das—for Appellants.

Krishna Kamal Maitra — for Respondents.

Nasim Ali, J.—This is an appeal against an order under S. 4, Provincial Insolvency Act. The appellants obtained a decree for money against one Jagat. On 6th January 1928 Jagat applied to the District Judge of Pabna for being adjudged an insolvent. On 11th January 1928 the appellants applied to execute their decree against Jagat in the Court of the Munsif at Pabna. On 16th January 1928 they received notice of Jagat's application for insolvency. On 11th February 1928 certain huts belonging to the debtor were attached by the executing Court. On 18th March 1928 the appellants appeared before the Insolvency Court and filed objections to the application for Insolvency. On 19th May 1928 the debtor informed the executing Court that his application for insolvency was admitted and prayed for stay of sale of the properties attached. This application however was dismissed for non-prosecution. The attached huts were sold on 23rd May 1928 and were purchased by the appellants for Rs. 200 paid in cash. Jagat was adjudged insolvent on 23rd August 1929. The Nazir of the Court who was thereafter appointed receiver sold the huts already purchased by the appellants at the auction sale for Rs. 200 to respondent 4, the son of respondent 3, another creditor of the insolvent. The Nazir receiver was subsequently discharged and respondent 2, a pleader, was appointed receiver. He applied to the Insolvency Court under S. 4 for a declaration that the appellants acquired no title to the huts on the basis of the auction purchase as against him and the purchaser to whom he had sold the huts. The learned Judge has given judgment for him. Hence the present appeal by the auction-purchaser.

The point for determination in this appeal is whether the appellants have acquired any title to the disputed huts by the auction-purchase. Now the mere admission of an insolvency petition does not debar a creditor from executing his decree against the debtor. But where execution of a decree has issued against any property of a debtor and before sale thereof notice is given to the executing Court that an insolvency petition has been admitted the executing Court is bound under S. 52, Provincial Insolvency Act, on application, to direct the property attached to be delivered to the receiver, and the receiver can sell the property for satisfying the charge on the property for the costs incurred by the attaching creditor. There is divergence of opinion on the question whether the section contemplates an interim receiver. In some cases it has been held that as the section contemplates delivery of property to the receiver after the admission of the insolvency petition and not after the order of adjudication as laid down in S. 35, Provincial Insolvency Act of 1907 and S. 54, Presidency Towns Insolvency Act the legislature must have contemplated an interim receiver in S. 52 of the present Provincial Insolvency Act. On the other hand it has been held that the section cannot contemplate an interim receiver as an interim receiver has no power to sell and the section authorises the receiver to sell the property for satisfaction of the charge on the property for costs of the attaching creditor. Again the opinion on the question whether an application for delivery of the property to the receiver (if a receiver has already been appointed) is necessary does not appear to be uniform. The following observations were made by Mitter, J., in 37 C. W. N. 392 (1) :

It has been argued that if this view (i. e. application to the executing Court is not necessary) is taken the words "on application" become superfluous and redundant. There is no force in that contention. The underlying principle of the Provincial Insolvency Act as can be gathered

1. Mahendra v. Dinesh, 1933 Cal 561=145 I C 597=60 Cal 696=37 C W N 392.

from the provisions of S. 52 is that when the Court is apprised of the pendency of an application for insolvency in another Court and of the further fact that such application has been admitted it should stay its hands so far as the execution of the decree by the creditor of the insolvent are concerned:

In 1935 Cal. 150 (2) Mukherji and S. K. Ghosh, JJ. have observed:

On reading S. 52, Provincial Insolvency Act, it seems to us to be perfectly clear that an application has got to be made to the Court which was executing the decree and it is that Court which on such an application being made can direct the property to be delivered to the Receiver in order that the sale may be held.

In the two cases cited above a Receiver was appointed before the sale. If the executing Court comes to know that the application for insolvency has been admitted and that there is a Receiver, the attached properties can be made over to him. In the present case however no Receiver was appointed before the sale in question.

The only order which the Court can pass under S. 52 is that the property be delivered to the Receiver, so that it follows that the order can only be made if the Receiver has already been appointed and clothed by the Insolvency Court with power to take possession of the insolvent's property: per Das, J., in 1930 Pat 406 (3).

It cannot be denied that the Court executing the decree is to deliver possession to the Receiver and to no one else so far at any rate as the provisions of S. 52 are concerned. Having regard to the finding that there was no Receiver in existence till after the sale in execution, the Court executing the decree could not have acted under S. 52: 1933 All 559 (4).

On reading the section I am of opinion that the executing Court is not bound to stay its hand if no Receiver to whom the attached property can be made over is in existence at the time of the sale. But the difficulty of the appellants does not end here. I have already pointed out that the auction sale in the present case took place on 23rd May 1928 and the order of adjudication was made on 23rd August 1929. The order of adjudication therefore related back to the date of the presentation of the insolvency petition by S. 28 (7) of the Act. Now what is the effect of the operation of this doctrine of relation back on the auction-purchaser's title vis-a-vis the title of the Receiver appointed after the order of adjudication in whom the property of the insolvent vests by legal fiction from the date of the presentation of the insolvency petition? This point was raised in 1933 All. 559 (4) cited above. But the learned Judges did not express any opinion on that question as it was not raised before the lower Court. In the present case however the decision of the learned Judge is mainly based upon the doctrine of relation back. It seems to me that by the operation of S. 28 (7) the title of the auction-purchaser who purchases the property of the debtor after the admission of the insolvency petition but before the order of adjudication is not absolute but contingent on the insolvency application being dismissed. If the insolvency application is dismissed he gets an indefeasible title. But if the order of adjudication is made he cannot claim any title as against the Receiver. An exception however has been made by the Legislature in favour of purchasers in good faith in all cases (see S. 51, Cl. 3). In the present case the learned Judge has found that the appellants are not purchasers in good faith. In view of the facts and circumstances of this case I find no reason to differ from the finding of the learned Judge on this point. I am therefore of opinion that the learned Judge was right in holding that the appellants have acquired no title to the disputed huts on the basis of the auction purchase. The appeal is accordingly dismissed with costs. Hearing fee two gold mohurs.

Henderson, J.—I agree. It was strenuously argued before us that the decision of Mitter and M. C. Ghose, JJ., to which my learned brother has referred in his judgment, is not correct and we were pressed to refer the question to a Full Bench. But in the present case no Receiver was appointed. S. 52 has no application and this point does not require to be decided.

S.R. *Appeal dismissed.*

2. Mathuresh v. S. R. Mills Co. Ltd., 1935 Cal 150=155 I C 77.
3. Tirpits Thakur v. Ramprakash Das, 1930 Pat 406=125 I C 783.
4. Sahu Durga Saran v. Beni Pershad, 1933 All 559=146 I C 832.

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HENDERSON AND R. C. MITTER, JJ.

Piramal Goenka and *others* —Decree-holders—Appellants.

v.

Basanti Das Chatterjee and *others*—Respondents.

Appeal No. 468 of 1933, Decided on 13th June 1935, from original order of Sub-Judge, Burdwan, D/- 26-6-1933.

(a) Execution — Application registered— Court can receive list of immovable properties even subsequently if giving list is in time.

Even after an execution application is registered, the Court has jurisdiction to allow the amendment of the application or the filing of a supplemental list of properties if the list is given within the period of limitation: 17 *Cal* 631 (*F B*), *Dist*; 1918 *Cal* 73 and 1932 *Cal* 766, *Appr*.
[P 616 C 2; P 617 C 1]

(b) Execution— Sale proclamation drawn after notice to judgment-debtor or judgment-debtor knowing terms of proclamation—He cannot urge, after sale, that property is described wrongly or under-valued.

If notice under O. 21, R. 66, Civil P. C., has been served on the judgment-debtor or he has come to know of the terms of the sale proclamation before the sale he cannot be allowed to urge after the sale that the properties had been under-valued or described wrongly: 20 *All* 412, *Expl.*; 12 *Mad* 19 (*P C*), *Foll.*; 1928 *Cal* 328, *Rel on*.
[P 618 C 1]

(c) Execution—Proclamation—Valuation— Heavily encumbered properties — Value in unencumbered state less encumbrances should not be taken as correct value.

It is not a correct method of valuing heavily encumbered properties by taking their value in an unencumbered state and simply deducting therefrom the amount of the encumbrances.
[P 618C 2]

Dr. Mukherji and *Bankim Chandra Roy* for Appellants.

B. C. Mukherjee, Bon Behari Mukherjee and *Ramaprosad Mukhopadhya*—for Respondents.

A. Ahmad—for Deputy Registrar.

R. C. Mitter, J. — This appeal is on behalf of the auction purchasers (who are also the decree-holders) and is directed against the order of the Subordinate Judge of Asansol, dated 26th June 1933, by which he has set aside the auction sale. The appellants before us lent to one Pran Kissen Chatterjee, father of respondents 1 to 3, Karali Prosad Chatterjee, father of respondents 4 (a) to 4 (c) and to the other respondents large sums of money on the security of immovable properties, mostly coal lands. On 9th December 1925 they obtained a preliminary decree for sale of the mortgaged properties, the amount due to them up to the day of grace being found to be Rs. 2,66,783-13-6. The final decree for sale was passed on 9th June 1926, the mortgaged properties were put up for sale on 9th November 1926, and were purchased, some by the decree-holders and some by a stranger, at the price of Rs. 20,000. An application to set aside the said sale by the judgment-debtors was dismissed for default by the Subordinate Judge, and while an appeal was pending in the Court the decree-holders obtained on 21st May 1927 a personal decree against the judgment-debtors under the provisions of O. 34, R. 6, Civil P. C. The appeal preferred by the judgment-debtors to this Court ended in a consent order, but the judgment-debtors having failed to carry out the terms of the said order the sale of the mortgaged properties was confirmed in terms of the said order.

On 9th August 1927 the appellants put in an application in the usual tabular form for execution of the personal decree. They prayed for attachment and sale of a decree obtained by judgment-debtor 3 against a third person and for realisation of the balance by attachment and sale of the moveable and immovable properties belonging to the other judgment-debtors.

The application further stated that:
The boundaries of the said moveable and immovable properties will be filed by them in Court after attachment of the aforsaid decree.

There can be no doubt that the application for execution was drafted in a loose way. It was registered on 9th August 1927, although no inventory of moveable properties and no list of immovable properties had been supplied by the decree-holders. After the decree mentioned in the application for execution had been attached, the decree-holders supplied the list of moveable and immovable properties which they wanted to sell. This was done on 15th September 1927. The executing Court on the same date issued the order of attachment and the attachment of the immovable properties with which we are concerned was actually effected on 29th September 1927. The judgment-debtors took up the position in the lower Court that all processes and notices, as also the sale proclamation has been suppressed by the decree-holder, but before us they have accepted the findings of the Subordinate Judge relating to the attachment and service of sale proclamation. They have however maintained that the notice issued on them for settling the terms of the sale proclamation under O. 21, R. 66 had been suppressed.

On 2nd November 1927 the Court directed the issue of a notice under O. 21, R. 66. There is a mistake in the paper book. Order No. 4 is dated 2nd November 1927 and not 21st November 1927, and in Order No. 3 the date is 2nd

November and not 21st November. The peon reported that he had served the notice on 17th November 1927 (Ex. D pp. 59-60, Part 2). The notice which is a part of the exhibit, but has not been printed, bears a thumb impression mark over the name of Bunwari Buri. On 25th November 1927 the Court being satisfied about the service of the said notice issued the sale proclamation. The sale proclamation was published in December 1927, and one of the judgment-debtors Hrishikesh Chatterjee who was present when the sale proclamation was published in the locale signed the same. His endorsement has been marked Exs. A and A 1, (p. 62, Part 2) and runs as follows: "I have known the purport of the sale proclamation, Hrishikesh Chatterjee." He is a member of the same family as the other judgment-debtors and lives with them, and although he has not joined as an applicant with the other judgment-debtors in their application to set aside the sale and has been made a pro forma opposite party, for the obvious reason that he had signed the sale proclamation, he is siding with the other judgment-debtors and helping them. In fact his son was present in Court at the hearing and instructed and helped the other judgment-debtors' pleaders (p. 30, line 46, Part 1, p. 63, line 40 Part 1). On the date fixed for sale (6th February 1928) the judgment-debtors applied for postponement of the sale, but their prayer being not acceded to the sale was held on 8th February 1928 and the properties were purchased by the decree-holders for Rs. 24,300, the amount mentioned in the sale proclamation.

On 8th March 1928 the application to set aside the sale was filed. Except for a vague allegation that the petition for execution was "illegal," the application proceeds to attack the sale on the ground that the processes and sale proclamation had been suppressed, that the value of the properties had been set out in the sale proclamation at a low figure and that the decree-holders had purchased the same at a very inadequate price. No point was made therein that the descriptions of the properties as given in the sale proclamation were materially defective or by reason thereof, no other bidders were present at the sale or that the price fetched was low. The Subordinate Judge found that the attachment was duly effected, that notice under O. 21, R. 66 was duly served on the judgment-debtors and the sale proclamation was duly published. He however held that there was material misdescription of the properties in the sale proclamation, the encumbrances on lots 1 and 2 being not set out and the revenue payable for lot 9 being not mentioned; and the sale proclamation was not published at the collectorate. He found that the value of all the lots had been greatly understated in the sale proclamation and they had been purchased by the decree-holders at a great undervalue. He accordingly set aside the sale.

The decree-holders auction purchasers who have appealed against the order setting aside the sale have raised two points namely: (i) that the judgment-debtors cannot raise the question of misdescriptions of the properties in the sale proclamation, or the question of undervaluation, they not having objected at the proper time; (ii) that the value fetched at the sale is adequate. The respondents besides supporting the finding and reasons of the Subordinate Judge have challenged the finding of the Subordinate Judge relating to the service of notice issued under O. 21, R. 66 and have also urged that the sale was illegal on the ground that the Court had no jurisdiction to allow the application for execution as filed on 9th August 1927 to be amended or supplemented by accepting the list of properties filed on 15th September 1927. We will deal with the contentions raised by the respondents first. In support of the last mentioned contention Mr. Mukherjee has drawn our attention to the provisions of of O. 21, Rr. 11, 13 and 17, and to the decision of the Full Bench in 17 Cal 631 (1). He contends that when the defective application for execution was filed, the Court could have directed the decree-holders to supply the list of immovable properties either then and there or within a certain time, but it could not receive the list later on after having registered the application. He further says that the decree-holders could have proceeded against the immovable properties only by filing a fresh application for execution in a tabular form and they

1. Asgar Ali v. Trailakhya Nath Ghose, (1890) 17 Cal 631 (F B).

not having done so, all the proceedings taken by the Court in bringing the properties to sale are illegal and the sale cannot stand. We are unable to give effect to his contention.

In 17 Cal 631 (1) there are no doubt observations to the effect that a defective application for execution cannot be amended after it is registered, but that case is distinguishable. In that case the decree was obtained on 5th September 1876 and the last application for execution could have been filed on 5th September 1888, and not thereafter, by reason of the provisions corresponding to S. 48, Civil P. C. of 1908. On 6th July 1888 the application for execution was filed but without the list of immovable properties against which the decree-holders wished to proceed. On 11th September 1888 the said list was filed and accepted by the Court. If the application for execution had to be considered as filed on the date when the list of immovable properties was filed it was out of time. If however the application filed on 6th July 1888 could be deemed to have been amended only when the list was filed, it was not in time. The controversy therefore centred round only one point, namely whether the Court had power to amend the application at that stage. In the case before us no question of limitation arises, even if the application for execution be deemed to have been filed on the date when the list of the properties was supplied by the decree holders, and the judgment-debtors could not at the date even insist on a notice under the provisions of O. 21, R. 22 of the Code. It is on this ground alone we overrule the contention of Mr. Mukherjee, but we may observe that the said observations made in 17 Cal 631 (1) have not met with approval in later cases of this Court: see 59 Cal 1266 (2) at 1268 and 1269. In 22 C W N 540 (3) it was held that a supplementary list of properties could be accepted after the application for execution had been registered.

We next take up the point about the service of the notice under O. 21, R. 66 of the Code on the judgment-debtors. On this point the finding of the Subordinate Judge is in favour of the decree-holders and we agree with his finding. The peons' report of the service is Ex. D (pp. 59 to 60, Part 2). At the time of the hearing the peon was dead and his report was proved by another peon who knew his handwriting (Abdur Sukur p. 36, Part 1). The identifier, Ram Protap Misser, was examined (p. 57, Part 1). In his examination-in-chief he substantially corroborated the statements made in the peon's return, but was not cross-examined by the judgment-debtors on the point. Banwari Buri, whose thumb impression is on the notice was also examined (p. 42, Part 1). Much has been made by Mr. Mukherjee of the statement made by this witness that none of the judgment-debtors was present at the outer room of the house at the time of the service, but we cannot attach much importance to this discrepancy. The man was 80 years old and was deposing to events which had occurred about six years before his deposition in Court. We accordingly find in agreement with the Subordinate Judge that the notice inviting the judgment-debtors to be present for enabling the Court to settle the terms of the sale proclamation had been duly served. This leads to the question as to whether the judgment-debtors after the sale could raise the question of misdescription or under-valuation of the properties put up for sale. We are of opinion that they cannot. In 15 I. A. 171 (4) Sir Richard Couch laid down the law in the following terms :

> Therefore, as far as regards the objection that the description was insufficient, which is relied upon, as their Lordships understand as vitiating the sale—for that appeared to be the contention of the counsel for the respondents that objection was not taken until the sale had been completed. The judgment-debtors, knowing as they must have known, what description was in the proclamation allow the whole matter to proceed until the sale is completed, and then ask to have it set aside on account of this, as they say misdescription. It appears to come within what was laid down by this Board in 10 I. A. 25 (5), that if there is really a ground of complaint, and if the judgment-debtors would have been injured by these proceedings in attaching and selling the whole of the property whilst the interest was such as it was, they ought to have come and complained. It would

2. Naurangilal Marwari v. Charubala Dassi, 1932 Cal 766=140 I C 747=59 Cal 1266.
3. Gnanendra Kumar Roy v. Rishendra Kumar Roy, 1918 Cal 73=44 I C 553=22 C W N 540.
4. T. R. Arunachelam Chetti v. K. R. R. M A. R. Arunachelam Chetti, (1889) 12 Mad 19=15 I A 171=5 Sar 265 (P C).
5. Olpherts v. Mahabir Prosad Singh, (1884) 9 Cal 656=10 I A 25=4 Sar 417 (P C).

be very difficult indeed to conduct proceedings in execution of decrees by attachment and sale of property if the judgment-debtor could lie by and afterwards take advantage of any misdescription of the property attached, and about to be sold, which he knew well, but of which the execution creditor or decree-holder might be perfectly ignorant—that they should take no notice of that, allow the sale to proceed and then come forward and say the whole proceedings were vitiated. That, in their Lordships' opinion, cannot be allowed, and on that ground the High Court ought not to have given effect to this objection.

The same principle has been applied to cases where the judgment-debtor had attacked the validity of the sale on the ground that the properties had been under-valued in the sale proclamation and purchased at an under value. If notice under O. 21, R. 66 had been served on him or he came to know of the terms of the sale proclamation before the sale, he cannot be allowed to urge the said grounds after the sale. In 25 I. A. 146 (6) these elements were wanting. In the case before us not only was the notice under O. 21, R. 66 served duly on the judgment-debtors, but one of them, Hrishikesh Chatterjee, had actually signed the sale proclamation at the time of publishing it after knowing its contents (Ex. A, p. 62, Part 2). It would not be unreasonable to infer that the other judgment-debtors came to know of the terms of the sale proclamation through him. We respectfully agree with the judgment of Suhrawardy, J., in 32 C. W. N. 309 (7) on this point. In this view of the matter in our judgment, the appeal should be allowed and the sale confirmed. We however record our findings on the remaining points. We disagree with the finding of the Court below that lots Nos. 1 and 2 were at the date of the sale worth Rs. 34,000 or Rs. 35,000. The Subordinate Judge has found that in an encumbered state the said properties were worth not less than three lacs thirty-eight thousand rupees. They are collieries. In the absence of any evidence of how much coal was left in 1928 which could be profitably worked and what was the life of the colliery we do not think that the Subordinate Judge was right in taking the average income of some years as the basis of his valuation. He has found that encumbrances on the property existing at the date of the Court sale amounted to three lacs and four thousand rupees. We do not think it to be a correct method of valuing heavily encumbered properties by taking its value in an unencumbered state and simply deducting therefrom the amount of the encumbrances. Certainly a purchaser would not have paid for the said properties charged to the tune of over three lacs of rupees, a price anything approaching the figure of Rs. 34,000 if their value in an unencumbered state was three lacs and thirty-eight thousand rupees only. We accordingly hold that the valuation of the lots Nos. 1 and 2 in the sale proclamation is not a glaring under-valuation and that the price fetched at the sale is not such as would shock the conscience.

Regarding the other lots we hold that there has been under-valuation and that they had been purchased at an under value. Lots Nos. 37 to 39 are however petty lots. The fact that some of the properties had been included in the conveyance executed by Pran Kissen Chatterjee in favour of his daughter-in-law, Binapani (Ex. J (1), p. 19, Part 2) or in favour of Binapani's brother Monoranjan (Ex. J, p. 15, Part 2) had no doubt some effect on the value of these properties, but cannot in our opinion account for the very low value fetched at the sale. By the said conveyance the share of Pran Kissen alone, which was only one-sixth passed, and the intending purchaser could only contemplate a litigation with regard to the sixth share.

We also hold that there had been misdescription of lots Nos. 1 and 2, inasmuch as the encumbrances thereon had not been mentioned in the sale proclamation, and of lot No. 9, inasmuch as the revenue was not stated, but there is no evidence to connect the alleged inadequacy of the price fetched with the said misdescription.

The appeal is accordingly allowed on the grounds mentioned above. The appellants will have the costs of the lower Court as also of this Court. We assess the hearing fee at five gold mohurs.

Henderson, J.—I agree.

K.S. *Appeal allowed.*

6. Saadatmund Khan v. Phul Kaur, (1898) 20 All 412=25 I A 146=7 Sar 380 (P C).
7. Maharaj Bahadur Singh v. Sachindra Nath Roy, 1928 Cal 348=113 I C 562=32 C W N 309.

A. I. R. 1935 Calcutta 619

NASIM ALI AND HENDERSON, JJ.

Hemanta Kumar Ghose and *others*—Plaintiffs—Petitioners.

v.

Rajendra Mondal and *others*—Opposite Parties.

Civil Rule No. 1559 of 1934, Decided on 27th June 1935, from decision of Sub-Judge, Khulna.

(a) Decree—Amendment — Though Court has power to amend decree without giving notice to party, it would be unfair to do so.

Though no notice is necessary for amendment of decree by Court, it would be unfair to allow a decree to be amended without an opportunity being given to the party who will be affected by the amendment: 32 *Cal* 253 (*FB*), *Appl.* [P 620 C 1]

(b) Decree—Decree capable of being amended by Court—Proper course is to apply for amendment and not to file appeal.

Where the Court can amend the decree, the proper course is to apply for amendment and not to appeal. Omission to appeal does not bar an application for amendment : 25 *W R* 63 and 1927 *Rang* 57, *Appr.* [P 620 C 1]

(c) Decree — Amendment— When decree can be amended, stated.

The only cases in which the decree can be amended by the Court which passed it are as follows : (1) Where there has been a clerical or arithmetical mistake or an error arising from an accidental slip or omission (S. 152, Civil P. C.). (2) Where the Court itself finds its decree as drawn up does not correctly state what the Court actually decided and intended to decide, provided the amendment can be made without injustice or in terms which preclude injustice : 1933 *Cal* 627; 1926 *P C* 136; *Ainsworth* v. *Wilding*, (1896) 1 *Ch D* 673 and *In re Swire*, 30 *Ch D* 239, *Rel on.* [P 620 C 1]

(d) Execution—Amendment—Court which passed decree executing it—Decree can be amended in execution—But if decree is confirmed or reversed and superseded by decree of appellate Court, only appellate Court can amend it.

An executing Court cannot go behind the decree but where the executing Court and the Court which passed the decree are one and the same, the Court can amend the decree in the course of the execution : 60 *Cal.* 753, *Foll.* But where the decree of the first Court is confirmed or reversed, it is superseded by the decree of the Appellate Court and the only Court that can amend the decree thereafter is the appellate Court : 32 *All* 295 (*PC*), *Rel on.* [P 620 C 2]

(e) Decree—Construction — If judgment includes costs, it implies costs allowed by rules—If costs which are not permissible are included in decree, Court should correct decree.

Where the judgment awards costs to a party it implies costs allowed by the rules. If the decree includes costs which are not permissible under the rules, the decree is not in accordance with the judgment and does not correctly state what the Court intended. It is therefore the duty of the Court to correct it so as to make it in conformity with the judgment. [P 620 C 2]

Bijan Kumar Mukherjee and *Rajendra Nath Das*—for Petitioners.

Mukunda Behari Mullick—for Opposite Parties.

Nasim Ali, J.—This Rule raises a question of procedure. The facts which give rise to this Rule and do not admit of any dispute are these : The petitioners instituted a suit in the Court of the Subordinate Judge of Khulna against the opposite parties and other persons for establishment of their title and recovery of possession of a large quantity of land in the year 1920. The contesting defendants divided themselves into ten groups and ten sets of appearances were entered in the trial Court. The Subordinate Judge decreed the suit in full with costs. In the decree that was prepared the costs allowed to the plaintiffs were shown but the costs incurred by the defendants for pleaders' fees were not entered therein as required by O. 20, R. 2, Cl. (2), Civil P. C. Against the said decree only 12 of the defendants preferred an appeal to this Court out of whom ultimately 9 appellants succeeded with the result that the suit stood dismissed as against them with costs. On 15th September 1930 the successful appellants, who are the opposite parties to this Rule, made an application to the trial Court for amending the decree by inserting pleaders' fees therein. No notice of this application was served upon the petitioners or their pleader and an ex parte order was made by the Court on 19th September 1930 allowing the amendment prayed for and directing that 6 sets of pleaders' fees amounting to Rs. 1,500 should be paid by the petitioners to the opposite parties. On 16th November 1933 a notice was served upon some of the petitioners calling upon them to show cause why the said decree for costs should not be executed against them. On 19th December 1933 the petitioners made an application before the Subordinate Judge under Ss. 151 and 152 of the Code praying inter alia that the order directing the amendment should be set aside. The Subordinate Judge by his order dated 5th October 1934 held that the amount of pleaders' fees entered in the decree was contrary

to the rules regarding costs. He however dismissed the petitioners' application on the ground that the executing Court had no jurisdiction to go behind the decree and that the proper remedy of the petitioners was by way of appeal or review. The petitioners thereupon obtained the present Rule. Now it has been stated above that the decree was amended by the Subordinate Judge without giving any notice to the petitioners. It is true that under the present Code no notice is necessary but it would be unfair to allow a decree to be amended without an opportunity being given to the party who will be affected by the amendment. In 32 Cal 253 (1), Maclean, C. J., observed :

> I think the Court has an inherent power to deal with an application to set aside an order made exparte and to set it aside upon a proper case being substantiated.

The Subordinate Judge therefore on his own findings had power to set aside the ex parte order. It is however contended by the advocate for the opposite parties that as this order has now been incorporated in the decree, the only remedy open to the petitioners was to appeal against that decree. The obvious answer to this contention is that where the Court can amend the decree, the proper course is to apply for amendment and not to appeal. Omission to appeal does not bar an application for amendment : see 25 W R 63 (2) at p. 64 and 4 Rang 347 (3). Now the only cases in which the decree can be amended by the Court which passed it are as follows : (1) Where there has been a clerical or arithmetical mistake or an error arising from an accidental slip or omission (S. 152, Civil P. C.); (2) where the Court itself finds its decree as drawn up does not correctly state what was the Court actually decided and intended to decide, provided the amendment can be made without injustice or in terms which preclude injustice: see the observations of Romer, J., in (1896) 1 Ch D 673 (4), of Cotton, L. J., Lindley, L. J. and Bowen, L. J., in 30 Ch D 239 (5) quoted with approval in 1926 P C 136 (6) and 60 Cal 753 (7). It is true that an executing Court cannot go behind the decree, but where the executing Court and the Court which passed the decree are one and the same, the Court can amend the decree in the course of the execution: see the observations of Mitter, J., in 60 Cal 753 (7) referred to above. But where the decree of the first Court is confirmed or reversed, it is superseded by the decree of the appellate Court and the only Court that can amend the decree thereafter is the appellate Court : see 37 I A 70 (8). Now the order of this Court in the appeal preferred by the opposite parties was that they were to get their costs from the petitioners. Where the judgment awards costs to a party it implies costs allowed by the rules. If the decree includes costs which are not permissible under the rules, the decree is not in accordance with the judgment and does not correctly state what the Court intended. It is therefore the duty of the Court to correct it so as to make it in conformity with the judgment. The advocate for the opposite parties did not dispute the contention of the petitioners that the pleaders' fees included in the decree by the amendment were not in accordance with the rules. It is therefore clear that the amended decree does not correctly state what the Court actually decided or intended.

For the reasons stated I make the rule absolute, set aside the order of the Judges dated 19th September 1930 and 5th October 1934. I also set aside that portion of the decree in question which embodies the order of the Subordinate Judge dated 19th September 1930 and which has been put into execution by the opposite parties. This will not however preclude the opposite parties from taking such steps according to law as are open to them for getting the decree amended in accordance with the judgment. The petitioners are entitled to get their costs from the opposite parties;

1. Bibi Tasliman v. Harihar Mahto, (1905) 32 Cal 253=9 C W N 81 (FB).
2. Mirza Akbar Ali v. Mukhdoom Buksh, (1875) 25 W R 63.
3. Sara Bi v. Hamid Cassim, 1927 Rang 57=98 I C 799=4 Rang 347.
4. Ainsworth v. Wilding, (1896) 1 Ch D 673=65 L J Ch 432=44 W R 540=74 L T 193.
5. *In re* Swire, (1885) 30 Ch D 239=33 W R 785=83 L T 205.
6. Soma Sundaram v. Subramaniam, 1926 P C 136=99 I C 742 (P C).
7. Midnapore Zamindari Co., Ltd. v. Abdul Jalil Mia, 1933 Cal 627=146 I C 658=60 Cal 753.
8. Lal Brij Narain v. Tejbal Bikram Bahadur, (1909) 32 All 295=6 I C 669=37 I A 70 (P C).

hearing fee is assessed at five gold mohurs.

Henderson, J. —The main point of controversy before us was whether we have power to interfere with this matter in revision or whether the petitioners ought to have appealed. Dr. Mukherjee did not contend that a party aggrieved by an amended decree cannot appeal against it. He however argued that in this case there was nothing done which would entitle either party to appeal. The original decree was entirely in favour of the plaintiffs. No doubt if the Subordinate Judge had amended it and substituted for it some order against the plaintiffs in favour of the defendants, it would have been open to the plaintiffs to appeal. But in the present case nothing of the kind was done and it is only by using language in the loosest possible way that the order of the Subordinate Judge, which is the subject-matter of this rule, can be described as an amendment of the decree. In fact the decree of the Subordinate Judge had vanished altogether and there was nothing to amend when it had been displaced by a decree of this Court passed on appeal. All that the Subordinate Judge was asked to do was to put into his original decree certain figures which would assist the office to assess the costs which had been awarded to the opposite party by the decree of this Court. In my judgment it cannot be disputed that there was nothing which would give anybody a right of appeal.

In the second place I am unable to see how any question of principle was involved before the Judge. In their petition the opposite parties never claimed Rs. 1,500. They simply wanted to assess the amount to which they were entitled under the rules. In these circumstances I cannot understand why the opposite parties have seen fit to attempt to uphold the order on a mere technicality. It was obviously to the interest of both sides to have a proper order passed by consent, as the only thing that had to be done was a matter of calculation and no question of principle was involved at all. In the third place supposing that there is any question of principle involved or any difficulty in interpreting the rules, that is a matter which has to be decided by this Court and the Subordinate Judge has no jurisdiction to decide it one way or the other. I am far from being satisfied that it was even necessary to enter any figures in the decree of the lower Court which has now been superseded. All that was necessary was for the opposite party to collect such materials as are required to enable the decree of this Court to be executed. For these reasons I am clearly of opinion that the petitioners have no right of appeal and their only remedy was by way of revision. On the merits I am entirely in agreement with my brother that the rule should be made absolute in the terms indicated by him.

K.S. *Rule made absolute.*

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* A. I. R. 1935 Calcutta 621

LORT-WILLIAMS AND JACK, JJ.

Jogendra Nath Gorai—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 330 of 1935, Decided on 10th July 1935.

(a) Bengal Excise Act (1909), S. 74—Statement made to Excise Officer during investigation—Excise Sub-Inspector has status of Police Officer—Statement made to him is therefore inadmissible.

By S. 74 it was intended that in making an investigation under the Act, the Excise Sub-Inspector should have the status of a Police Officer and therefore a statement made to him in the course of an investigation would also be inadmissible under the provisions of S. 162, Criminal P. C. : 1934 *Cal* 580, *Appl.* [P 622 C 2]

*** (b) Practice—Statement of another accused, in separate case, against accused referred to in judgment—Practice is entirely improper—Case should be transferred irrespective of S. 190, Criminal P. C.**

Reference to a statement made by another accused in another case is entirely improper. It clearly indicates bias of the Magistrate against the accused from the start. Under the circumstances it is advisable to transfer the case to some other Magistrate though the case does not come under the provisions of S. 190 (c), Criminal P. C. [P 623 C 1]

Sudhansu Sekhar Mukherjee and *Nripendra Nath Dutt Roy*—for Petitioner.

D. N. Bhattacharjee—for the Crown.

Jack, J.—The appellant Jogendra Kumar Gorai has been convicted under S. 46 (a), Bengal Excise Act, and sentenced to rigorous imprisonment for one month. The facts of the case are that he was found at 10 o'clock at night by Babu Mon Mohan Banerji, an Excise Sub-Inspector in a room at No. 3 Ratan

Babu Bara Bagan Busti along with Panchanan who has already been convicted of an offence of distilling illicit liquor. Distillation was actually taking place in the room and when the Sub-Inspector appeared, both of them tried to escape but they were seized. In the room were found a full set of apparatus for manufacturing liquor from methylated spirit, 3 gallons of illicit liquor and other articles. The accused's defence is that he was there by mere accident. Panchanan was related to him. He had gone to visit a neighbour of Panchanan and then to see Panchanan when the Sub-Inspector came in. The Courts below have found him guilty on the circumstantial evidence. Panchanan admitted his guilt and he was convicted. The Courts held that the circumstances showed that the accused must also have been concerned in the manufacture of illicit liquor. These circumstances are, first of all, that he tried to escape; secondly, that he made no protest when he was caught and the defence, which he has now raised, was only made when the Sub-Inspector recorded the statement 5 days after his arrest; and thirdly, that he attempted to deny all connexion with Panchanan in a statement made at the time to the Sub-Inspector. This statement was wrongly admitted in evidence if the Excise Sub-Inspector is to be regarded as a Sub-Inspector of Police under the provisions of S. 162, Criminal P. C. That is a matter which I will deal with subsequently.

It appears to me, taking all the circumstances into account, that they are in themselves a matter of grave suspicion against the accused. The room, in which this distillation had taken place was the room of Panchanan which he had hired and there is no evidence that the accused in this case was in possession of these articles for distillation. All that has been really proved is that he was aware that distillation had taken place and that he was with Panchanan at the time. It was not proved that he was assisting in distillation or that he was in possession of any of the articles. So the evidence against him appears to amount to no more than grave suspicion. The trial appears also to be invalidated, owing to the fact that inadmissible evidence has been admitted inasmuch as the statement made to the Sub-Inspector of Police under S. 162 is inadmissible. The statements which were made by Jogendra to the Sub-Inspector of Excise at the time of his investigation were wrongly admitted. Under the provisions of S. 74, Excise Act, any of the powers conferred upon a police officer making an investigation, or upon an officer in charge of a police station, by Ss. 160 to 171, Criminal P. C. can be exercised by an Excise Officer investigating an offence which he is empowered to investigate under S. 73, Excise Act.

In this case, the Excise Officer was investigating an offence and therefore he had the powers of a Police Officer under Ss. 160 to 171 and apparently therefore the statement made to him by any person in the course of an investigation would not be admissible. The objection to this view is raised on the ground that S. 162 only applies to statements made to a Police Officer in the course of an investigation under Ch. 14, Criminal P. C., but there can be no question that S. 74 refers specifically to this section and there can be little doubt that it was intended that this section should also apply to an Excise Officer investigating an excise case. Cl. 3, S. 74 states that for the purposes of S. 156, Criminal P. C. 1898, the area to which an Excise Officer empowered under S. 73, Sub-S. (2) is appointed, shall be deemed to be a police station, and such officer shall be deemed to be the officer in charge of such station. And S. 156 refers to the investigation of cognizable offences within the area of the police station, and although S. 162 refers only to statements made in the course of investigation under Ch. 14, Criminal P. C., it seems clear that it was intended that in making an investigation under the Excise Act, the Excise Sub-Inspector should have the status of a police officer and therefore a statement made to him in the course of an investigation would also be inadmissible under the provisions of S. 162. As these portions of Ch. 14 are included in S. 74, they are made applicable to the statements recorded in the course of an investigation by an Excise Officer. But apart from this technical ground, in my opinion, the evidence taken as a whole amounts merely to a grave suspicion. Another objection to the trial is that the learned Magistrate in his judg-

ment refers to the statement made by Panchanan in the course of the trial of the case against him. He made a statement against Jogendra and that has been referred to in the judgments of the Courts below. This was entirely improper, and there can be little doubt that the trying Magistrate must have had some bias (owing to Panchanan's statement) against Jogendra from the start.

In the circumstances, it would have been better if the trial had been conducted by some other Magistrate, even if the case does not come under the provisions of S. 190 (c), Criminal P. C., inasmuch as this was a trial of the co-accused. On these grounds I think that the conviction and sentence should be set aside and the accused be released from bail.

Lort-Williams, J.—I agree. Apart from the merits, the trial was vitiated by the admission of the statement made by the accused to the Excise Officer during the course of the investigation. In my opinion, S. 162, Criminal P. C., applies to an accused person. S. 73 (2), Bengal Excise Act, provides that an Excise Officer specially empowered by the Local Government in respect of all or any specified class of offences punishable under this Act, may, without the order of a Magistrate, investigate any such offence which a Court having jurisdiction over the local area to which such officer is appointed would have power to inquire into or try under the aforesaid provisions. S. 74 (1) provides that such an Excise Officer may exercise any of the powers conferred upon a police officer making an investigation, or upon an officer in charge of a police station, by Ss. 160 to 171, Criminal P. C. 1898. And Sub-S. (3) provides that for the purposes of S. 156, Criminal P. C. 1898, the area to which an Excise Officer empowered under S. 73, Sub-S. (2) is appointed shall be deemed to be a police station, and such officer shall be deemed to be the officer in charge of such station. Reading these sections together, it seems to me clear that S. 162 applies to such an investigation by an Excise Officer, and that a statement made to him by the accused person in the course of such investigation comes within the provisions of S. 162, Criminal P. C. Moreover the ratio decidendi in 38 C W N 930 (1), which applied to confessions under S. 25, Evidence Act, in my opinion apply equally to a statement made under S. 162, Criminal P C.

S.R./V.V.C. *Conviction set aside.*

1. Amin Shariff v. Emperor, 1934 Cal 580=1934 Cr C 841=150 I C 561=35 Cr L J 1071=61 Cal 607=38 C W N 930 (FB).

* A. I. R. 1935 Calcutta 623

R. C. MITTER, J.

Mohammad Soleman Molla and *others* Plaintiffs—Appellants.

v.

Tasadduq Hossain and *others*—Defendants—Respondents.

Appeal No. 816 of 1933, Decided on 17th June 1935, from appellate decree of Sub-Judge, Second Court, Hooghly, D/- 12th January 1933.

*** (a) Wakf — Office of mutawalli is not heritable or transferable in absence of provision in wakfnama — Mutawalli has no power to nominate successor in his own lifetime and in health and withdraw from management or transfer or assign unless he is given such power.**

In the absence of any provision in the wakfnama, the office of a mutawalli is neither heritable nor transferable. A mutawalli has only power to nominate his successor in death bed, but he has no right to appoint his successor in his own life time and in health and withdraw from the management of the wakf or transfer or assign his office during his life time and while in good health, unless his powers are "general" or as the authorities put it, "unless the consignment was made to him in a general manner." That is to say such appointments or transfer are valid only when the appointing mutawalli or the mutawalli who is transferring his office had been given at the time of his appointment either by the wakif or the kazi the power of transferring the trust to another and substituting that other in his own place by a sanadi-wakf or wasiat, should necessity arise for it: 37 *Cal* 263, *Rel on.* [P 624 C 2]

*** (b) Religious Endowment—Person without legal right but in actual possession of endowment is entitled to maintain suit for recovery of possession appertaining to it for benefit of such endowment** (*Obiter*).

Obiter.—A person without legal right but in actual possession of a math or any other endowment is entitled to maintain a suit for recovery of possession appertaining to it, not for his own benefit, but for the benefit of the mutt or endowment: 19 *Cal* 776 and 1927 *Cal* 130, *not Foll*; 1933 *P C* 75 and 1935 *P C* 44, *Rel on.* [P 625 C 1]

(c) Wakf—Suit for possession of wakf property not as persons having interest in wakf or in representative capacity but as mutawallis—Plaintiffs not found to be mutawallis—Suit is not maintainable.

A suit for possession of wakf property framed by plaintiffs as a suit not by persons having an

interest in the wakf and filed in a representative capacity but by the plaintiffs as mutawallis is not maintainable, where it is found that they are not mutawallis. [P 625 C 1]

* (d) **Wakf—Wakf property in possession of trespasser — In suit for possession, all mutawallis should join especially where property is not admitted to be wakf.**

Where administration of a trust is vested in several persons they all form, as it were, one collective trustee and they must exercise the powers of their office jointly. If a suit has to be brought to recover trust property in the possession of trespasser, all must join as plaintiffs, and only such of them as refuse to join as plaintiffs must be made defendants; all the trustees must be parties to the suit. This principle applies to shebaits and mutawallis. Hence some of the mutawallis alone cannot maintain a suit for recovery of possession of wakf property in possession of a trespasser especially where the property is not admitted to be wakf property: *Luke* v. *South Kensington Hotel Co.*, 11 *Ch D* 121, *Appl.*; 8 *Cal* 42 (*P C*); 5 *C L J* 527 and 11 *Cal* 338, *Appr.* [P 625 C 1]

Saadulla and *Farhat Ali*—for Appellants.

Dr. Mukherjee and *Paresh Nath Mukherjee*—for Respondents.

Judgment.—The four plaintiffs who are the appellants in this Court sued as mutawallis to recover a parcel of land in the possession of the defendants on the ground that it appertains to a wakf. The defendants denied that they were mutawallis, set up one Abdur Rahaman as the sole mutawalli and denied the right of the plaintiffs to maintain the suit. They also stated that the land is not a part of the wakf estate at all, but their own property. Both the Courts below have found the property in suit to be part of the wakf estate, but the Courts below have differed on the question as to the right of the plaintiffs to maintain the suit. It has been found by the lower appellate Court that at one time four brothers, Sanitulla, Nayeam, Jafar and Hamid were mutawallis. Abdur Rahaman who is the grandson of Jafar has been found to be a de facto mutawalli along with the plaintiffs and defendant 4. He has not been made a party to the suit. The contesting defendants' case that Abdur Rahaman is the sole mutawalli has not been accepted by the lower appellate Court. The plaintiffs and defendant 4 have been found to be the sons of Majam and Fazley Huq respectively. It has also been found that Majan and Fazley Huq were the daughter's sons of Hamid. Nayeam and Hamid's son sold their rights as mutawallis to the father of the plaintiffs and of defendant 4 by two deeds dated 1296 and 1287 B. S. respectively.

The lower appellate Court has found that the said deeds did not make the transferees mutawallis in law. In my judgment a correct view of the law has been taken by the lower appellate Court in this respect. In the absence of any provision in the wakfnama the office of a mutawalli is neither heritable nor transferable. A mutawalli has only power to nominate his successor in death bed, but he has no right to appoint his successor in his own life time and in health and withdraw from the management of the wakf or transfer or assign his office during his life time and while in good health unless his powers are "general" or as the authorities put it, "unless the consignment was made to him in a general manner." That is to say, such appointment or transfer is valid only when the appointing mutawalli or the mutawalli who is transferring his office had been given at the time of his appointment either by the wakf or the kazi the power of transferring the trust to another and substituting that other in his own place by a sanadi-wakf or wasiat, should necessity arise for it. 37 Cal. 263 (1). The lower appellate Court has held that the plaintiffs, defendant 4 and Abdur Rahaman are defacto mutawallis and the suit is not maintainable as Abdur Rahaman has not joined as co-plaintiff nor has been made a defendant on the allegation that he had refused to join as co-plaintiff.

The learned Advocate for the appellants has raised two points. He says that (1) one of several mutawallis can maintain a suit for possession of wakf property found to be in the possession of a trespasser and (2) the plaintiffs can at least maintain the suit as persons interested in the wakf. The learned advocate for the respondents has raised a further point, namely the plaintiffs cannot maintain the suit, there being no finding that they have been managing the wakf to the exclusion of the rightful mutawallis for the period which would bar their suit for recovery of the office. Although in the view I am taking of the first point urged by the appellants, it is not necessary for me to decide this fur-

1. Salimulla v. Abdul Khair M. Mustafa, (1909) 37 Cal 263=3 I C 419.

ther point raised by the advocate for the respondents, I am inclined to hold that it is not a good point. The cases reported in 19 Cal. 776 (2) and 44 C L J 339 (3) no doubt support him, but in my judgment the authority of these decisions has been considerably shaken by the judgments of the Judicial Committee in 60 I. A. 124 (4) and 62 I. A. 47 (5). A person without legal right, but in actual possession of a mutt or any other endowment, is entitled to maintain a suit for recovery of possession appertaining to it, not for his own benefit, but for the benefit of the mutt or endowment. The second contention raised by the advocate for the appellant cannot be accepted. The suit has been framed as a suit not by persons having an interest in the wakf and filed in a representative capacity but by the plaintiffs as mutawallis. Hence this point cannot be entertained.

Regarding the first point raised by the appellant my view is that the suit is not maintainable. It is a general principle of law that where administration of a trust is vested in several persons they all form, as it were, one collective trustee and they must exercise the powers of their office jointly. If a suit has to be brought to recover trust property in the possession of a trespasser all must join as plaintiffs, and only such of them as refuse to join as plaintiffs must be made defendants; all the trustees must be parties to the suit. Shebaits or mutawallis are not trustees unless the document creating the endowment vests the property in them as trustees. They are managers no doubt, but the aforesaid principles formulated in 11 Ch. D. 121 (6) have been applied both to the cases of shebaits and mutawallis: 8 I. A. 135 (7). 5 C. L. J. 527 (8) (cases of shebaits) and 11 Cal. 338 (9) (case of mutawalli). The view I am taking accords with the view expressed by Mr. Amir Ali in his Tagore Law Lectures, Vol. 1, p. 562 (Edn. 4), where the learned author introduces only one exception, where it is said that one of several mutawallis can sue (for which, however no authority is cited by him), namely where the fact of the property being wakf is admitted, a case which does not apply here, because in the case before me the contesting defendants contended in both the Courts below that the property was not wakf property but their own personal property. I accordingly hold that the suit has been rightly dismissed by the lower appellate Court and dismiss this appeal with costs.

K.S. *Appeal dismissed.*

2. Jagannath Dass v. Birbhadra Dass, (1892) 19 Cal 776.
3. Devendra Nath v. Safatulla, 1927 Cal 130=99 I C 205=44 C L J 339.
4. Ram Charan Dass v. Naurangi Lall, 1933 P C 75=142 I C 214=60 I A 124=12 Pat 251 (P C).
5. Mahadeo Prasad Singh v. Karia Bharti, 1935 P C 44=153 I C 1100=62 I A 47=57 All 159 (P C).
6. Luke v. South Kensington Hotel Co., (1879) 11 Ch D 121=48 L J Ch 361=27 W R 514=40 L T 638.
7. Rajendra Nath Dutt v. Mohammad Lal, (1882) 8 Cal 42=8 I A 135 (P C).
8. Kokilasari Dassi v. Rudranand Goswami, (1907) 5 C L J 527.
9. Bechu Lal v. Oliulla, (1885) 11 Cal 338.

* A. I. R. 1935 Calcutta 625

MUKHERJI AND S. K. GHOSE, JJ.

Mohammed Ali Khan — Defendant—Appellant.

v.

Kanailal Haldar and *others*—Respondents.

Appeal No. 186 of 1931, Decided on 5th June 1935, against original decree of Sub-Judge, First Addl. Court, 24-Perganas, D/- 28th March 1931.

(a) Hindu Law — Alienation — Widow — Though alienee is not bound to see to application of money, fact of money being spent for such object may prove necessity.

Though the alienee for a Hindu widow is not bound to see the application of the loan, the fact that the money was in fact so spent would go a long way to establish the truth of the allegation as to necessity. [P 627 C 2]

(b) Hindu Law—Alienation—Widow leasing property for 99 years to secure yearly sum for herself and to discharge prior mortgage not for necessity—Intention of lady not to benefit estate but to spite reversioners—Lease held not binding on reversioner—But lessee held should be compensated for improvements effected which are inseparable from land.

Where a widow executed a lease for 99 years and her motive in so doing was firstly merely to secure for herself a yearly sum of Rs. 100 as rent and to deprive the reversioners of the property itself for such a long period in lieu of a like amount yearly and possibly also for a further term of 99 years in lieu of rent at such rate as would be found to be the prevailing rate at the term of the renewal and secondly to satisfy a mortgage which was not supported by justifying necessity:

Held: that the transaction was not binding on the reversioner but that in equity, the lessee

should be compensated for improvements effected on the land which were inseparable from land: 33 *Cal* 842; 6 *M I A* 393; 6 *Cal* 843; 13 *C W N* 201; 1914 *P C* 128 and 1922 *P C* 356, *Ref.* [P 629 C 1]

* **(c) Hindu Law—Alienation—Widow — Benefit of estate—Meaning—Bare idea to improve so as to increase income but not to protect or preserve it is not sufficient to make transaction binding on reversioner** (*Obiter*).

Obiter.—The expression "benefit of the estate" as used with regard to circumstances justifying an alienation by a limited owner cannot be precisely defined but it may be taken as including the preservations of the estate from extinction, its defence against hostile litigation, its protection from inundation, and similar circumstances: 1917 *P C* 33, *Rel on.*

Therefore benefit, in which no idea of protection or preservation but only an idea to improve so as to increase the income is included, would not be sufficient by itself to make the transaction binding on the reversioner. [P 629 C 2]

(d) Hindu Law—Reversioner — Long lease executed by widow to spite reversioner—Knowledge of reversioner that property was to be sub-let and construction about to be raised by lessee on property—These alone held not sufficient to constitute estoppel.

Where a reversioner sued for declaration that certain lease for a long term executed by widow was not binding on him and for possession of the property and the plea of estoppel of the defendant rested upon two facts, namely, that there was a notice board put upon the property which showed that the land was to be sublet; and that the building was being openly constructed and the reversioner had knowledge of such construction:

Held: that these facts without anything more did not create any estoppel as against the reversioner. [P 630 C 1]

(e) Transfer of Property Act (1882), S. 51 Principle of section can be applied to lessees who are sought to be ejected.

Though the case of a lessee holding under a lease for over 99 years may be outside the contemplation of S. 51, the principle contained therein may be applied to lessees who are sought to be ejected: 1925 *All* 261, *Rel on.* [P 630 C 1]

(f) Transfer of Property Act (1882), S. 51 —Negligence in investigating title does not necessarily prove want of good faith.

It is true that absence of proper inquiry condemns a bargain as one not made in good faith. But any and every negligence does not show want of good faith. Good faith within S. 51 is not necessarily precluded by facts showing negligence in investigating the title: 1930 *P C* 297, *Rel on.* [P 630 C 1]

S. C. Basak and *Syed Farhat Ali*—for Appellant.

Brojo Lal Chakraburty and *Hira Lal Chakraburty*—for Respondents.

Judgment.—This appeal has arisen out of a suit for declaration of plaintiffs' title and for recovery of possession in a plot of land 3 bighas 6 cot. 12 ch. 29 sqr. feet in area in Tollygunge in the suburbs of Calcutta. The two plaintiffs are sons of one Satya Charan Haldar. Satya's mother and Sushila Devi were the two wives of one Nagendra who had by the latter another son named Sailendra. Sailendra died unmarried leaving Sushila as his heir. The plaintiffs as reversioners on the death of Sushila instituted this suit on the allegation that Sushila with a view to injure the reversionary interest of Satya, with whom she was on terms of bitter enmity, had granted a lease in respect of the property of which the defendants are the present holders.

The history of the lease is as follows: Sailendra died in 1907 and thereafter in 1912 there was a suit for partition between Satya and Sushila as the result of which the land in suit fell to Sushila's share. In July 1918 Sushila contracted a loan of Rs. 1,000 by executing a mortgage of a plot of 1 1/2 cot. of land in Tollygunge in favour of one Jitendra Mohan Banerjee alleging that the money was required for performing the Sradh of her husband and of her son at Gaya. On 14th November 1919 she granted a lease of the land in suit in favour of one Ram Sashi Chaudhury on taking a Selami of Rs. 1,000 for a term of 99 years at a yearly rental of Rs. 100 and stipulating that the lessee would have the option of renewing the lease for 99 years at the rate of rent prevailing at the time of such renewal. As regards the necessity for the lease the following recital appears in the documents:

> At present there having arisen difficulty in the realization of rents from the tenants, and having been in need of money for the performance of Sradh of my late son Sailendra at Gayadham and for performance of duties for the spiritual benefits of my late husband and son, I on lawful grounds, took loan of Rs. 1,000 from Sreejut Jitendra Mohan Banerjee by executing a registered mortgage bond. And there is no possibility for the clearance of the said debt out of my present income. As the mortgagee is about to sue me for his dues and there is the possibility of my valuable properties being sold away on account of the suit aforesaid and for the improvement of the land given in the schedule below, which has got ditches in many places and as the land given in the schedule below is of small value, it is necessary to pay off the debt by letting it out on lease for a long term and to make improvement of the said land.

Ram Sashi Chaudhury had taken the lease on behalf, and in the interest of some Englishmen. He transferred the property to the Bombay Industrial Trust

who did some work of improvement on the land after the transfer. The trust however was wound up, and before they did so they assigned the lease over to defendants 1 and 2 for a consideration of Rs. 3,000 on 21st April 1928. These defendants are said to have sublet portions of the land to the other defendants in the suit, and defendant 1 has erected a building on a small area out of it. The plaintiff's father Satya died in January 1926, Sushila died in April 1926. The present suit was instituted on 19th September 1928. An injunction was applied for to restrain the defendants from erecting the building, but as the building, the construction of which was said to have been going on, was very nearly complete and as it did not appear that any other construction was contemplated, the injunction was not granted. The defence was that the mortgage and the lease were justified on the ground of legal necessity and that defendants 1 and 2 were bonafide assignees of the lease and had acted in good faith. The Subordinate Judge having decreed the suit, defendant 1 has appealed.

The Subordinate Judge has gone minutely into the evidence which was adduced to show the financial condition of Sushila Devi since her husband's death. He has found that her income from the landed properties could not have been less than Rs. 83, and from her turn of worship at the Kalighat Temple not less than Rs. 200 per year. Some argument has been addressed to establish that these amounts have been assessed at figures too high, but we are not satisfied that the Judge has been in error. But even if occasional falling off of the income is to be taken into account, the figure would always remain much higher than Rs. 100 which has been found as the total amount of her monthly expenses. There is evidence which the Judge has believed and which we see no reason to disbelieve that she never felt the pinch of want, and that she used to carry on, on a small scale a business in lending money on pledge. In addition to what has been stated so far, she had in deposit with a gentleman a sum of Rs. 5,500 which she had got as owelty money on partition and which was to bring her Rs. 330 per year as interest. Whether she got this interest regularly or not is not certain. But she had also other money in deposit in connection with certain Land Acquisition Cases in the Court of 24 Perganas and also in the Improvement Trust Tribunal. Out of the deposit in the Court of 24, Perganas she had drawn Rs. 4000 in 1915 for her daughter's marriage. The interest she was receiving on account of the deposit in that Court aggregated to about Rs. 150 a year. The Improvement Trust deposit gave her a yearly interest of Rs. 271-10-4.

With the above facts in mind, we have, in the first place to consider the validity of the mortgage she executed in 1918. The learned Judge has said that just a few days before the mortgage she had withdrawn Rs. 224 as interest from the Court of 24 Perganas. This statement is wrong, for the amount so withdrawn was about Rs. 80 or so. He is also wrong in the date that he has given of the satisfaction of the mortgage—an error which has led him to draw an erroneous inference. He has also been incorrect in giving certain other figures as of amounts which were available to her at the date of the mortgage. But discarding all these matters there is the fact, which strikes one at the outset, namely that there was a huge sum of money in deposit in the Court of 24 Perganas and in the Improvement Trust Tribunal, out of which on a proper application being made and on a ground of justifying necessity being made out a small sum of Rs. 1000 could have been easily obtained. No such course was adopted; and obviously, for the reason that she was not prepared to face an inquiry. There is evidence which stands unchallenged that she was on terms of hostility with Satya and was for that reason living away from the family dwelling house and in a house rented for herself and her son. The reason given for the mortgage was that money was needed for the expenses of the Sradh at Gaya. It has not been shown that the money raised was so spent; a matter which is important, because though of course the mortgagee is not bound to see to the application of the loan, the fact that the money was in fact so spent would have gone a long away to establish the truth of the allegation as to necessity. The evidence, such as it is, on the question of the actual receipt on her part of the consideration for the

mortgage, is extremely unsatisfactory. The learned Judge has, on an examination of the evidence as regards the mortgage, expressed himself thus:

> The mortgagee Jitendra hails from Kandi within the District of Murshidabad, and he has not been called as a witness, and it has not even been suggested that he is no longer in the land of the living and that his evidence cannot be procured. The scribe Satish comes from Kidderpore while the transaction took place at Kalighat. No light has been thrown to dispel the suspicion that naturally arises out of these circumstances regarding the bonafides of the mortgage. Tarakdas Babu, pleader, examined on the side of the defendant, is no doubt a witness to the mortgage, but he was positive that no consideration was paid in his presence. His evidence instead of furthering the case of the defendant deepens the suspicion that the transaction embodied in the mortgage was not straight.

We are unable to dissent from the view which the learned Judge has taken.

Then comes the lease. The ground of necessity recited in it are: (1) satisfaction of the mortgage debt which was imperative because a suit was about to be instituted; and (2) improvement of the property which was fetching no appreciable income and was infested by tenants who were undesirable. As regards (1) there is really no evidence that there was any apprehension of any suit being instituted at the time or that the estate was in fact in jeopardy. And as regards the satisfaction of the mortgage, the endorsement itself is somewhat curious because it says that there had been a previous payment of Rs. 50 presumably on account of interest, and now Rs.1,000 was paid on deduction of remission. The pleader Babu Tarakdas Mukherjee who wrote the endorsement has not deposed to the payment itself. Lalit Mohan Adhikari who signed as a wituess to the payment has not been examined ; Satis who signed for the mortgagee Jitendra has not been called. As regards (2), it is quite true that the rent which the property was fetching was insignificant and the tenants were people who were not desirable as tenants. But we are unable to hold that the lady really made up her mind to effect an increase in the income and for that purpose granted the lease. If she was acting bona fide she would have made an estimate as to what it would cost her to get rid of the tenants, to fill up the ditches and open up roads, and she would then have tried for a lease of the property on reasonable terms. There is no evidence of any such bona fides on her part in entering into the present transaction by which she granted a lease for 99 years, at a yearly rent of Rs. 100 with an option on the part of the lessee to get a further lease for 99 years at such rate of rent as would be pevailing at the time of renewal.

It was stated in the document that the tenants on the property were all tenants at will. If that was so, or if, as the evidence shows, only Rs. 2,000 had in fact to be paid to the tenants to get them to vacate, it is not easy to understand why instead of spending that amount herself she granted the lease to Ram Sashi Chaudhury on such terms. Of course, the lessee was also expected to spend money in making improvements, but the terms of the lease indicate that it was entirely at his option to make or not to make any improvements. All the benefit that the lady secured for herself and for the reversioners by the transaction was a rent for 99 years at the rate of Rs. 100 per year and a liability to be kept out of the property for a further period of 99 years in lieu of the rent at a rate which would be regarded as the prevailing rate at the time of the renewal. If she really wanted to have some improvements effected on the property itself one would have found some obligations in that respect imposed upon the lessee by the terms of the lease. The terms of the lease to our mind, indicate that some speculators finding the property in her hands approached her or were brought into touch with her and she herself being only too willing to spite the reversioners the bargain was closed. An endeavour has been made in the evidence to show that there were idgas and dargas on the land and some correspondence has been put in to establish that there was considerable difficulty in ejecting the tenants. But the learned Judge, was right in appreciating the real effect of that oral and documentary evidence. After all, as the learned Judge has observed, the tenants got a small compensation each and left without demur. Such evidence as there is of the value of land near about the land in suit sufficiently shows that the lease that was granted was a most improvident arrangement.

The position therefore is that there was no legal necessity for the lease: firstly because the mortgage itself for satisfaction of which it was granted was not a transaction which, even if real, was supported by justifying necessity; and secondly because there was no real intention on the part of the lady to benefit the estate which, if she had, she would not have entered into an improvident transaction of this description. Her motive and intention, as far as we can judge, were to secure for herself a yearly sum of Rs. 100 as rent, and to deprive the reversioners of the property itself for a period of 99 years in lieu of a like amount yearly and possibly also for a further term of 99 years in lieu of rent at such rate as would be found to be the prevailing rate at the term of the renewal.

A number of decisions, in which transactions by which a Hindu widow disposed of her husband's property in due course of management have been upheld by the Courts, have been cited. 33 Cal. 842 (1) was a case in which Maclean, C. J., after referring to the paucity of authority on the question and relying upon the principles laid down by the Judicial Committee in 6 M. I. A. 393 (2) and 6 Cal. 843 (3) upheld a permanent lease which was found to have been granted for the benefit of the estate and which was also found to have benefited the reversioners. In 13 C. W. N. 201 (4) a lease for 60 years was upheld on the ground that it was a beneficial family arrangement and considered beneficial and accepted as such by the widow's principal opponents. This decision was upheld by the Judicial Committee in 41 Cal. 793 (5) their Lordships holding on the facts that the arrangement was made in good faith and was one dictated by the necessities of the case, that the choice of the term of 60 years was for the benefit of the estate, and that the arrangement having received the sanction of the expectant reversioners afforded evidence that it was made under circumstances which the Hindu law would regard as valid on the ground of necessity. In 49 I A 342 (6) their Lordships of the Judicial Committee upheld a compromise entered into by a Hindu widow bonafide for the benefit of the estate and not for her personal advantage as being justified by necessity observing that "necessity does not mean actual compulsion, but the kind of pressure which the law recognises as serious and sufficient."

On these authorities an abstract question of law has been argued namely whether a transaction, by which a loan is raised for effecting improvements on a property by getting rid of bad tenants, filling up ditches, opening roads and erecting structures and in similar other ways can be justified. In the view of the facts of this case and of the nature of the present transaction the question does not really arise. But if it does it may be answered that the expression "benefit of the estate" as used in decisions with regard to circumstances justifying an alienation by a limited owner cannot be precisely defined, but it may be taken as including the preservations of the estate from extinction, its defence against hostile litigation, its protection from inundation, and similar circumstances: 44 I A 147 (7). Therefore, benefit, in which no idea of protection or preservation but only an idea to improve so as to increase the income is included, would not be sufficient by itself to make the transaction binding on the reversioner.

In the Court below as well as in this Court an endeavour was made on behalf of the appellant to support the lease, in so far as the defendants now purport to hold under it, on the ground that proper enquiry was made and the assignment was taken in good faith. (But after examining the evidence his Lordship held that no protection could be pleaded on the strength of the enquiry). Estoppel has been pleaded, but we do not see that the circumstances were such as would create any estoppel as against the plain-

1. Daya Moyi Debi v. Srinibash Knndu, (1906) 33 Cal 842.
2. Hanooman Prasad Panday v. Babover Munraj, (1854-57) 6 M I A 393 = 18 W R 81n=2 Suther 29=1 Sar 552 (PC).
3. Kameswar Prasad v. Run Bahadur Singh, (1881) 6 Cal 843=8 C L R 361=8 I A 8=4 Sar 210 (PC).
4. Shankar Nath v. Bijay Gopal, (1909) 13 C W N 201=4 I C 513.
5. Bijoy Gopal v. Girindra Nath, 1914 PC 128=23 I C 162=41 Cal 793 (PC).
6. Ram Sumran Prasad v. Shyam Kumari, 1922 P C 356=69 I C 71 = 49 I A 342=1 Pat 741 (PC).
7. Palaniappa Chetty v. Deivasikamony Pandara, 1917 P C 33=39 I C 722 = 44 I A 147 = 40 Mad 709 (PC).

tiffs. Their cause of action accrued only on Sushila's death, when the plaintiffs were minors and one of them has attained majority some time after the suit was instituted. The plea of estoppel rests upon two facts, namely, that there was a notice board put up on the property which showed that the land was to be sublet,and that the building was being openly constructed and the plaintiffs had knowledge of such construction. These facts without anything more, and there is nothing more to which the appellant can point in this connexion, do not create any estoppel as against the plaintiffs.

In such circumstances, there can be no question that the plaintiffs' title should be declared. But the question is what is the decree that should be passed as regards their prayer for possession. This question will have to be decided in the light of the principle of equity which has received statutory recognition in S. 51, T. P. Act; though there are difficulties in applying the section itself in view of its terms to the present case. The section speaks of a person absolutely entitled to the property in respect of which eviction is sought for ; and therefore it may not unreasonably be contended that the case of a lessee holding under a lease of the present nature is outside the contemplation of the section : see 47 All 430 (8). But the principle contained in the section has often been applied to lessees who are sought to be ejected, and we see no reason why the principle should not be applied in the present case. It is true that absence of proper enquiry condemns a bargain as one not made in good faith. But any and every negligence does not show want of good faith. As was explained in 32 Mad 530 (9), good faith within S. 51, T. P. Act, is not necessarily precluded by facts showing negligence in investigating the title. In view of all the circumstances of the case, we have come to the conclusion that though the transaction itself under which the appellant came to acquire the leasehold cannot be upheld, there are enough grounds on which it should be held that he believed that he had acquired a good title. We therefore think we shall be justified in taking into account the equities that are in his favour.

That in such a case such equities may be taken into account is sufficiently established by the decision of the Judicial Committee in 57 I A 305 (10). In restoring the land to the plaintiffs we must distinguish between improvements effected on it which are inseparable from the land itself, and such structures, etc , as may also have been erected upon it but are removeable. As regards the improvements there is some evidence in the shape of bills showing that Rs. 2,000 had been spent for clearing the property of tenants and Rupees 11,000 for opening up roads and filling ditches. These expenses are said to have been made by the Bombay Industrial Trust. So far as the latter amount is concerned there is hardly any satisfactory evidence as regards the work that was in fact done or what the real value of such work was. Any way, the appellant can have no equity in his favour except on the basis of the figure of Rs. 2,000 which is the amount he had to pay for the assignment of the lease in his favour, in addition to Rs. 1,000 which he had to pay because it was the premium for the original lease. The appellant therefore is entitled to be reimbursed to the extent of Rs. 2,000. So far as the structures erected by the appellant are concerned they do not go with the land. The plaintiffs are not bound to take the land burdened with them and the appellant is entitled to remove them if he likes. But we think he is also entitled to ask us to make an order that the plaintiffs be called upon to sell their interest to him in respect of the land on which he has erected his dwelling house. We asked his learned Advocate whether he would like to have an order of the last mentioned description and he has answered in the affirmative. (His Lordship then passed a suitable decree modifying the lower Court's decree).

K.S. *Decree modified.*

8. Rajrup Kunwar v. Gopi, 1925 All 261=87 I C 44=47 All 430.
9. Nanjappa Gounden v. Peruma Gounden, (1909) 32 Mad 520=4 I C 18.
10. Narayan Swami Ayyar v. Rama Ayyar, 1930 P C 297=128 I C 261=57 I A 305 = 53 Mad 692 (PC).

* A. I. R. 1935 Calcutta 631

NASIM ALI AND HENDERSON, JJ.

Abed Hossain Mia and *others* — Plaintiffs—Appellants.

v.

Abdur Rahaman Saha Choudhury — Defendant—Respondent.

Appeal No. 349 of 1933, Decided on 6th June 1935, from appellate order of Dist. Judge, Rajshahi, D/- 27th March 1933.

(a) Limitation Act (1908), S. 6—Scope.

Section 6 contemplates cases where there is only one minor decree-holder or where all the decree-holders are minors. [P 631 C 2]

*** (b) Guardian and Ward — Money due to minor under decree — Certificated guardian cannot receive decretal money out of Court and give valid discharge.**

Whatever may be the powers of the certificated guardian to collect other moneys of the minor, his powers to receive money payable to a minor under a decree is subject to the permission of the Court.

He cannot receive the decretal money amicably and out of Court and give a discharge. The discharge given by a certificated guardian who is appointed next friend of the minor with the permission of the Court is really a discharge by the order of the Court : 36 *Mad* 295, *Rel on.* [P 632 C 1]

*** (c) Limitation Act (1908), S. 7 — S. 7 contemplates discharge by person who is able to give discharge by virtue of his legal capacity under substantive law— Discharge by certificated guardian out of Court does not come under S. 7 unless it is proved that such person is in a position to give discharge.**

Section 7 contemplates discharge by a person who, by virtue of his own legal capacity under the substantive law is able to give a discharge. It does not contemplate a legal capacity which only empowers a person to realize a debt on behalf of another by the process of execution with the permission of the Court. Hence where there are five joint decree-holders one of whom is a minor and the others are adults and one of the adults is the certificated guardian of the minor a discharge given by such guardian out of Court is not a discharge without concurrence of the minor within the meaning of S. 7 unless it is proved that the adult decree-holder who represents the minor is in a position to give discharge : 1929 *Cal* 165, *Expl. and Dist.* ; 1924 *Cal* 710, *Rel on.* [P 632 C 2 ; P 633 C 2]

(d) Execution—Decree binding—Execution Court should not consider whether decree is right or wrong.

It is not the duty of the execution Court to consider whether the decree is right or wrong. [P 634 C 1]

Naresh Chandra Sen Gupta and *Jogesh Chandra Sinha*—for Appellants.

Bireswar Bagchi and *Bireswar Chatterjee*—for Respondent.

Nasim Ali, J.—This is a decree-holders' appeal in an execution case. They are five in number, one of whom Abdul Rauf Choudhury is a minor and is represented by a co-decree-holder who is a certificated guardian. The appellants obtained a decree against the respondents on 21st June 1928. The execution proceedings out of which this appeal arises were started by them admittedly after three years had expired from the date of the decree. The judgment-debtors objected to the execution on the ground that it was barred by limitation. The executing Court accepted the objection of the judgment-debtors and ordered the execution case to be dismissed. On appeal by the judgment-debtors to the lower appellate Court the learned Judge has affirmed that order. Hence the present appeal by the decree-holders. The contention of the learned advocate for the appellants is that the Courts belows are wrong in holding that the execution is barred by limitation. It is argued that one of the decree-holders is still a minor and consequently under the second part of S. 7, Lim. Act, the execution is not barred. Now S. 7, Lim. Act, is in these terms :

> Where one of several persons jointly entitled to institute a suit or make an application for the execution of a decree is under any such disability, and a discharge can be given without the concurrence of such person, time will run against them all ; but, where no such discharge can be given, time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others or until the disability has ceased.

Section 6, Lim. Act, contemplates cases where there is only one minor decree-holder or where all the decree-holders are minors. The second part of S. 7 extends the period of limitation to some cases where there is a joint decree in favour of persons some of whom are minors; prima facie therefore under the second part of S. 7 the application for execution is not barred by limitation. It is however contended by the learned advocate for the judgment-debtors that the provisions of the second part of S. 7 are not attracted to the facts of the present case. He puts forward two grounds: (1) that the decree is not at all a joint decree, and (2) that the certificated guardian of the minor decree-holder had the legal capacity to give a discharge without the concurrence of the minor. As regards the first ground it appears from the decree itself that it does not

specify the shares of the different decree-holders. The learned advocate for the judgment-debtors however contends that as the decree-holders obtained the decree as heirs of a certain Mahomedan lady, they are tenants-in-common and consequently the decree cannot be a joint decree.

The obvious answer to this contention is that the materials on the record of the present case do not support such an argument. In support of the second ground it is argued by the learned advocate for the respondents that under the powers conferred on the certificated guardian by the Guardians and Wards Act he had power to collect the moneys of the minor and consequently he had the legal capacity to give a discharge for the decretal debt without the concurrence of the minor. I am unable to accept the contention. Whatever may be the powers of the certificated guardian to collect other moneys of the minor his powers to receive money payable to a minor under a decree is subject to the permission of the Court, see O. 32, R. 7, Civil P. C., and the case reported in 40 I A 132 (1). He cannot receive the decretal money amicably and out of Court and give a discharge. The discharge given by a certificated guardian who is appointed next friend of the minor with the permission of the Court is really a discharge by the order of the Court.

Again S. 7 contemplates a legal capacity to give discharge without the concurrence of the person under disability. The section requires that the co-decree-holder in addition to his capacity as a co-decree-holder must have such a legal capacity as would empower him alone to realize the decretal debt and give a discharge without putting the decree into execution, even if his minor co-decree-holder had been under no disability and had the capacity to give his assent. In other words the legal capacity must enable him alone to give a discharge the consent of the other decree-holders not being necessary at all in the exercise of that legal capacity. The law must clothe him with rights to give a discharge for the whole debt irrespective of the consent of the other decree-holders. Familiar instances of such legal capacities are those of a partner and the karta of a joint Hindu family. Their legal capacity to give discharge is derived from the substantive law. They have the power to realize the whole decretal debt amicably and are not required by law to take the consent of the other joint decree-holders, or the permission of the Court under the processional (procedural ?) law before giving discharge. The legal capacity of a certificated guardian to realize moneys payable to a minor decree-holder under a decree of the Court does not fulfil the test which I have indicated above. It is not independent of the rights of the mincr decree-holder. S. 7 contemplates discharge by a person who by virtue of his own legal capacity under the substantive law is able to give a discharge. It does not contemplete a legal capacity which only empowers a person to realize a debt on behalf of another by the process of execution with the permission of the Court. Much reliance however was placed by the learned Advocate for the respondents upon certain observations in 48 C. L. J. 555 (2).

In that case however the adult decree-holder was the Karta of a joint Hindu family. He had his powers under the Hindu law to give a discharge for the whole debt. He alone could have received the decretal money out of Court and given a discharge even if the other decree-holders had not been under any disability. It is true that in that case there is an observation that in his capacity as a certificated guardian the adult decree holder was also entitled to give a discharge. But in view of the fact that he was also the Karta of the joint family, that observation was not necessary for the decision of that case. As pointed out before in view of the principle underlying the decision of the Judicial Committee cited above and the provisions of O. 32, R. 7, Civil P. C., it is difficult to maintain that after a certificated guardian has been appointed next friend of the minor, he can give a discharge of the decretal debt without the permission of the Court. Such a discharge therefore cannot be a discharge by the guardian, far less a discharge without the concurrence of the minor within the meaning

1. Ganesh Row v. Tuljaram Row, (1913) 36 Mad 295=19 I C 515=40 I A 132 (PC).

2. Ashutosh Ghose v. Sashi Mohan, 1929 Cal 165 =115 I C 354=48 C L J 555.

of S. 7. In this view of the matter it is not necessary to refer to the cases which were decided under Ss. 7 and 8, Limitation Act of 1877. After the amendment of the Limitation Act in 1908, S. 7, as it now stands, contemplates discharge by an adult decree-holder by virtue of some legal capacity conferred on him by the substantive law apart from and without reference to his capacity to give discharge with the permission of the Court under the processional law. For the reasons stated, I am of opinion that the judgment-debtors have failed in the present case to show that the adult decree-holder, who represents the minor decree-holder, was in a position to give discharge. My conclusion therefore is that the application for execution is not barred by limitation. In the result the appeal is allowed, the orders of the Courts below dismissing the appellants' application for execution are set aside and I order the execution to proceed. The appellants decree-holders will get their costs from the respondent judgment-debtors. Hearing-fee is assessed at five gold mohurs.

Henderson, J.—I agree. The point which arises for our consideration in this appeal is a short one and is concerned with the interpretation of S. 7, Limitation Act. We were invited by Mr. Bagchi to construe that section by a strict interpretation of the words used therein. If we do this, it seems reasonably plain that the section seeks to draw a distinction between cases in which one of several persons entitled to a joint debt can give a discharge for the whole debt without the concurrence of the other persons so entitled and cases in which such a discharge cannot be given. In the former case time will run against a person suffering under disability; in the latter case it will not.

The learned District Judge took a different view and held that, inasmuch as there was a person who was in a position to collect debts due to the minor and give a valid discharge, time would run against the minor as well as the major decree-holders. We have been asked on behalf of the respondents to say that this is the proper meaning of the words used and that in this case a discharge can be given without the concurrence of such persons. As I have already indicated, in my judgment that would not be the natural interpretation of the words used and I do not think that the matter can be better expressed than in the words of Suhrawardy J., in 51 Cal 566 (3). In dealing with the point the learned Judge says this:

> Section 7, Limitation Act, contemplates a case where a decree-holder holds such a legal character as to be able in law to give discharge on behalf of his co-decree-holders. One of the tests may be that had the judgment-debtor paid the debt to one of the decree-holders amicably and out of Court, could he have successfully pleaded payment to all the decree-holders as full satisfaction of the decree ?

With those observations I respectfully agree. It is therefore necessary to consider whether in the present case a discharge could have been given without the concurrence of the minor. It is to be noted that one of the major decree-holders is the certificated guardian of the minor and on that ground we have been asked to say that the application was barred by limitation on the authority of the case reported in 48 C L J 555 (2). As my learned brother has pointed out inasmuch as one of the plaintiffs in that case was able to give a discharge as the karta of the family, it has not really decided the point at all. In the second place the facts are quite different. In that case there were two plaintiffs one of whom was a major and the other a minor. The major was the certificated guardian of the minor. The position therefore was that the major was able to give a discharge both on his own behalf and on behalf of the minor. In such a case it might be necessary to consider whether this peculiar position of one of the plaintiffs would prevent the minor from getting the benefit of S. 7. But in the present case the facts are quite different. Here there are four majors and one minor. One of the majors is the certificated guardian of the minor. It is quite clear that if the debt was paid out of Court to the major who is the certificated guardian of the minor, he would not be in a position to give a discharge which would bind the other co-decree-holders.

The only other point on which I need say anything is the contention made on behalf of the respondents to the effect that this decree is not a joint decree, because the heirs are Mahomedans and are not joint. It may be that the Court which passed the decree ought not to

3. Bilwar Bibi v. Mahammad Habibar Rahman, 1924 Cal 710=84 I C 204=51 Cal 566.

have passed a joint decree. But the fact remains that it did pass a joint decree and it is not the duty of the execution Court to consider whether that decree was right or wrong. This point was not really taken in the petition of objection under S. 47. The objection that was taken was to the effect that the application was entirely barred and should be dismissed. The objection as now being placed is quite different and is to the effect that, although the minor decree-holder is entitled to take out execution for his individual share the application of the major decree-holders is barred. It is quite obvious that such an objection could not be determined without going into the facts, because we do not even know the share of the minor decree-holder.

K.S. *Appeal allowed.*

✻ A. I. R. 1935 Calcutta 634

R. C. MITTER, J.

Lalit Kishore Mitra — Plaintiff — Appellant.

v.

Nathu Mandal and *others* — Respondents.

Appeal No. 2003 of 1933, Decided on 28th June 1935, from appellate decree of Dist. Judge, Bankura, D/- 19th July 1933.

✻ (a) Jurisdiction—Civil Court — Assessment made intra vires by Collector — Civil Court has no jurisdiction to touch it — Collector assessing person as tenure holder — Civil Court has no jurisdiction to say that he is cultivating ryot for purposes of Cess Act —The only remedy of aggrieved person is under Cess Act.

As the Civil Court has no jurisdiction to touch an assessment made intra vires by the Collector, it has no jurisdiction to say that a person is a cultivating ryot for the purpose of the Cess Act when the Collector had made the assessment on the footing that he is a tenure holder. The Cess Act itself provides for the remedy of an aggrieved person, whether he is a proprietor of an estate or a tenure holder, and in the case of intra vires assessment that remedy is the only remedy. [P 635 C 2]

(b) Bengal Cess Act (1880) — Scheme is to make decision of Revenue officers regarding assessment intra vires final.

The whole scheme of the Act is to make the decision of officers of the Revenue Department in the matter of assessment intra vires final. Such decision cannot be challenged by a party in a civil Court: 1926 *Pat* 175; 1929 *Pat* 743 and 14 *I C* 177, *Dist.* [P 636 C 1]

(c) Bengal Cess Act (1880), S. 107—Person assessed by authorities as tenure holder—Assessment cannot be touched—For purposes of determining his liability to pay cess to landlord, he must be regarded tenure holder.

If a person is assessed by the Revenue Authorities on the basis that he is a tenure holder, the assessment cannot be touched and for the purpose of determining his liability to pay cess to his landlord he must be taken conclusively to be a tenure holder. [P 636 C 1]

(d) Bengal Cess Act (1880)—Distinction is made between tenure holder and cultivating ryot and not ryot.

The distinction made in the Cess Act is as between a tenure holder and a cultivating ryot and not between a tenure holder and a ryot. [P 636 C 2]

Panchanan Ghose and *Krishna Chaityanna Ghose*—for Appellant.

Sailendra Nath Banerji — for Respondent.

Ramendra Chandra Roy—for Deputy Registrar.

Judgment.—This appeal is on behalf of the plaintiff who is a co-sharer landlord, his share being 8 annas. The proforma defendants are the remaining co-sharer landlords, but they have not appeared and taken part in the proceedings. The suit was for recovery of the plaintiff's share of the rent for the years 1337 and 1338 and for his share of the cesses for the years 1335 to 1338. The plaintiff avers that the total jama is Rs. 35-6-6 a year and the total cess payable by the tenants defendants is Rupees 11-6-9 per year, and he claims on the said basis. His claim was decreed in full by the Munsif, but on appeal the learned District Judge has reduced his claim for cesses. The appeal is therefore directed to that part of the judgment and decree of the learned District Judge which deals with the plaintiff's claim for cesses.

In the valuation roll the annual value of the lands in the defendants' possession has been determined to be Rupees 200-6-0. Their tenancy is entered in form No. 3 given in appendix B of the Cess Act, and form prepared under R. 96 of the Cess Manual, a rule which deals with the preparation of the valuation roll under S. 34 of the Act, that is to say, his tenancy was classed by the Collector for the purpose of assessment of cesses as a tenure. In the first column is entered the number of the khatian. The second column is headed thus:

Name and touzi number, or if rent free, number in Register 2 of rent free lands, or number in Register 3 of chaukidari chakran lands, with the names of zemindars, tenure holders and sub-tenure holders in the estate.

Under this heading is entered the name of Natabor and others, the defendants' predecessors. In the third column the annual value (Rs. 200-6-0) is entered. In the fourth column which is headed

amount of revenue payable to Government or chaukidari chakran assessment payable and rents payable to superior landlords on which deduction is to be made under S. 41 of the Act

is entered, the rent Rs. 30-3-6, which was the rent payable by the defendants' predecessors at the time of the preparation of the valuation roll to the plaintiff and his co-sharers. It is admitted the rent was subsequently enhanced and is now Rs. 35-6-6. There cannot be any doubt that the defendants' predecessors had been assessed by the Collector on the basis that they were tenure holders and not cultivating ryots. The fourth column obviously mentions the amount on which deduction has to be made under the provisions of S. 41 (2) Cess Act. The rate of road and public works cess being fixed at one anna per rupee of the annual value the plaintiff arrives at the figure Rs. 11-6-9 as the amount of cesses payable by the defendants in the following manner:

At the rate of 1 anna per rupee on the annual value fixed at Rs. 200-6-0	Rs. 12—8—4½
Deduction at 6 pies per rupee on Rs. 35-6-6, the annual rent payable by the defendants to the plaintiff and his co sharers under S. 41 (2)	Re. 1—1—8
Balance	11-6-8½

The defendants say that they are ryots and the amount of cess payable is at the rate of six pies on every rupee of the rent payable by them or at the rate of six pies per rupee of the annual value determined by the Collector. The learned District Judge relying upon the entry in the Record of Rights prepared under Chap. 10, Bengal Tenancy Act, which has recorded the defendants as ryots, has held that cesses can be received from them at such rates at which it can be received from cultivating ryots. He says in this judgment that

the defendants are cultivating ryots not only for the purpose of Tenancy Act, but also for the purposes of the Cess Act.

In granting the decree the learned District Judge has however miscalculated the amount payable by the defendants. Instead of giving the plaintiff a decree for cesses at the rate of six pies per rupee on the annual value of Rs. 200-6-0, he has deducted a sum equivalent to six pies per rupee or Rs. 35-6-6, the rent payable by the defendants to the plaintiff, for which deduction there is no warrant in law, for sub-S. 3, S. 41 of the Act does not allow any such deduction, i. e., in the case of cultivating raiyats. The whole question however is whether, when the Collector is acting intra vires, can the civil Court go behind the assessment made by him. That assessment depends upon and is based on the following factors ; (1) Annual value of the lands ; (2) rate of cesses notified under S. 38 ; (3) status of the assessee, whether a zemindar, tenure holder or cultivating raiyat.

Any modification or variation in any of the aforesaid three elements will affect the assessment as made by the Collector, and as the civil Court has no jurisdiction to touch an assessment made intra vires by the Collector, it has no jurisdiction to say that a person is a cultivating raiyat for the purpose of the Cess Act when the Collector had made the assessment on the footing that he is a tenure holder. The Cess Act itself provides for the remedy of an aggrieved person, whether he is a proprietor of an estate or a tenure holder, and in the case of intra vires assessment that remedy is the only remedy. Confining myself to the case of a person assessed to cess on the footing that he is a tenure holder the following sections of the Cess Act are important : S. 34, authorises the Collector to have a valuation roll prepared of tenures from the returns made and from his enquiries. S. 35 requires the Collector to post up extracts of such portions of the valuation roll as deals with a particular tenure at the mal katchery of the tenure holder if there be a mal kutchery or if there is no mal katchery on some conspicuous place on the tenure, or if the tenure cannot be found, in a conspicuous place in any village in which such tenure is believed to be situate. S. 26 gives the Collector power to determine whether a person is a tenure holder or a cultivating raiyat for the purpose of assessment. S. 93 provides that every valuation roll shall be open to revision by the Commissioner or Board of Revenue but not otherwise. S. 104 provides for appeal to the Commissioner in certain cases and then follows S. 107 which says that

nothing done in accordance with the Cess Act shall be deemed to affect the rights of any person in respect of any immovable property or any interest therein.

The whole scheme of the Act is to make the decision of officers of the Revenue Department in the matter of assessment intra vires final, and the meaning of the saving S. 107 seems to me that if a person is assessed by the revenue authorities on the basis that he is a tenure holder, the assessment cannot be touched and for the purpose of determining his liability to pay cess to his landlord he must be taken conclusively to be a tenure holder; but for determining his rights and liabilities in relation to his landlord in other matters, the fact that the Collector had, in assessing him to cesses, taken him to be a tenure holder or had decided under S. 26 of the Act that he is tenure holder and not a cultivating raiyat, would not be relevant and can be disregarded. To take an illustration if the landlord brings a suit for enhancement of rent under S. 7, Ben. Ten. Act, such a person would not be debarred from proving that he is a raiyat and not a tenure holder. The view that I am taking is in accordance with the general principle that an intra vires assessment cannot be challenged by a party in a civil Court and is supported by the decisions of the Patna High Court in 1926 Pat 175 (1) and 118 I C 325 (2) cases which have no hesitation in following.

The learned Advocate for the respondent has relied strongly upon the decision of this Court in 15 C L J 428 (3) in support of his contention that the civil Court in a suit for recovery of cesses can go into and reopen the question as to whether the tenant is a cultivating raiyat or tenure holder, notwithstanding that the Collector in making the assessment had proceeded upon the footing that he is a tenure holder. An examination of that case shows that the landlord had in his return showed that the tenant was a cultivating raiyat and there is no precise or clear indication that the Collector had proceeded upon the footing that he was a tenure-holder. In the Letters Patent Appeal Sir Lawrence Jenkins pointed out that the distinction made in the Cess Act is as between a tenure-holder and a cultivating raiyat and not between a tenure-holder and a raiyat. In that case also 3 tenancies had been lumped together and one annual value for the three was fixed by the Collector, and that fact would make the assessment of the Collector ultra vires, and would thereby give the civil Courts jurisdiction to discard the assessment altogether and to determine the question whether the defendant was or was not a tenure-holder. I accordingly hold that Peary Mohan's case does not support the respondent. The appeal is accordingly allowed. The decree of the learned District Judge is modified. The plaintiff's claim to cesses is fully allowed. The net result is that the decree of the Munsif is restored in all respects. The appellant will have the costs of this Court and of the lower appellate Court.

S.R. *Appeal allowed.*

1. Kesho Prosad Singh v. Ram Swarup, 1926 Pat 175=90 I C 621.
2. Kharag Narayan v. Secretary of State, 1929 Pat 743=118 I C 325.
3. Peary Mohan Ray v. Sarat Kumari Debi, (1912) 15 C L J 428=14 I C 177.

** A. I. R. 1935 Calcutta 636

LORT-WILLIAMS AND JACK, JJ.

Kamal Krishna Sircar—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 173 of 1935, Decided on 17th July 1935.

**** Penal Code (1860), S. 124-A—Recommending Bolshevism as preferable to present form of government and encouraging youths to join Bengal Youth League and carry propaganda to obtain supporters of communism is no sedition.**

To suggest some other form of government is not necessarily to bring the present Government into hatred or contempt.

Where the accused made a speech recommending Bolshevik form of government as preferable to the present one, and encouraged by his speech young men to join the Bengal Youth League and asked them to carry on propaganda to obtain supporters of the idea of communism as represented by the Bolshevik system in Russia :

Held : that the speech was a long way from coming within the provisions of Section 124-A and it was not wise to institute prosecution against the makers of speeches of this kind. [P 637 C 2]

B. Das and *Hiran Kumar Ray*—for Accused.

D. N. Bhattacharya—for the Crown.

Lort-Williams, J.—In this case the appellant was convicted of sedition under S. 124-A, Penal Code, and sentenced to rigorous imprisonment for one year.

The speech in which he made the remarks complained of was delivered at

Shradhananda Park on 22nd November 1934. There was a meeting of the Bengal Youth League, and there was a red banner with hammer, sickle and star. The audience were composed mostly of Bengali youths of the student community and a number of speeches were made.

The accused moved a resolution, expressing emphatic condemnation of Government legislation as being calculated to gag the working-class movement in India, in declaring the Communist party of India and various trade unions and labour organizations illegal, while anti-working class organizations like the Indian National Congress and the Congress Socialist party had not been banned and had been allowed to prosecute their aims of sabotaging the real class struggle for emanicipating the toiling masses of India. The resolution also condemned the banning of the Communist party of India and other militant class organizations in the Punjab and Bombay.

In his speech the accused referred to these orders made by the Government, and explained that what was meant was that the Government by such banning of certain organisations were making it easier for the organisations which were carried on by the well-to-do and the capitalists, one of the aims of which was to put down the workers' movement to pursue the new reformist movements which were favoured by these other bodies. The rich, Gandhi and the Congress, were all lumped together by the speaker as being supported by the Government. Then he proceeded to deal with the Round Table Conference and pointed out that at one time the Government had declared the Congress illegal, but that it was the object of the Government, and by reference the speaker obviously wanted to include all Governments, to encourage the reformist movement as a method of checking the revolutionary movement represented by the Communist party, the Bolsheviks and others. The rest of the speech was a mere recital of facts, either of recent or past history. A great deal of it was obviously taken from well-known and quite respectable books which have been published recently about the world economic depression, the alleged failure of the capitalistic system, and the necessity of finding some other method for the distribution of goods. In fact all that the speech amounted to was a recommendation of the Bolshevik form of government as preferable to what is generally called the 'capitalistic' form of government, i. e., the present form of government, and all that the speaker did was to encourage the young men, whom he was addressing, to join the Bengal Youth League and to carry on a propaganda for the purpose of inducing as large a number of people in India as possible to become supporters of the idea of communism as represented by the present Bolshevik system in Russia.

It is really absurd to say that speeches of this kind amount to sedition. If such were the case, then every argument against the present form of government and in favour of some other form of government might be alleged to lead to hatred of the Government, and it might be suggested that such ideas brought the Government into contempt. To suggest some other form of government is not necessarily to bring the present Government into hatred or contempt.

The learned Magistrate, who tried the case, obviously takes a strong view with regard to Bolshevism. He does not like it; neither do I, nor do a very large number of sensible people. That does not mean that one may not make speeches of this kind. I do not like quite a lot of things the people do constantly from day to day. That is no reason for suggesting that those people are guilty of sedition or of attempting to bring the Government into hatred or contempt.

In my opinion it is not wise to institute prosecutions against the makers of speeches of this kind. The effect of it is to give the impression that the Government are desirous of taking the kind of steps which, we understand, have been taken in countries like Germany and Italy, where the right of free speech has practically disappeared. So far as we know, that is not the present position in India. In any case the present speech is a long way from coming within the provisions of S. 124-A, Penal Code. The conviction and sentence passed on the appellant are, accordingly, set aside and he is acquitted. The appellant

who is on bail will be discharged from his bail-bond.

Jack, J.—I agree.

S.R. *Conviction set aside.*

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* A. I. R. 1935 Calcutta 638

R. C. MITTER, J.

Bir Bikram Kishore Manikya Bahadur —Plaintiff—Appellant.

v.

Amanaddin and *others*—Defendants—Respondents.

Appeal No 1880 of 1933, Decided on 10th July 1935, from appellate decree of Sub-Judge, 1st Court, Tippera, D/- 22nd May 1933.

(a) Deed—Construction—Document headed "agreement" — No vernacular word corresponding to "rent" in body of document — Plaintiff in khas possession of property in question before transferring same to defendant by document—Document held lease.

Where the document was headed "an agreement" and in the body of the said agreement, no vernacular word was used which corresponds to the word "rent" and where the transferor who was in khas possession from before, gave the exclusive right of khas possession to the transferee, the document is a lease. [P 638 C 2]

*** (b) Deed—Construction—Test — Lease of tank—True test as to whether lease is for agricultural purposes or not is to see whether primary object was lease of tank or of land surrounding it for purposes of agriculture.**

Where the lease is of a tank the true test as to whether the lease is for agricultural purposes or not is to see whether the primary object was the lease of the tank or lease of the land surrounding it for purposes of agriculture with the tank within it. [P 639 C 1]

(c) Lease—No reference to cultivation —No stipulation for payment of cesses—True purpose of lease preservation or rearing of fish —Grazing cattle on bank only subsidiary—Lease is for non-agricultural purposes and is governed by Transfer of Property Act and not by Bengal Tenancy Act.

In a document of lease no reference was made to cultivation. Neither was there any stipulation as to payment of cesses and the true purpose of the lease was preservation and rearing of fishes, grazing of cattle on the bank being only a subsidiary one :

Held : that the lease was for non-agricultural purposes governed by the provisions of Transfer of Property Act and not by those of Bengal Tenancy Act: 20 *W R* 341 and 34 *C W N* 1063, *Foll.* [P 639 C 2]

J. C. Roy and *Nripendra Chandra Das* —for Appellant.

Upendra Kumar Roy — for Respondents.

Judgment. — This appeal is by the plaintiff in a suit for ejectment of the defendants. The plaintiffs' case is that the defendants were tenants in respect of a tank and its banks in suit the tenancy being governed by the provisions of the Transfer of Property Act, and that the said tenancy has been duly terminated. The defendants say that they have acquired occupancy right in the subject matter of the suit. It is admitted that the defendants were in occupation under a registered agreement executed by them in favour of the then Maharaja Bahadur of Tipperah, the predecessor in title of the present Maharaja the plaintiff on 4th July 1917. Mr. Jogesh Chandra Roy who appears for the plaintiff-appellant whose suit was dismissed by both the Courts below, raises two points before me. First of all he says that the aforesaid document which allowed the defendants to remain in possession for five years, created a license and not a lease ; and secondly, he contends that even if it is conceded to be a lease, it is a lease for non-agricultural purposes, and the defendants became tenants from month to month after the expiry of the term of the said lease.

On the first point I cannot agree with Mr. Jogesh Chandra Roy ; although the document is headed "an agreement" and although in the body of the said agreement no vernacular word is used which corresponds to the word rent, it is quite clear that the Maharaja who was in khas possession from before, gave the exclusive right of khas possession to the defendants. On a fair reading of the document, I do hold that this document is a lease, and the subject matter of this suit was demised to the defendants for a period of five years from 1326 to 1330 Tipperah year. On the second point I agree with the contention of the appellant, and I do hold that the main purpose of this letting was non-agricultural. The subject matter of the demise are a tank of an area of about 13 kanis and its banks, the area of which is about five kanis. The document begins by saying that the defendants applied for holding possession for the purpose of rearing fish in the tank and grazing cattle on the bank. In the demise it is said that the defendants shall keep the boundaries intact, and shall be entitled to possess the tank by preserving or rearing fish and grazing cattle on the banks. The occupation of the tenants are described

as Grihasthas, a term of an ambiguous import which may either mean cultivator or house-holder. So far as the principles applicable to such cases are concerned there cannot be any doubt. That principle has been formulated in the judgment of Sir Richard Couch,C.J., and Glover, J., in 20 W. R. 341 (1), and has been re-affirmed by Dwarkanath Mitter, J., in 34 C. W. N. 1063 (2). At p. 1067 of the Report Mitter, J., says:

> The true test as to whether the lease is for agricultural purposes or not is to see whether the primary object was the lease of the tank or lease of the land surrounding it for purposes of agriculture with the tank within it.

No doubt on considering the lease in that particular case both the Hon'ble Judges came to the conclusion that the primary object was the lease of the banks surrounding the tank and that lease was taken for the purpose of grazing agricultural cattle. On the particular facts of that case and on the particular terms of the document in that case, they came to the conclusion that the defendants acquired occupancy right in the subject matter of that suit, although the lease comprised a tank and its banks, and the purpose of letting out the tank was for rearing fish and the purpose of letting out the banks was for grazing cattle. The true test is, as has been formulated in that case, to find out what was the primary object. Proceeding on that basis, it is necessary to consider the terms of the registered agreement dated 4th July 1917, which admittedly governs the rights of the parties. In this document there is no reference to cultivation. There is no stipulation for the payment of cesses. The true purpose for which the lease was given was for rearing and preserving fish in the waters of the tank and for grazing cattle on the banks which was only subsidiary. When the other terms are examined, it is quite clear that the principal or the primary object was for rearing fish. In the document itself it is stated that the tank being used by the neighbours and the public in general the right of these persons must be reserved. On the tenants is imposed an obligation to take particular care to see that the water of the tank may not become unfit for human use and by being covered by pana and various kinds of acquatic plants and weeds, it may not cause injury to the health of the public.

If the water of the tank becomes polluted on account of negligence of or any act of the tenants, and, if for that reason any order be issued or any sentence be passed by the Municipality or any other office of the Government, then the tenants are to remain wholly responsible for that :

> There will be no concern of the landlord. . . . . If the tenants exceed any of the aforesaid rights or if it be necessary for the landlord to take the said tank into khas possession, within the term of this agreement, then the tenants will have without objection to give up possession thereof before the expiry of the term, and shall neither be able to claim nor be entitled to claim a refund of the Nazar money.

Then there are clauses restricting the sale or mortgage by the tenants, and there a reference is made only to the tank. There is a further clause that on the expiry of the term they shall give up the said tank to the khas possession of the plaintiff. In all the covenants in the lease the tank and not the bank is mentioned. It is clear in my judgment that the principal parcel of the demise was intended to be the tank and not the bank, which is to be used subject to the restrictions indicated above, and the purpose for which the tank was to be held clearly a non-agricultural purpose, namely preservation of fish.

In this view of the matter I am clearly of opinion that on a construction of this document, the primary object of the letting was a non-agricultural purpose, and following the principle laid down by Sir Richard Couch in 20 W. R. 341 (1) and by Mitter, J., in 34 C. W. N. 1063 (2), I do hold that the lease in the present case is governed by the provisions of the Transfer of Property Act, and not by the provisions of the Bengal Tenancy Act. On the expiry of the terms of the lease, the defendants became tenants from month to month and there is no dispute that their tenancy, if precarious, was determined according to law. I accordingly set aside the judgments and decrees of the Courts below and pass a decree in favour of the plaintiff in terms of his prayer. The appeal is accordingly allowed with costs, both of this Court and of the Courts below. Prayer for leave to appeal under S. 15, Letters Patent is refused.

S.R. *Appeal allowed.*

1. Nidhi Krishna Bose v. Ram Dass Sen, (1873) 20 W R 341.
2. Surendra Kumar Sen v. Sm. Chandratara Nath, 1931 Cal 135=130 I C 219 = 34 C W N 1063.

A. I. R. 1935 Calcutta 640

GUHA AND LODGE, JJ.

Ahad Bux Jamadar — Judgment-debtor—Appellant.

v.

Kinkar Chandra Pal — Decree-holder —Respondent.

Appeal No. 463 of 1934, Decided on 18th July 1935, from appellate order of Addl. Dist. Judge, Howrah, D/- 8th June 1934.

Execution—Step-in-aid — Application for transfer of decree from one Court to another for execution is step-in-aid.

The expression "step-in-aid of execution" must be taken to be intended to cover every application made by the decree-holder in accordance with law, setting the Court in motion to execute the decree and in furtherance of the proceeding in execution. Hence an application made for transfer of the decree from one Court to another for the purpose of execution, must be deemed to be an application to keep the decree in force and in that way a step-in-aid of execution: 1922 *Cal* 3, *Dist.* [P 640 C 2]

Mukunda Behari Mallick—for Appellant.

Amiruddin Ahmed and *Enayet Hossein* —for Respondent.

Judgment.—This appeal has arisen out of an application for execution of a decree passed by the Small Cause Court, Calcutta, on 28th June 1929. The decree passed by the Small Cause Court was an instalment decree; and an instalment in accordance with the terms of the decree was paid by the judgment-debtor on 18th August 1930. The application for execution of the decree giving rise to this appeal was made by the decree-holder on 3rd November 1933. An objection was raised on behalf of the judgment-debtor to the execution of the decree, and it was asserted on the side of the judgment-debtor that the application for execution was barred by limitation. It appears that an application was made by the decree-holder to the Court of Small Causes, Calcutta, on 27th February 1932, and the question before the Court below was whether a further period of limitation would run from the date of the order passed on the said application for transmission of the decree for execution.

On the materials there can be no question that the application on which the order for transmission was made on 27th February 1932 was an application for transfer of the decree for execution, to the Court of the Munsif at Amta in the district of Howrah. The order for transmission of the decree was passed by the Court passing the decree and the question therefore was whether the application made by the decree-holder on 27th February 1932, on which the order was made for transmission of the decree was a step-in-aid of execution, as contemplated by Cl. (2) of Art. 182, Sch. 1, Lim. Act. The Courts below have answered the question raised before them in the affirmative in favour of the decree-holder.

The judgment-debtor appealed to this Court. In support of the appeal reliance was placed on a decision of this Court in 26 C W N 292 (1) in which it was held that an application for issue of notice under O. 21, R. 22, Civil P. C., to the Court, to which an application had already been made for transfer of the decree to another Court, could not be treated as a step-in-aid of execution as contemplated by the provisions of the Limitation Act to which reference has been made above. The case therefore cited above could have no application to the facts of the present case. The expression "step-in-aid of execution" must be taken to be intended to cover every application made by the decree-holder in accordance with law, setting the Court in motion to execute the decree and in furtherance of the proceeding in execution. In that view of the matter, the application made for transfer of the decree from one Court to another for the purpose of execution, must be deemed to be an application to keep the decree in force and is in that way a step-in-aid of execution. In this view of the case before us, the appeal must be dismissed, and the decisions arrived at by the Courts below upheld. The appeal is dismissed with costs. Hearing fee is assessed at two gold mohurs.

K.S. *Appeal dismissed.*

1. Hazari Lal v. Baidynath Shaha, 1922 Cal 3= 63 I C 116=26 C W N 292.

* A. I. R. 1935 Calcutta 641

MUKERJEE AND S. K. GHOSE, JJ.

Indian Iron and Steel Co. Ltd. — Appellant.

v.

Bara Gopal Thakur and *others* — Respondents.

Appeal No. 304 of 1929, Decided on 25th June 1935, from original decree of Dist. Judge, Burdwan, D/- 30th July 1929.

*** (a) Civil P. C. (1908), O. 41, R. 27 — Party applying in appeal for admission of documents in evidence—Application should be rejected.**

Where a party to an appeal makes an application that certain documents should be admitted as additional evidence Court should not entertain such an application: 31 *Bom* 381 (*P C*) and 1931 *P C* 143, *Foll.* [P 642 C 1]

*** (b) Res judicata — Question under consideration in subsequent suit not raised in previous suit because of form of suit — Held judgment in previous case cannot operate as res judicata.**

Where in previous suit the question to be considered in the subsequent suit was not raised or could not be raised and decided having regard to the form in which the parties to that case were arrayed, the judgment in that suit could not operate as res judicata. [P 642 C 2]

*** (c) Adverse Possession — Transferees of a co-shebait purporting to come in as co-shebaits—Their possession is not such as enabled acquisition of title against co-shebaits.**

The transferees from a shebait purported to come in only as co-sharer of the co-shebaits and their possession was not such as would enable them to acquire a title as against the latter; such possession in order to be sufficient for the purpose of adverse possession must amount to an ouster of the latter. [P 643 C 2]

(d) Record of Rights—Plot recorded as in deity's khas possession — No rebutting evidence—Title of deity to plot subsists.

Where in the Record of Rights the plot concerned was recorded as in the khas possession of the deity and nothing was proved to rebut the entry:

Held: that the title of the deity to the plot subsisted: [P 643 C 2]

Amarendra Nath Bose and *Satindra Nath Mukherjee*—for Appellant.

Atul Chandra Gupta, *Bijan Kumar Mukherjee*, *Panchanan Ghosal* and *Sailendra Nath Banerjee*—for Respondents.

A. Kasem—for Deputy Registrar.

Judgment.—This is an appeal by the Indian Iron and Steel Co. Ltd., from a decision of the District Judge of Burdwan by which the learned Judge has dismissed their claim to a part of the compensation money awarded for acquisition of lands for a project named, "Indian Iron and Steel Co. Ltd., construction of their works, office and buildings." In the reference which has given rise to this appeal the claim of the appellants was confined to two plots of land numbered as 1156 and 1159. They claimed a fifth share of the compensation money awarded for plot 1156, and a sixth share of that for plot 1159. From the judgment appealed from it would appear that the claim as regards the latter plot was not seriously pressed in the Court below, and in this Court Mr. Bose appearing on behalf of the appellants has conceded that there are no sufficient materials on which he can argue that the said plot is identifiable with or covered by the subject-matter of the two kobalas on which the appellants' claim as regards the plot rests.

The controversy in the appeal has thus been reduced to the share of the compensation money which has been awarded for plot 1156. The documents of title on which the appellants rely for this plot are four in number: they are Exs. 1, 2, 3 and 4. By Ex. 2, dated 1886, one Atal Chandra Thakur sold a one-fifth share of a plot of jungle named Korkota Jungle to Mr. Coutts, a missionary priest belonging to the Roman Catholic Mission at Asansol. The property was described as rent free jungle, situate in Moujah Hirapore which bore Towzi No. 1 of the Burdwan Collector and was a Lakheraj debuttar mehal held by the vendor Atal Chandra Thakur and his cosharers. Ex. 3 is a deed of release dated 1889 executed by Mr. Coutts in favour of Dr. Goethals, the then Archibishop of Calcutta, in respect of several properties amongst which this property was one. By Ex. 4 dated 1891 Dr. Goethals sold the property to one Mrs. Stevo. On 11th June 1919, three months before the declaration in connection with the present land acquisition proceedings, the company purchased the property from Mrs. Stevo by the Kobala Ex. I. The Collector awarded the entire compensation money in respect of this plot to the shebaits of Sree Sree Madan Gopal Jiu Thakur, of whom Atal Chandra Thakur is one, and ordered that the amount be invested under S. 32, Land Acquisition Act. The learned Judge has upheld this order.

At the outset it is necessary to deal with an application which was made to

us on behalf of the appellants for receiving certain documents as additional evidence. One of these the Court below refused to admit in evidence and as regards the others they allege they have discovered their existence during the pendency of this appeal. The document, which the Court below refused to admit in evidence, is a sale-deed the consideration showing the value to be Rs. 71-12-9; and the learned Judge rejected it on the ground that it was not a registered instrument. The document no doubt was not receivable for any of the purposes mentioned in S. 49, Registration Act, but in our opinion, it was not altogether inadmissible in evidenee, and so we ordered it to be admitted and marked as an Ex. (H. C.) 1. We then gave the respondents an opportunity to adduce such rebutting evidence as they might desire to do and they filed two documents, a copy of an award and a cess return. They were admitted in evidence and marked as Exs. (H. C.)-A and (H. C.)-B, respectively. As regards the other documents we are satisfied that the account which the appellants have given is not untrustworthy. But we think the decision of the Judicial Committe in 34 I. A. 115 (1), and the explanation given by their Lordships of O. 41, R. 27 of the Code in 58 I. A. 254 (2) preclude us from receiving them as additional evidence. The application for receiving the said document as such therefore is rejected.

Considerable stress has been laid on behalf of the appellants upon a judgment (Ex. 11) passed by the District Judge of Burdwan in L. A. Ref. Case 12 of 1892 on 12th May 1893 in which the appellants' predecessor Mr. Coutts was allowed a share of compensation in connection with the acquisition of another part of the same property on the strength of the very same title; and it has been urged on their behalf that the decision operates as res judicata on the question of the appellants' title to the property and so of the share they claim. Ex. 14 shows that in that reference the deity as such was not a party at all and the Shebaits of the deity, that is to say Atul Chandra Thakur and his cosharers, were ranged as 2nd party debuttardars and Mr. Coutts, apparently as purchaser from Atul Chandra Thakur, was the 3rd party debutterdar. And the judgment Ex. 11 shows that the contest as between these two sets of persons was that while Mr. Coutts claimed an one-fifth share in the compensation money the cosharers-debutterdars of Atul Chandra Thakur (he himself being absent) put forward an objection that Atul Chandra Thakur had no power to alienate his share of the property by deed of sale to Mr. Coutts and hence the latter's assignee, that is to say Mrs. Steve, who by the same judgment had stepped into Mr. Coutts' shoes as such assignee, had no right to an apportionment of the compensation. The question which has to be considered in the present case, namely whether a shebait or rather an assignee from a co-sharer shebait has the right to the compensation money as against the deity does not appear to have been raised in that case; and indeed such a question, in our opinion, could not be raised or decided in that case having regard to the form in which the parties to that case were arrayed. It is quite true that the right of suit vests in the shebait and not in the deity and when all the shebaits institute a suit as shebaits the suit may be regarded as a suit in which the deity is the plaintiff. And it is also true that in that way the constitution of the reference aforesaid is distinguishable from the constitution of the suit in 54 I A 238 (3). But in the reference the shebaits raised a contest as regards their rights inter se and not a right as against the deity which is the nature of the contest in the present case. We are of opinion therefore that the judgment Ex. 11 does not operate as res judicata.

It appears that the question whether the property was a complete debuttar property of the deity or not was gone into as between the deity and the present appellants in a suit of which the judgment is Ex. A from which an appeal to this Court was taken by the appellants but was ultimately allowed by them to be dismissed. The decision was that the entire Mouzah Hirapur was a property dedicated to the deity Sree Sree Madan Gopal Jiu Thakur and not a pro-

1. Kessowji Issur v. G. I. P. Ry. Co., (1907) 31 Bom 331=34 I A 115=9 Bom L R 671 (PC).
2. Parsotim Thakur v. Lal Mohan, 1931 P C 143 =132 I C 721=58 I A 254=10 Pat 654 (PC).
3. Radha Benode Mandal v. Gopal Jiu Thakur, 1927 P C 128=101 I C 873=54 I A 238=54 Cal 770 (P C).

perty merely charged with the expenses of his sheba. As against this decision what has been shown on behalf of the appellants is, firstly that in the present case one of the other shebaits, namely one Mukunda Lal Thakur, claimed an apportionment of the compensation money as amongst themselves (vide his petition dated 29th March 1921); secondly on one occasion compensation money was allowed to be divided between Mrs. Stevo on the one hand and the shebaits on the other (vide Ex. 11) and thirdly that there is some evidence that Mrs. Stevo possessed the property by cultivating the lands and keeping cattle there and that she as well as the appellants since then have erected structures on it.

So far as the first two of the aforesaid three items of evidence are concerned they are obviously of no value. As regards the third, the learned Judge has found the evidence untrustworthy and he has disposed of the case with some general remarks to the effect that all the sale deeds, Exs. 1, 2, 3 and 4 are paper transactions and that neither Atal Thakur nor the successive transferees from them had any possession in the property. These remarks, in our judgment, are without justification. The sale deeds were bona fide documents and intended to pass title; but at the same time we are of opinion that there is nothing which would indicate that such possession as the vendees exercised was anything else than the kind of possession which the owner of a piece of land full of jungles could have or exercise on it. An argument has been addressed to us by Mr. Bose based on his reading of the decision of the Judicial Committee in 61 I. A. 35 (4). That decision as well as the decision of this Court in 27 C. L. J. 605 (5) which it purports to approve of, no doubt lay down that the shebaits are trustees as regards endowed property and that where there is a body of shebaits their interests and authority are equal and undivided and so they cannot act separately and must all join and act as a collective trustee and exercise the powers of their office in their joint capacity. Whether by this pronouncement their Lordships intended to depart from the long line of decisions in which their Lordships expressly propounded a different view as regards the true position of shebaits is a matter which we need not discuss. The argument is that the act of Atul Thakur in transferring his share was ultra vires and so the vendee from him was a trespasser, and by adverse possession on the part of the successive transferees, who were also trespassers, the right of the deity to that share was lost. The transferees purported to come in only as cosharers of the co-shebaits and their possession was not such as would enable them to acquire a title as against the latter; such possession in order to be sufficient for the purpose must amount to an ouster of the latter. And as against the deity the possession was at no point of time hostile to the title of the deity and so never adverse to the deity; the sale-deed by Atul Chandra Thakur in favour of Coutts was in respect of ancestral debutter mahal held by the vendor and his cosharers, and the successive vendors held possession under that title.

We are of opinion that the title of the deity to the share which the appellants claim is still subsisting. In the record of rights, Ex. B., the plot concerned has been recorded as in the deity's khas possession, and nothing in our opinion has been proved which can go to rebut that entry. The documents admitted in this Court as Ex. (H C) 1 relates to a part of the acquired land in this case which appears to have been sold by the Government after it had been acquired. It describes the remaining portion of the land which lay on the north, east and west of the plot sold as mukarrari land of Mrs. Stevo. The recital of the boundary is hardly any evidence and certainly evidence of no worth at all against the deity. The documents Exs. (H C) A and (H C) B are of no worth whatever. The appeal is dismissed with costs, hearing-fee five gold mohurs.

S.R. *Appeal dismissed.*

4. Baraboni Coal Co. v. Gokulnanda Thakur, 1934 P C 58=147 I C 884=61 I A 35=61 Cal 313 (P C).
5. Narendra Nath v. Atul Chandra, 1918 Cal 810 =41 I C 837=27 C L J 605.

* A. I. R. 1935 Calcutta 644

GUHA AND LODGE, JJ.

Jatindra Nath Saha — Insolvent — Appellant.

v.

Katihar Oil Mills Ltd. and *others*— Respondents.

Appeal No. 407 of 1932, Decided on 3rd July 1935, from original order of Dist. Judge, Rajshahi, D/- 25th August 1932.

*** (a) Insolvency — Appeal — Abatement— Application for discharge dismissed—Appeal —Heirs of one of deceased creditors not brought on record—Appeal abates as a whole —If receiver is on record, it does not abate.**

Where an appeal is filed by the insolvent from an order dismissing his application for discharge but he does not bring on record the heirs of one of the deceased creditors, who had not raised any objection to the discharge, the appeal abates as a whole as such heir is necessary party. But if there is a Receiver in insolvency appointed in the case the absence of heirs of one of the creditors will not render the appeal infructuous and incompetent, if the Receiver representing all the parties concerned is on record. [P 644 C 2]

(b) Provincial Insolveney Act (1920), S. 41 —Order of discharge can be made only in interest of general body of creditors—That only one of them objects to it is not material.

An order of discharge as contemplated by S. 41 could only be made in the interest of the general body of creditors of the insolvent, and the fact that one of them only raises objection to the discharge is not material for the purpose of the Courts making an order which is to affect the entire body of creditors. [P 614 C 2]

Anilendranath Roy Chowdhury — for Appellant.

Hem Chandra Dhar, *Ramesh Chandra Pal* and *Jyotish Chandra Banerji*—for Respondents.

Judgment.—This is an appeal from the decision of the learned District Judge, Rajshahi, refusing the application of an insolvent for discharge, under S. 41 Provincial Insolvency Act. The application made by the insolvent was opposed by one of the creditors, on this ground amongst others that the insolvent had not disclosed all his properties. The Judge in the Court below gave effect to this objection; and rejected the application for discharge. Hence the appeal.

At the hearing of the appeal, a preliminary objection as to the competency of the same as it now stands, was raised on behalf of the respondents, the creditors. The preliminary objection related to the position that the appeal has abated as a whole seeing that it had abated in regard to the heirs of one of the creditors respondent No. 7 in the appeal who was dead, who were not brought on the record within the time allowed by law. The creditor who died during the pendency of the appeal to this Court and whose heirs were not substituted, was undoubtedly a necessary party to the proceeding before the Court below, and a necessasy party to this appeal; the effect of non-substitution of the heirs of such a necessary party was that the appeal as a whole became infructuous and incompetent. It was contended on the side of the appellant that objection to the application for discharge as made by the insolvent was opposed by one of the creditors only, and the respondent 7, who died during the pendency of the appeal to this Court not having been a party who raised any objection to the discharge, the absence of his heirs from the category of respondents could not and did not result in the abatement of the appeal as a whole.

We are unable to give effect to this contention, on the ground that no effective order for discharge of an insolvent as contemplated by law, could be passed in the absence of any of the creditors before the Court. An order of discharge as contemplated by S. 41, Provincial Insolvency Act, could only be made in the interest of the general body of creditors of the insolvent, and the fact that one of them only raised objection to the discharge was not material for the purposes of the Courts making an order which was to affect the entire body of creditors. In the above view of the case seeing that no valid order of discharge could, in the circumstances that have happened, be made in favour of the appellant in the absence of the heirs of the creditor respondent No. 7 the appeal must fail, for the reason that it has abated as a whole. It may be mentioned that if there is a Receiver in insolvency appointed in the case, as was not the case here, the absence of heirs of one of the creditors would not have rendered the appeal infructuous and incompetent, if the Receiver representing all the parties concerned was on record.

The appeal is dismissed. There is no order as to costs in the appeal.

K.S. *Appeal dismissed.*

A. I. R. 1935 Calcutta 645

GUHA AND LODGE, JJ.

Basiruddin Sarkar—Decree-holder—Appellant.

v.

Elahi Bux Pramanik — Judgment-debtor—Respondent.

Appeal No. 310 of 1934, Decided on 18th July 1935, from appellate order of Dist. Judge, Dinajpur, D/- 15th February 1934.

Execution—Satisfaction of decree entered—Decree-holder can re-open proceedings on proper case being made out.

It is open to a decree-holder to re-open proceedings in execution of his decree, after satisfaction has been entered by an application in Court, on a proper case being made out.

[P 645 C 2]

Jatindra Nath Sanyal, *Sourindra Narayan Ghose* and *Madan Mohan Malhotra*—for Appellant.

Jitindra Mohan Banerji and *Nirmal Kumar Sen*—for Respondent.

Judgment.—This appeal has arisen out of an application purported to have been made under S. 151, Civil P. C., but was substantially one under S. 47 of the Code. The appellant in this Court secured a decree against the respondent on 23rd July 1929, for Rs. 729-8-0. The decree so obtained was put into execution on 25th September 1931, and on 16th November 1931 full satisfaction of the decree was entered on an application filed in Court. Thereafter the application giving rise to this appeal was filed by the decree-holder alleging that the petition entering satisfaction of the decree was filed in Court owing to fraud, coercion and undue influence practised by the judgment-debtor, and it was prayed that the execution proceedings started on 25th September 1931, might be allowed to be reopened. The application for reopening the proceedings, in execution was opposed by the judgment-debtor ; and the question for consideration in the case before the Court of execution were whether the application for reopening the proceedings was maintainable, and whether the petition of satisfaction of the decree was filed without any payment, by the undue influence, coercion or fraud of the judgment-debtor, as alleged in the application before the Court by the decree-holder.

So far as the first question was concerned, it has been conceded, and there can be no doubt on the authority of the decision of this Court from which we see no reason to differ, that it is open to a decree-holder to reopen proceedings in execution of his decree, after satisfaction has been entered by an application in Court, on a proper case being made out. In the case before us, we hold that the appellant was entitled to dispute the validity of the order passed on the petition of satisfaction of decree, and reopen the proceedings in execution, inasmuch as there was the allegation that the order entering satisfaction of the decree was passed on a petition which was filed in Court, owing to undue influence, coercion, and fraudulent representation of the judgment-debtor.

The question for decision next was whether there was any fraud, coercion or undue influence as alleged by the decree-holder in his application before the Court, on proof of which, the proceedings in execution, started on 29th September 1931, could be reopened. The Court of execution came to definite conclusion on evidence on this question ; but in view of the decision arrived at by the learned Subordinate Judge in the Court of appeal below, that the application for reopening the proceedings in execution was not maintainable under the law, no conclusion was arrived at by him on evidence bearing upon the question mentioned above. The case has therefore to be sent back to the Court of appeal below, for a decision on evidence already on the record of the question raised for determination by the primary Court, whether the petition of satisfaction of the decree was filed without any payment, by the undue influence, coercion or fraud of the opposite party as alleged.

It has to be mentioned that we do not agree with the view expressed by the Judge in the Court of appeal below that the appellant by his contract, namely the filing of the petition of satisfaction, was in prosecution of an illegal object that is to say, the composition of a non-compoundable offence, and was not therefore entitled to get the help of the Court for recovering the decretal amount in the present proceedings. In our judgment the appellant was entitled to get relief in the present proceedings, on his succeeding in establishing fraud, coercion

and undue influence, as alleged, in his petition before the Court of execution, giving rise to this appeal.

In the result the appeal is allowed. The order of the Court of appeal below is set aside, and the case is remanded to that Court for a fresh decision in the light of this judgment. The costs in this case will abide the result on remand. Hearing fee in this Court is assessed at two gold mohurs.

K.S. *Appeal allowed.*

A. I. R. 1935 Calcutta 646

NASIM ALI AND HENDERSON, JJ.

Joy Gopal Singha and *others* — Plaintiffs—Appellants.

v.

Probodh Chandra Bhattacharjee and *others*—Respondents.

Appeal No. 2145 of 1932, Decided on 9th July 1935, from appellate decree of Sub-Judge, Burdwan, D/- 18th July 1932.

(a) Cosharer — Third person in possession with express sanction of one cosharer—Other cosharers cannot eject him from whole land.

If two persons are joint owners and a third person holds the land with the express sanction and acquiescence of one of the cosharers, he cannot be ejected from the whole of the land by the other cosharer. The latter can get a joint possession to the extent of his share : 20 *W R* 126 and 7 *Cal* 414, *Rel on.* [P 646 C 2]

(b) Ejectment — Suit for —Plaintiff must succeed on strength of his own title.

In an action for ejectment, the plaintiff must succeed on the strength of his own title and not on the absence of any title in the defendants. [P 647 C 1]

(c) Possession — Person dispossessed not filing suit under S. 9, Specific Relief Act — He can succeed only on strength of his title.

If a person has entered into possession lawfully and peaceably and if his possession is attempted to be disturbed by a person who has no title, he can maintain his possession by an injunction from the Court. If however he is dispossessed and does not sue for possession under S. 9, Specific Relief Act, he can only succeed on the strength of his own title : 12 *All* 51 *(P C)*, *Expl.* [P 647 C 2]

Bijan Kumar Mukherjee and *Byomkesh Basu*—for Appellants.

Atul Chandra Gupta and *Khitindra Kumar Mitter*—for Respondents.

Nasim Ali, J.—This appeal arises out of an action in ejectment. The plaintiffs' case shortly stated is as follows : One Girish Chandra Roy was the owner of the disputed land. He mortgaged it and in execution of a decree obtained on that mortgage it was purchased by one Nritya Gopal Singha in the name of Khagendra Ghosh on 14th March 1906. The plaintiffs as heirs of Nritya Gopal were in possession of the disputed land till they were dispossessed by defendants 1 and 2 in Aswin 1335 B. S. The suit was contested by defendants 1 and 2. They denied the title of Girish to the land in suit and pleaded that the property really belonged to one Ramkalpa, the grandfather of defendant 1. The trial Court came to the conclusion that defendants 1 and 2 were trespassers on the land and that Girish had 12 annas share in the land. It accordingly declared the plaintiffs' title to the extent of 12 annas to the disputed land and gave the plaintiff a decree for possession of that share. On appeal by the defendants to the lower appellate Court the learned Judge has affirmed the finding of the trial Court that the defendants are trespassers. The learned Judge however has found that Girish had only one-fourth share in the disputed land and consequently the plaintiffs were not entitled to get a decree for more than one-fourth share in the disputed land. Hence the present appeal by the plaintiffs.

Mr. Gupta appearing on behalf of the appellants has raised two points in support of the appeal. His first contention is that the plaintiffs having been found to be cosharer of the disputed land to the extent of four annas share and the defendants having been found to be trespassers, the plaintiffs were entitled to eject the defendants from the whole of the disputed land. If two persons are joint owners and a third person holds the land with the express sanction and acquiescence of one of the cosharers, he cannot be ejected from the whole of the land by the other cosharer. The latter can get a joint possession to the extent of his share : see 20 W R 126 (1), 7 Cal 414 (2), Mitter, J., in 49 C L J. 83 (3), relying on the opinion of Baron Parke and Baron Alderson in 20 L J Ex 301 (4) has held that a cosharer can

1. Hulodhar Sein v. Gooroo Das Roy, (1873) 20 W R 126.
2. Radha Proshad Wasti v. Esuf, (1881) 7 Cal 414=9 C L R 76.
3. Naresh Chandra v. Haydar Sheikh, 1929 Cal 28=115 I C 180=49 C L J 83.
4. Deo d. Hellyer v. King, (1851) 20 L J Ex 301 =6 Ex 791.

only recover joint possession as against a trespasser to the extent of his share in the joint property. In 20 L J Ex 301 (4) Plat B. however observed that a cosharer was entitled to recover possession of the whole. In affirming the decision of Mitter, J., in L. P. 104 of 1928, Rankin, C. J., observed as follows :

A theoretical and highly important question is raised as to whether or not one cosharer can maintain a case of trespass in the absence of other cosharers against the trespasser so as to get an order of eviction as distinct from an order of joint possession with the trespasser. That is a matter which has long been considered in this Court. The position as regards the execution of such an order and the position as regards the theory of the matter have in practice been in this Court dealt with by giving a decree for joint possession together with the trespasser and leaving it to the plaintiff to work out his further rights by a suit for partition. I do not think that there is anything unusual in the form of the decree.

In view of the finding of the lower appellate Court that the plaintiffs have succeeded only in establishing his title to the one-fourth share of the disputed land, they are only entitled to recover joint possession to the extent of four annas share with defendants 1 and 2. If the plaintiffs be given a decree for possession of 12 annas share on the ground that he is a cosharer to the extent of four annas share, this will entitle him to get mesne profits to the extent of 12 annas share which under the law he is not entitled to claim. In an action for ejectment the plaintiff must succeed on the strength of his own title and not on the absence of any title in the defendants. In 57 Cal 170 (5), C. C. Ghose, J., had held that a cosharer by himself can maintain an action of trespass against a wrong-doer. But from this it does not necessarily follow that he can get a decree for possession of the whole property. In fact as has been stated above the practice in this Court had been all along to give the cosharer a decree for joint possession with the trespasser leaving the plaintiff to work out his further rights by a separate suit for partition. This contention of the appellants therefore fails.

The second point urged by the learned advocate for the appellants is that even if the appellants have not succeeded in proving their title to the whole of the 12 annas share, they are entitled to eject the trespasser from that share on the strength of their previous possession. It is argued by the learned advocate on the authority reported in 16 I A 186 (6) that if a person obtains possession lawfully, peaceably, without force or fraud and no one interested in the land opposes him, he is entitled to maintain his possession against all persons except those who can plead a preferable title. I am unable to accept this contention for two reasons. In the first place it has not been found by the lower appellate Court that the appellants were in possession of the 12 annas share of the land before they were dispossessed by the defendants. In the second place 16 I A 186 (6) is not an authority for the proposition that where a person brings a suit for ejecting a trespasser and is not defending his possession, he can eject the trespasser from the whole of the land. If a person has entered into possession lawfully and peaceably and if his possession is attempted to be disturbed by a person who has no title, he can maintain his possession by an injunction from the Court. If however he is dispossessed and does not sue for possession under S 9, Specific Relief Act, he can only succeed on the strength of his own title. Therefore it is clear that the plaintiffs in the present case having failed to prove their exclusive possession of 12 annas share before the dispossession by the defendants and the plaintiffs' title to the extent of four annas share only having been found, the lower appellate Court was right in passing a decree for joint possession in favour of the plaintiffs to the extent of four annas share only. The result therefore is that this appeal is dismissed with costs.

Henderson, J.—I agree and only desire to say this, that in dealing with the appellants' contention, that they are entitled to succeed on account of their previous possession, though they have not established their title, the learned Judge found that this plea must be overruled in accordance with the accepted view of this Court. I am of opinion that the learned Judge correctly estimated the position with regard to the law in this Court and it is not necessary to say any more. In the second place,

5. Currimbhoy & Co. Ltd. v. L. A. Greet, 1930 Cal 113=123 I C 250=57 Cal 170.

6. Mt. Sundar v. Mt. Parbati, (1890) 12 All 51=16 I A 186 (PC).

the previous possession of the plaintiffs was merely that of cosharers and it is quite meaningless to say that they were in possession of a share greater than that to which they were entitled.

K.S. *Appeal dismissed.*

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* A. I. R. 1935 Calcutta 648

R. C. MITTER, J.

Annada Charan Misra and *others*—Defendants—Appellants.

v.

Jhatu Charan Roy and *others*—Respondents.

Appeal No. 1959 of 1932, Decided on 5th July 1935, against decree of Sub-Judge, 3rd Court, Midnapur, D/- 21st May 1932.

(a) Limitation Act (1908), S. 20 — Part payment by one of joint debtors—Mere presence of other debtors at place of payment is not sufficient.

Where a part payment by one of the joint debtors is made, the mere presence of the other debtors at the place of payment will not save limitation, unless it is proved that they also made the payment or that the person who actually paid it did so being authorised by the others. [P 649 C 1]

(b) Hindu Law—Joint family—Payment by manager saves limitation of whole debt.

A payment by a managing member of a joint Hindu family saves limitation of the whole debt. [P 649 C 2]

(c) Practice—Finding based on no evidence is not binding on appellate Court.

A finding based on no evidence is not binding on the appellate Court and must be set aside. [P 649 C 2]

*** (d) Mortgage — Death of mortgagor—Payment by one of his heirs within limitation does not save limitation as against others but is operative only as against him.**

Where subsequent to the death of the mortgagor, one of his heirs makes a payment within the period of limitation, such payment does not save limitation as against all heirs but only as against the person who makes the payment : 37 *Cal* 461, *Not Foll* ; 1922 *All* 37, *Foll* ; 32 *Cal* 1077 and 33 *Cal* 1278, *Dist.* [P 650 C 2]

Rama Prosad Mukhopadhya — for Appellants.

Prakash Ch. Bhose—for Respondents.

Ramendra Chandra Roy—for Deputy Registrar.

Judgment.—This appeal is on behalf of defendants 4 to 9 and is directed against a mortgage decree passed by the learned Subordinate Judge, 3rd Court, Midnapur. The suit was instituted by the plaintiff on a mortgage bond executed in favour of his predecessor-in-interest by one Hari Manna on 7th April 1914. Hari is the father of defendants 1 and 2 and grandfather of defendant 3 Hari took from the plaintiff's predecessor-in-interest on that date a loan of 40 maunds of paddy and promised the repayment thereof with interest at the rate of 11 seers per maund with annual rests within one year. He secured the repayment of the paddy lent to him by mortgage of his properties. On the death of Hari his properties were inherited by his heirs, namely his sons defendants 1 and 2 and his grandson defendant 3. Defendants 4 to 9 are the subsequent mortgagees from defendants 1 to 3 and the suit being a suit to enforce the mortgage they have been impleaded on that footing.

The suit was instituted on 15th January 1930 admittedly beyond 12 years of the date of the period limited in the mortgage bond for repayment and under the rules of pleading the plaintiff was required to state how limitation was saved. For the purposes of saving limitation he pleaded that on 21st January 1916 Hari delivered to him 11 maunds of paddy and the fact of the said delivery was shown by an endorsement made on the back of the mortgage bond by Hari's son, defendant 1. This part payment does not save limitation because it is beyond 12 years of the date fixed for repayment. The plaintiff further pleaded that in February 1923 six maunds of paddy were delivered by defendant 1, Hari having died in the meantime. Defendant 1 made the delivery and endorsed the repayment on the back of the mortgage bond purporting to act both on behalf of himself and on behalf of defendants 2 and 3. He further alleged that there was delivery of eight maunds of paddy in February 1926 by way of interest by defendant 1 purporting to act on behalf of himself and on behalf of defendants 2 and 3 and he had made endorsement on the back of the mortgage bond on behalf of himself and as agent on behalf of defendants 2 and 3. The Court of first instance held that defendants 2 and 3 were not present at the time of the delivery by defendant 1 of six maunds of paddy in February 1923 nor at the date of delivery of eight maunds of paddy by defendant 1 in February 1926. It also held that there was nothing to prove that defendant 1 made the delivery of

paddy on these two occasions as an authorised agent of defendants 2 and 3. In this view of the matter the suit was decreed in part by the learned Munsiff against defendant 1 to the extent of one-third share of the claim and against the mortgaged properties to that extent as against defendants 4 to 9. It further directed that in default of payment within the period of grace one-third share of the mortgage properties which admittedly belong to defendant 1 was to be sold. The suit was dismissed by the learned Munsiff as against defendants 2 and 3 on account of limitation. The plaintiff appealed to the learned Subordinate Judge. The learned Subordinate Judge first of all took up the question as to whether defendants 2 and 3 were present at the time when defendant 1 delivered the paddy to the plaintiff in February 1923 and February 1926.

The evidence with regard to that in his opinion was conflicting but when he says that it would be probable in the course of events that defendant 2 and 3 would also be present at the time of delivery. It is doubtful whether these observations were made on the evidence or were surmises on the part of the Subordinate Judge. But assuming that he means to find on evidence that defendants 2 and 3 were present at the time when paddy was delivered to the plaintiff in February 1923 and February 1926 that would not save limitation unless it could be proved that defendants 2 and 3 also made the delivery or defendant 1 made the delivery being authorized by defendants 2 and 3. The mere presence of defendants 2 and 3 at the place of delivery would not necessarily bring the case within S. 20, Lim. Act.

The learned Subordinate Judge does not decide the case on the said fact that defendants 2 and 3 were also present, for in the next paragraph the real reason is given by the learned Subordinate Judge on which he bases his decision that the suit is not barred by limitation even against defendants 2 and 3. The reason which he gives there is that defendant 1 is the eldest brother and the manager of the joint family and he says that a payment by defendant 1 under those circumstances could be a payment which would keep alive the mortgage against other members of the family, namely, his brother defendant 2 and his nephew defendant 3. If there had been any evidence on record to show that defendant 1 was a manager of the joint family nothing could be said by the appellants on the point of limitation. It is undoubtedly the law that a payment by a managing member of a joint Hindu family saves limitation of the whole debt. A specific ground has been taken in this Court that there is no evidence on the record that defendant 1 was at the material point of time, or ever, the manager of a Hindu joint family consisting of himself, his brother defendant 2 and his nephew defendant 3 and Mr. Mukherjee who appears on behalf of the appellants has pressed that ground with great force. The evidence was placed before me by both parties but the learned advocate for the respondents could not point out any evidence to the effect that defendant 1 was at the material point of time, or ever, the manager of the joint family. This being the state of the record the finding of the learned Subordinate Judge that defendant 1 was the manager of the joint family is a finding based on no evidence and is not binding on me and must be set aside. Therefore the basis on which the learned Subordinate Judge held that the suit was in time even against defendants 2 and 3 having been kept alive by the aforesaid two payments in February 1923 and February 1926 disappears.

Mr. Bose on behalf of the respondents has sought to support the decree made by the learned Subordinate Judge on another ground. He says that the loan was incurred by the ancestor of defendants 1 to 3 who had executed the mortgage. On the death of Hari-Manna, the ancestor, the liability for repayment devolved upon his sons and grandsons. He says that they in a body, so to say, represented the equity of redemption and a payment within the period of limitation, says he, by any of those persons, would save limitation as against all. In support of this proposition he has relied upon the decision in 14 C. W. N. 741 (1). The observations on which he relied upon are to be found at p. 746 and they certainly support Mr. Bose's argument. But an examination of the facts of this case would indicate that

1. Sarada Ch. Chakravarty v. Durga Ram De Singha, (1910) 37 Cal 461=5 I C 484=14 C W N 741.

those observations were really obiter inasmuch as the learned Judges found that defendant 1, one of the heirs of the original mortgagor, and who had made the payment, was not only the guardian of some of the other defendants but also the manager of the joint Hindu family. The decision really proceeded on the ground that a payment made by a manager of a joint Hindu family would save limitation as against all the other members who are liable to pay the debt. After having based their decision on the said facts the learned Judges in that case made these observations:

The third contention therefore on behalf of the defendants-appellants must fail. But the learned vakil for the plaintiff-respondent has called our attention to the case reported in 32 Cal. 1077 (2) followed in 33 Cal. 1278 (3) and he has argued that the mortgage debt incurred by the father of the defendants was binding on the family any member of which could acknowledge the obligation or make a payment on behalf of all. We are disposed to accept this argument in support of the judgment of the lower appellate Court. The entire equity of redemption descended to the sons of the mortgagor; they were jointly liab'e for the debt not as co mortgagors but as representing the sole mortgagor, their father. There is nothing in S. 20, Lim. Act, to warrant the belief that the extended period of limitation is intended to operate only against the person making the payment.

Now, the two cases mentioned in this part of the judgement, which I have quoted, namely the case of 32 Cal. 1077 (2) and 33 Cal. 1278 (3) are really of a different nature and do not support the proposition laid down therein; for in both those cases the mortgagor himself made the payment within the period of limitation and the only question was whether the payment made by the mortgagor would keep the mortgage alive against certain other persons who had acquired a portion of the equity of redemption from the mortgagor. Sir Francis Maclean in both these cases relied upon the terms of S. 20, Lim. Act, which contemplates a payment by the debtor. The mortgagor was the debtor within the meaning of the Limitation Act. He was liable for the whole amount of the money borrowed.

Mr. Mukherjee has cited the decision of the Allahabad High Court in 44 All. 360 (4). There the mortgage had been executed by Muhammad Ali. On his death his properties were inherited by his two sons Md. Hasan and Md. Zahur and four daughters as his heirs and the mortgage suit was instituted against all of them. One of the sons Md. Hasan had made an acknowledgment of the debt. The question was whether this acknowledgment kept alive the mortgage as against the other heirs also of Muhammad Ali. Rafiq and Lindsay, JJ., held that the acknowledgment was only operative as against Md Hasan but did not save the suit from limitation as against the other heirs of Md. Ali. I do follow this decision of the Allahabad High Court in preference to the obiter contained in the judgment of this Court in 14 C. W. N. 741 (1).

I hold accordingly that the plaintiff's suit is in time so far as defendant 1 is concerned, but it is out of time so far as defendants 2 and 3 are concerned. The suit is accordingly dismissed against defendants 2 and 3. If any one of the defendants 1 and 4 to 9 repay the money found due within one month from this date the mortgaged properties would not be brought up to sale; but in default of payment within the said time the share of defendant 1 alone in the mortgaged property will be put up to sale after the passing of the usual final decree. It is understood clearly that defendants 1 and 4 to 9 are under no personal liability to repay the sum which has been decreed against them. The appeal is accordingly allowed in part with costs of this Court as also of the lower Courts to defendants 4 to 9. Let a self contained preliminary decree be drawn up.

K.S. *Appeal partly allowed.*

2. Krishna Chandra Saha v. Bhairab Chandra Saha, (1905) 32 Cal 1077=9 C W N 868.
3. Domi Lal Sahu v. Roshan Dobay, (1906) 33 Cal 1278=11 C W N 107.
4. Collector of Jaunpur v. Jamna Prasad, 1922 All 37=66 I C 171=44 All 360.

A. I. R. 1935 Calcutta 650

NASIM ALI AND HENDERSON, JJ.

Ratan Chand Jahwirlal and *another*—Objecting-Creditors—Appellants.

v.

Pramatha Nath Guha and *others*—Respondents.

Appeal No. 69 of 1934, Decided on 20th June 1935, from original order of Dist. Judge, Mymensingh, D/- 22nd January 1934.

(a) Provincial Insolvency Act (1920), S. 54—Fraudulent preference — Debtor giving of his own motion, without pressure, security to creditor on eve of insolvency is fraudulent preference—Debtor mortgaging portion

of assets to one of the creditors to relieve himself from pressure of such creditor and to enable him to continue to carry on business—Held not fraudulent preference.

A debtor must not of his own mere motion without pressure or application give a security to a creditor on the eve of bankruptcy, and if he does, that is a fraudulent preference; but if there be any pressure or negotiation for a security on the part of the creditor, then the fact that the creditor knows the debtor to be in embarrassed circumstances is no objection to the validity of the security: *Smith* v. *Pilgrip*, (1876) 2 *Ch D* 127, *Foll.*; 1928 *P C* 77, *Appr.* [P 653 C 2]

Where the debtor mortgaged a portion of his assets which was not a substantial portion to one of his creditors and his object was to relieve himself from the pressure of such creditor so as to enable him to continue to carry on his business and it was found that he had not sold the good-will of the firm or shops or buildings:

Held: that there was no fraudulent preference. [P 654 C 1]

(b) Provincial Insolvency Act (1920), Ss. 53 and 54—Receiver challenging transfer by debtor and not allowing transferee to adduce evidence as to the fairness of the price but confining his case to one of fraudulent preference and not pressing case under S. 53—He should not be allowed to adduce fresh evidence in appeal as to inadequacy of price.

Where in challenging a transfer by the debtor the receiver does not press his case under S. 53 and does not allow the transferee to adduce evidence as to the fairness of the price but confines his case to one of fraudulent preference under S. 54, he should not be allowed in appeal to adduce fresh evidence as to inadequacy of price. [P 654 C 2]

(c) Provincial Insolvency Act (1920), S. 53 Onus of proving want of good faith is on receiver.

Where the receiver challenges a transfer by the debtor under S. 53, the onus is upon him to prove the want of good faith. [P 654 C 2]

H. D. Bose and *Shyama Prosanna Deb* —for Appellants.

A. K. Roy, *Rajendra Chandra Guha*, *Mahendra Kumar Ghose*, *Sudhish Chandra Roy* and *Prem Rajan Roy Chowdhury* —for Respondents.

Nasim Ali, J.—This appeal arises out of a proceeding under the Provincial Insolvency Act. Takatmull Nahata and Prithiraj Nahata, who were carrying on business under the name and style of Firm Multanchand Chauthumull of Calcutta, (respondents 2 and 3, hereinafter called Nahatas) used to advance goods on credit to Akshoy Chand, Prithiraj Begwami (respondents 4 and 5, hereinafter called Begwanis) who had been carrying on business from a long time as general merchants under the name and style of firm Akhoy Chand Prithwiraj Begwani at Sherpur and Jhinaigati in the District of Mymensingh. By the end of 1985 Sambat, corresponding to March or April 1928 the dues of the Begwanis to the Nahatas having exceeded Rs. 21,000 the latter refused to supply goods to the Begwanis on credit until their dues were paid off. The Begwanis were unable to pay off the debt of the Nahatas with the result that the dealings of the Nahatas with the Begwanis came to an end by the end of 1985 Sambat. The Begwanis then approached the appellants (hereinafter called Suranas) who agreed to advance goods on credit. The Begwanis however did not then disclose to the Suranas their indebtedness to the Nahatas. During the years 1986 and 1987 Sambat the Begwanis carried on business with the Suranas. They made certain payments to the Nahatas from time to time during these years. At the end of 1987, that is, the middle of April 1931, the Begwanis became indebted to the Suranas to the extent of Rs. 18,000, and the debt due to the Nahatas was reduced to Rs. 16,000 by payments made in 1986 and 1987 Sambat. At that time the Suranas came to know for the first time that the Begwanis were heavily indebted to the Nahatas. Certain letters were written to the Begwanis by the appellants' officer Poune Chand Sethia who brought about the dealings of the appellants with the Begwanis. On 19th May 1931, the Begwanis executed a simple mortgage bond in respect of the buildings and land of their firm in the district of Mymensingh in favour of one of the Suranas for a consideration of Rs. 2,000 and sold to the Suranas their stock-in-trade in their shops and the outstanding debts due to them for Rs. 4,000. The goodwill of the firm however was not sold. On 4th June 1931 the Nahatas filed a suit against the Begwanis in the Bikanir High Court for recovery of Rs. 16,667 odd and obtained an order for attachment before judgment of all the immovable properties of the Begwanis in Bikaner State and also a mortgage bond in favour of one of the Begwanis. This suit was decreed on confession on 21st July 1931.

The Begwanis on the next day, that is, on 22nd July 1931, assigned the attached mortgage bond in favour of the Nahatas. In the meantime, on 6th June 1931, Poune Chand Sethi removed the

goods purchased by the Suranas from the mortgaged premises to another shop. A criminal case was thereupon started against him at the instance of the Begwanis under S. 390, I. P. C. On 26th June 1931, the Suranas instituted a suit in Sujanagar Court within the Bikanir State against the Begwanis and attached before judgment the immovable properties of the Begwanis which were already attached by the Bikanir High Court. On 28th June 1931 Akhoy Chand Begwani was arrested before judgment at the instance of the Suranas. He was however released on security on 1st July 1931. On 8th August 1931 the Nahatas applied to the District Judge of Mymensingh for adjudging the Begwanis insolvents under the provisions of the Provincial Insolvency Act. On 26th September 1931 the adjudication order was made and respondent 1 was appointed receiver. On 2nd January 1932 the Suranas applied for annulment of the order of adjudication. That application however was rejected on 25th January 1932. The schedules of creditors in which the names of the Nahatas and Suranas only were entered was prepared on 17th March 1933. On 28th March 1933 the receiver applied to the learned Judge to annul the transfers in favour of the Suranas. The latter filed their objection to the said petition on 11th May 1933. On the same day the Suranas filed an application before the Judge for expunging the debt of the Nahatas from the schedule. The Nahatas filed their objection to the same on 29th May 1933. On 2nd June 1933 the receiver filed another application before the learned Judge for annulling the assignment of the mortgage bond in favour of the Nahatas and for certain other reliefs. The learned Judge heard all these applications together and by his order dated 22nd January 1934 the transfers in favour of the Suranas were annulled under S. 54 of the Act and the debt of the Nahatas was reduced to Rs. 500. He however did not pass any definite order so far as the application of the receiver against the Nahatas is concerned. Hence the present appeal by the Suranas. The Nahatas have also filed a cross-objection.

I shall deal with the application of the Suranas for expunging the debt of the Nahatas from the schedule under S. 50 of the Act. The case of the Suranas is that the claim of the Nahatas was fully satisfied on 22nd July 1931 by the assignment of a mortgage bond and by payment of Rs. 4,000 in cash and gold to them by the insolvents in pursuance of an arrangement. (His Lordship then examined the evidence on this point and held that the appellants had failed to prove that the claim was fully satisfied and proceeded). Now I will come to the application of the receiver for annulling the transfers in favour of the Suranas. It appears that the receiver submitted a report to the learned Judge on 23rd December 1932 in which he stated that these transfers were benami transactions. The learned Judge however on 8th March 1933 directed him to apply under Ss. 53 and 54, Provl. Inso. Act, for annulling these transfers. On 28th March 1933 the receiver, as has been already stated, applied to the learned Judge to annul these transfers under Ss. 53 and 54 of the said Act. The objections to the said petition were filed by the Suranas on 11th May 1933. On 29th June 1933 the receiver wanted to amend his application by inserting another ground of attack, namely that the transactions were benami transactions. This amendment was allowed by the Court. Additional written statement was filed by the Suranas on 8th July 1933 and two additional issues were framed on that day. The new ground of attack however was not pressed by the receiver before the learned Judge. though the insolvents whom he examined as witnesses stated that the transfers were mere benami transactions. It was also not pressed before us by the learned Counsel for the receiver.

As regards the receiver's prayer to annul the transfers under Ss. 53 and 54 of the Act the matter stands thus : The allegations of the receiver in connexion with his case under S. 53 are contained in the second paragraph of his petition. His case apparently is that the Suranas were not purchasers as in good faith as they purchased the stock-in-trade and other assets of the insolvents' business for Rs. 4,000 although the real value of the goods sold was about Rs. 20,000. The Suranas denied these allegations in their petition of objection. When the matter came up for hearing before the learned Judge the Suranas wanted to adduce evidence about the value of the goods

purchased by them, but the learned Counsel appearing on the other side objected to the taking of any evidence on the question of valuation on the ground that it was immaterial. The learned Judge therefore did not allow the Suranas to give any evidence about the valuation. The receiver also did not give any evidence on this point. It further appears from the judgment of the learned Judge that Dr. Sudhish Ch. Roy, who admittedly appeared before the learned Judge for the receiver as well as the Nahatas, and who also appeared before us on behalf of the receiver, argued the case before the learned Judge on the footing that the transactions were only fraudulent preferences within the meaning of S. 54 of the Act. Under these circumstances the learned Judge proceeded to consider whether the transactions in question were fraudulent preferences within the meaning of S. 54, Provincial Insolvency Act, which is in these terms :

Section 54.—(1) Every transfer of property, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor, with a view to giving that creditor a preference over the other creditors, shall, if such person is adjudged insolvent on a petition presented within three months after the date thereof, be deemed fraudulent and void as against the receiver and shall be annulled by the Court ; (2) this section shall not affect the rights of any person who in good faith and for valuable consideration has acquired a title through or under a creditor of the insolvent.

It is admitted in this case that there had been preference in fact of the Suranas over the Nahatas by these transfers. It is also admitted that at the time of the transfers, the insolvents were unable to pay their debts in cash and the transfers were effected within three months from the date of the presentation of the insolvency petition. The dispute between the parties is about the view or object which led the insolvents to make these transfers. Now, in the case of 47 C L J 339 (1), their Lordships of the Judicial Committee observed as follows :

The question to be determined is one of fact. Was the dominant motive actuating the debtor in making the transfer a desire to prefer the particular creditor or was it of a different character ? As the solution of this question involves an inquiry into the state of a man's mind, and as it must very seldom be the case that there is direct evidence on the point, the decision generally depends on the inference properly to be drawn from the circumstances attending the transfer as established by the evidence. A word or two must be said on the onus of proof. In their Lordships' opinion, the onus is on the assignee; he has to show that the case is within the statute. A good deal was said in argument as to the shifting of the onus at particular points in the development of the case, but when all the circumstances have been ascertained so far as the parties have thought fit to ascertain them, discussion on this point becomes immaterial and the decision must be come to on the whole of the circumstances so ascertained, and the question of onus only becomes important if the circumstances are so ambiguous that a satisfactory conclusion is impossible without resort to it.

In (1876) 2 Ch. D. 127 (2) it was observed :

A debtor must not of his own mere motion, without pressure or application, give a security to a creditor on the eve of bankruptcy, and if he does, that is a fraudulent preference. But if there be any pressure or negotiation for a security on the part of the creditor, then the fact that the creditor knows the debtor to be in embarrassed circumstances is no objection to the validity of the security.

In this case the receiver examined the insolvents to prove what was their intention in effecting these transfers. (After examining the evidence of Akshoy Ch. Begwani, his Lordship proceeded.) The learned Judge has observed that the evidence in this case does not show satisfactorily that at that time the insolvents expected any immediate danger from the Nahatas. The real danger to their business at the time came from the Suranas who were threatening them to sue unless some arrangement was made for their money. The arrangement agreed upon at first was that all the properties of the insolvents would be transferred to the Suranas and that they would continue to advance goods to them as before, provided the business was carried on under a new name. The insolvents however did not agree to transfer the Bikanir properties and to change the name of their firm. They thought that if all the properties were transferred to the Suranas and the business were not carried on under the old name, the Nahatas would start proceedings against them as soon as they would come to know of the transfers as well as the change in the name of the firm and would bring about the ruin of the firm. Under these circumstances

1. Sime, Darby & Co. Ltd. v. Official Assignee of the Estate of Lee Pang Sing, 1928 P C 77=107 I C 233=47 C L J 339 (PC).

2. Smith v. Pilgrip, (1876) 2 Ch D 127=34 L T 408.

they thought that the best course was to transfer a portion of their property in favour of the Suranas to induce them to stay their hand for the time being. They therefore executed a mortgage of their immovable properties in Bengal and did not sell them outright. They did not sell their Bikanir properties. They did not sell the goodwill of the business. The evident object was to relieve themselves from the pressure of the Suranas to carry on their business as before under the old name and to pay the creditors gradually. The very fact that they transferred only a portion of the properties which has not been shown to be a substantial portion of their assets would go to show that they were not actuated by any feeling of bounty towards the Suranas. They simply did what their self-interest dictated them to do, namely to make the best possible arrangement under the circumstances for saving their business.

The learned Advocate-General placed much reliance upon certain passages in the evidence of Poune Chand to show that immediately before the transfers in question the Suranas refused to advance goods on credit to the insolvents and consequently the insolvents knew that they could not continue their business and their dominant motive therefore could not have been as suggested by the Suranas. But the fact remains that the insolvents did not transfer the goodwill of their firm. They did not sell the shop buildings. They still entertained the hope of continuing the business even if the Suranas were unwilling to advance any further goods to them on credit for the time being. It may be that they were hoping against hope. Poune Chand in his evidence stated as follows :

> On the day of execution of the two documents Akshoy Chand said that he would not start a new firm; that he would sell the Bikanir properties and so settle the claims of both Suranas and Nahatas; that the firm Akhoy Chand Prithwiraj Begwani would continue to do business.

If the Suranas immediately before these transfers refused to advance goods that would not help to create a desire in the insolvents to prefer them. The refusal of the Suranas to advanc goods immediately before the transfers naturally caused disappointment to them and could not therefore lead them to entertain feelings of bounty towards the Suranas. The insolvents stated that their main object was the saving of their business. The receiver failed to prove any circumstances which would go to show that the motive was something else. The evidence given by the Suranas also does not establish that the dominant motive was a desire to prefer them. The facts and circumstance of this case indicate that in making these transfers the insolvents were not actuated by any desire to prefer the Suranas

The learned Counsel appearing for the receiver as well as the Advocate General appearing for the Nahatas pressed for a remand for a finding of the learned Judge on the question whether these transfers were hit by S. 53, Provincial Insolvency Act. I have already indicated that they did not press their cases under S. 53 before the learned Judge and they did not allow the Suranas to adduce any evidence on this question. Under these circumstances it would not be fair to allow the receiver to adduce fresh evidence in this case in support of the allegation that the properties were sold at a very inadequate price which certainly would be good evidence to show want of good faith on the part of the Suranas. The learned Advocate-General also attempted to show from the materials on the record that the Suranas were not transferees in good faith. There is no reliable evidence on the record from which it can be said that the goods were sold at a very inadequate price. From the petition of the Receiver it is clear that the receiver relied on this ground for the purpose of showing that the Suranas were not transferees in good faith. No other fact was alleged in the petition in support of the receiver's claim for annulment of the transfers under S. 53. There is nothing also on the record to show that by the transfers in question a substantial portion of the assets of the insolvents became unavailable to the Nahatas.

The mere fact that they secured a mortgage of a portion of the insolvent's property and a sale of certain goods and certain outstanding debts for satisfaction of their just dues would not go to show that they were not transferees in good faith. It is not disputed and it cannot be disputed that the onus is upon the receiver to prove the want of

good faith. The receiver as I have already stated did not adduce any evidence in support of his case. The evidence adduced by the Suranas indicates that though originally they wanted a transfer of all the properties of the Suranas, ultimately they agreed to be satisfied with the transfers under discussion. The Suranas evidently agreed to that arrangement simply to enable the insolvents to carry on their business and, if possible, to pay off their debts gradually. It may be that the insolvents were hoping against hope but that does not necessarily go to show want of good faith on the part of the Suranas. They were quite willing to accommodate the insolvents for the time being and not to ruin their business provided some security was given for their debt. In these circumstances I am not prepared to hold that the receiver in the present case has succeeded in establishing want of good faith on the part of the Suranas.

The application of the receiver for annulling the transfers in favour of the Nahatas and for reduction of their debt now remains to be considered. It appears however that this application was not abandoned by the receiver before the learned Judge. The learned counsel appearing for the receiver stated that the receiver did not abandon this petition and that he wanted to press it. The learned Judge however did not consider this application at all, as he was of opinion that the claim of the Nahatas was fully satisfied by the assignment and the payments which were alleged to have been made by the insolvents to the Nahatas. The result therefore is that the application of the receiver remains undisposed of. Under these circumstances the only course left is to direct the learned Judge to dispose of the application according to law.

The result therefore is that both the appeal and the cross-objections are allowed in part. The application of the receiver for annulling the transfers in favour of the Suranas is dismissed. The application of the Suranas for expunging the debt of the Nahatas is also dismissed and the learned Judge is directed to hear the application of the receiver filed on 22nd June 1933 according to law. Parties will bear their costs throughout. The Nahatas, however, will recover from the Suranas half of the costs of the interpreter which have been paid by them in the trial Court.

Henderson, J.—I agree that both the appeal and the cross-objection must be allowed. The third application which was one by the receiver against the Nahatas has not been disposed of with the result that none of the parties interested are in a position to appeal. In those circumstances the only reasonable course open to us is to direct the learned Judge to dispose of it according to law. The subject-matter of the cross objection is the application filed by the Suranas against the Nahatas in which they contended that nothing is due from the insolvents to the Nahatas and that the name of the Nahatas should be removed from the schedule of creditors. The learned Judge decided this application in favour of the Suranas with the result that he came to the conclusion that the entire claim of the Nahatas had been satisfied on adjustment before the petition for insolvency was filed; further inasmuch as the adjudication order was made on a petition filed by the Nahatas, he held that by res judicata a debt of Rs. 500 must have been due when the petition was filed. The result was that while he held that in fact nothing was due to the Nahatas, he held that by res judicata Rs. 500 was due to them. My learned brother has pointed out the difficulties of attempting to reconcile the story of full satisfaction with the conduct not only of the Nahatas but also of the insolvents themselves. When the Suranas put forward such an improbable story I should require very cogent evidence supported by witnesses whose trustworthiness could not seriously be challenged, before I could agree to accept it. Now when both the creditors and the debtors say that a claim has not been settled, it is a very strong thing for a third person, who knows nothing about it, to come and say that in fact it was settled. This is what the Suranas however attempted to do in this application and they have attempted to establish it by evidence of a most flimsy character. The story is that a claim of about Rs. 18,000 had been settled in full by the assignment of a mortgage for Rs. 3,000 by payment of Rs. 2000 in cash and by transfer of gold to the value of another Rs. 2,000. A certain amount of evidence to prove the transfer of the

gold was produced. There was practically no evidence to prove payment in cash and the assignment of the mortgage is not disputed. One witness was examined to prove the alleged adjustment.

Now the receiver took quite a different view with regard to these transactions. He never contended that the claim of the Nahatas had been settled in full. His case was that they had not given credit for a sum of Rs. 4,000 and he has asked that their claim be reduced to that extent. That question is the subject matter of the application which is still undisposed of and it would clearly be most undesirable if we were to express any opinion with regard to the evidence on the point; fortunately it is not necessary to do so. Mr. Bose argued that if we were to accept the evidence that ornaments, the value of which has not been properly ascertained, were melted down and the gold handed over to the Nahatas, we ought to draw from that the conclusion that the story of full settlement is true. I have no hesitation in rejecting such an argument. If evidence of a part payment is to be accepted as evidence of settlement in full, it would be unnecessary to prove payment of cash or transfer of gold. It might just as well be argued that the admitted assignment of the mortgage was itself proof of the adjustment. It is obvious that in order to succeed on this application, the Suranas must do one of two things. They must either prove that the claim of the Nahatas has been paid in full or they must prove that the Nahatas agreed to accept a smaller sum in full satisfaction. They do not even pretend that the claim was paid in full and the evidence to prove adjustment is transparently worthless.

The learned Judge relied upon the evidence of the goldsmiths. That evidence was certainly important in dealing with the receiver's application; but with great respect to the learned Judge I must say that he has omitted to notice that mere evidence of a part payment cannot possibly support an inference that the claim has been fully settled. The evidence to prove this rests upon the deposition of Mohipal alone; he is a man of the Suranas and is clearly not independent. He does not even pretend that he has any personal knowledge of the making of the settlement or what the terms agreed upon were. He merely proves a statement by the insolvent Prithwiraj to the effect that the claim had been fully settled by assignment of the mortgage bond, payment of Rs. 2,000 and transfer of some gold ornaments, the value of which was not mentioned. Now it is quite clear that if this, the statement by the insolvent, was to the effect that the claim of Rs. 18,000 was settled at Rs 7,000 it would not be admissible in evidence at all. On the other hand, if it was meant to mean that the assignment of the mortgage, cash and the ornaments were of sufficient value to discharge the claim in full, it is quite inconsistent with the appellants' case.

Prithwiraj himself has given evidence that the story is entirely false and that the claim was never settled. The appellants therefore seek to establish their story of an adjustment by the statement of a man who, if Mohipal was speaking the truth, made one statement to Mohipal and an absolutely contradictory statement on oath in Court. It is quite obvious that evidence of this kind cannot be accepted as sufficient to establish the absurd story which the Suranas have asked us to believe.

My learned brother has very fully dealt with all the circumstances which have to be considered in dealing with the appeal and it will not be necessary to say very much. The question for our determination is mainly whether the learned Judge was right in annulling the transfers in favour of the appellants as a fraudulent preference. The receiver was directed to enquire into the matter and he came to the conclusion that the transfers were not transfers at all, but mere benami transaction, the properties still remaining with the transferors. On receipt of the report the learned Judge directed the receiver to file an application under Ss. 53 and 54 which he accordingly did. At a later stage he amended his petition by asking for a declaration under S. 4, in the event of it being found that the transactions were benami. At the time of the trial he produced evidence to prove that the transactions were sham transactions. He produced no evidence to prove that the transactions were liable to be annulled under Ss. 53 and 54. If the learned Judge had accepted the evidence, he would certainly

have been justified in giving the receiver a declaration to the effect that the transfers were benami, that the property was still the property of the insolvents and that he was entitled to take possession of it. But inasmuch as there was no evidence at all to support the alternative and the inconsistent application, it should have been then and there dismissed. The learned Judge held that the transactions were not benami, but that the transfers were void under S. 54. The result is that the receiver in this Court is in a very difficult position. He does not contend that the transactions were benami and he offered no evidence to support the finding of the learned Judge. All that he has been able to do is to attempt to point out here and there some passages in the evidence given by the appellants' witnesses and ask us to say that the case is really one of fraudulent preference.

For some years the insolvents carried on business in Sherpur which was financed by the Nahatas in the sense that they supplied articles on credit. As time went on, the position of the insolvents became difficult and the Nahatas pressed for payment. The result was that the insolvents ceased to carry on business with the Nahatas and instead secured goods on credit from the Suranas. They entirely suppressed the fact that they had a debt of a considerable sum due to the Nahatas. It is therefore not surprising that a crisis arose when the Suranas suddenly discovered that the debts of the Nahatas had not been paid. It is only natural that on coming to learn of this, the Suranas should insist that something must be done and this discovery was in fact the proximate cause of these transfers; thus there can be no question that the transfers were made under pressure.

I am also satisfied that the motive of the insolvents was to save their business. There is no reason why they should have preferred to pay the Suranas rather than the Nahatas and the only explanation of the transfers is that they were doing so in the interest of their business. The actual transfers were the result of somewhat protracted negotiations. Not only is there the evidence of Poune Chand, but there are also letters which were written by Poune Chand while the negotiations were actually going on. It is perfectly clear from those letters that the Suranas were not particularly anxious to supply goods on credit, but they were willing to do so provided the insolvents were unsuccessful in getting goods from anybody else; not only were they willing, but they did actually do so. It is thus clear that the Suranas were also of opinion that the best way of getting their dues was to insure that the business of the insolvents should go on, if possible.

There is only one fact which would suggest that these transactions were not genuine. It may be said that the transfer of the stock-in-trade was a peculiar method of helping a business to carry on. But while this factor might support the receiver's case that the transactions were benami it certainly would not support a case of fraudulent preference. My learned brother has dealt with this matter and I need only shortly say that the goodwill of the business and the premises were not transferred. It was undoubtedly the intention of both the Suranas and the insolvents that the business should be carried on and neither of them had the slightest idea that an insolvency petition was going to be filed. It was this action of the Nahatas and not the action of the Suranas or insolvents that brought the matters to a head. I am therefore clearly of opinion that the transfers were made by the insolvents under pressure in order to save their business and that the receiver's application ought not to have been allowed.

On behalf of the Nahatas the learned Advocate-General asked us to annul the transfers under S. 53. We are not prepared to say that such a case has been made out. The circumstances in connexion with these transfers which we have already indicated, in no way suggest that the Suranas were guilty of bad faith. The receiver's application was based upon an alleged inadequacy of price: This clearly would not affect the mortgage in the slightest degree. The Suranas wanted to produce evidence to show that they paid a fair and proper price. They were not allowed to do so and there was a petition by the other side that the price was immaterial. There can be no question that a case under S. 53 was abandoned at the trial and there is absolutely no evidence

on the record which would entitle us to annul the transfers on that ground.

K.S. *Appeals and cross objections allowed in part.*

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* A. I. R. 1935 Calcutta 658

R. C. MITTER, J.

(*Firm*) *Tarachand-Protapmal*—Plaintiff—Appellant.

v.

Tamijuddin Sheikh — Defendant — Respondent.

Appeal No. 2279 of 1932, Decided on 11th March 1935, from appellate decree of Special Sub-Judge, Assam Valley, D/- 20th June 1932.

(a) Promissory Note — Plaintiff can file suit on it or in alternative on consideration —But suit filed only on note—Note inadmissible being insufficiently stamped—He is out of Court.

Where plaintiff files a suit on a promissory note, it is open to him to put his case in an alternative form and sue for money on basis of original consideration. But if he does not base his case in the plaint on the original consideration, he is out of Court because the promissory note is inadmissible in evidence being insufficiently stamped : 1918 *P C* 146, *Rel on.* [P 658 C 2]

*** (b) Promissory Note—Promissory note insufficiently stamped—Plaintiff can succeed on basis of consideration only where right to obtain such relief is independent of promissory note.**

Where a promissory note is given which is insufficiently stamped, the plaintiff is entitled to succeed only when his right to obtain relief is independent of the promissory note, that is to say, if the plaintiff's cause of action to recover the money had become complete before the execution of the promissory note, he would be entitled to sue and succeed on the original consideration, if the promissory note is rejected by the Court : 7 *Cal* 256 ; 19 *I C* 840 ; 128 *I C* 194 and 1931 *All* 183 (*F B*), *Foll.* [P 659 C 1]

Where there was no completed and independent cause of action before the promissory note was executed and a part of the money was advanced contemporaneously with the execution of the promissory note :

Held : that the advance by the plaintiff and the execution of the promissory note by the defendant was one transaction and gave rise to only one cause of action, namely, a cause of action the basis of which was the execution of the promissory note. [P 659 C 2]

Manmatha Nath Roy (*Jr.*)—for Appellant.

Nirmal Chandra Chakrabarti — for Respondent.

Judgment.—The plaintiff whose suit for recovery of Rs. 657 odd has been dismissed by both the Courts below has preferred this appeal to this Court. In the plaint, the plaintiff laid his claim on a promissory note said to have been executed by the defendant on 7th Falgoon 1332 for the sum of Rs. 326. The promissory note is insufficiently stamped. In the plaint however the plaintiff did not base his case on a cause of action independently of the promissory note. At the time of the trial however he wanted to shift the case and without making any attempt to amend his plaint wanted to get a decree on the basis that the defendant having taken Rs. 200 in cash from him on 7th Falgoon 1332 was bound to repay the same. His case as developed in the evidence was that the sum of Rs. 200 was advanced to the defendant in the morning of 7th Falgoon 1332, the transaction was complete then and gave him a distinct cause of action, but later in the evening, a promissory note was taken as money was not returned to him during the interval between the morning and evening of the said date. This story however of the money being advanced in the morning and the promissory note being taken in the evening by reason of the non-return of the money by the defendant has been disbelieved by the Subordinate Judge.

In my judgment, there are two difficulties in the way of the plaintiff. His suit is based on the promissory note only. He did not claim to get any money on the basis of the original consideration. The plaintiff in such circumstances was no doubt entitled to put his case in an alternative form as was pointed out by the Judicial Committee in 46 I. A. 33 (1) and if he does not base his case in the plaint on the original consideration he is out of Court because the promissory note is inadmissible in evidence being insufficiently stamped. This is the first difficulty in the plaintiff's way.

There is another and an additional difficulty in his way. Assuming that it is open to him now to sue on the basis of the advance made by him to the defendant and independently of the promissory note, the findings of fact arrived at by the learned Subordinate Judge concludes the matter. It has been laid down by Sir Richard Garth in 7 Cal. 256 (2) that where a promissory note is given

1. Sadusuk Janki Das v. Kishan Pershad, 1918 P C 145=50 I C 216=46 I A 33=46 Cal 663 (P C).
2. Sheikh Akbar v. Sheikh Khan, (1881) 7 Cal 256=8 C L R 528.

which is insufficiently stamped, the plaintiff is entitled to succeed only when his right to obtain relief is independent of the promissory note, that is to say, if the plaintiff's cause of action to recover the money had become complete before the execution of the promissory note he would be entitled to sue and succeed on the original consideration if the promissory note is rejected by the Court. The same view is expressed by Mookerjee, J., in 19 I. C. 840 (3) where it is pointed out that where a promissory note is invalid for want of proper stamp, the plaintiff is not debarred from claiming upon any ground of action which he can prove without the aid of the promissory note. Later on, in the same judgment Mukherjee, J., expressed himself by saying that the plaintiff cannot enforce his claim on the original consideration where the original consideration had been merged in the promissory note which is insufficiently stamped. The same view has been expressed by Mukherjee, J., in 128 I. C. 194 (4) and the matter has been considered by a Full Bench of the Allahabad High Court in 53 All. 114 (5), where nearly all the earlier cases of this Court and of other Courts have been discussed. The Full Bench of the Allahabad High Court has laid down the law clearly and with its judgment I agree as being in consonance with the decisions of this Court. Their Lordships of the Allahabad High Court pointed out that :

It is not open to a party who has lent money on terms recorded in a promissory note, which turns out to be inadmissible in evidence for want of proper stamp duty, to recover his money by proving orally the terms of the contract, in contravention of the provisions of Section 91, Evidence Act. In cases in which there is already a completed cause of action for recovery of money on foot of a distinct and separate transaction, and a promissory note is afterwards given as a collateral security, the creditor may, if the promissory note be inadmissible in evidence, recover on the original consideration and evidence aliunde can be given to prove the same. But where a promissory note and the lending of the money are part and parcel of the same transaction and the terms of the loan are the very terms of the promissory note, the contract of loan cannot be proved from the document itself and the plaintiff's suit must fail if the document itself be inadmissible in evidence.

3. Ram Bahadur v. Dusuri Ram, (1913) 19 I C 840.
4. Abdul Rabbani v. Shyam Lal Thapa, (1929) 128 I C 194.
5. Nazir Khan v. Ram Mohan, 1931 All 183= 133 I C 307=53 All 114 (F B).

As I have noticed above, the finding of fact arrived at by the lower appellate Court is that there was no completed and independent cause of action before the promissory note was executed. A part of the money was advanced contemporaneously with the execution of the promissory note and the advance by the plaintiff and the execution of the promissory note by the defendant was one transaction and gave rise to only one cause of action, namely, a cause of action the basis of which is the execution of the promissory note. In this view of the matter, I hold that the plaintiff's suit has been rightly dismissed by the Courts below. The result is that this appeal is dismissed with costs.

K.S. *Appeal dismissed.*

A. I. R. 1935 Calcutta 659

GUHA AND LODGE, JJ.

Satya Charan Srimani and *others* — Appellants.

v.

Ramkinkar Banerji and *others* — Respondents.

Appeals Nos. 212 and 218 of 1931, Decided on 20th May 1935, from original decrees of Addl. Sub-Judge, Burdwan, D/- 20th April 1931.

(a) Deed—Construction—Intention must be gathered from document as it stands — All clauses should be taken together — Form is very delusive guide — Covenant imposing liability must be strictly construed.

The intention of parties concerned has to be gathered from the documents as they stand, taking all the provisions contained in the same together. The real nature of a transaction must always be carefully looked into as the mere form of the instrument is a very delusive guide. In construing documents which purport to impose liabilities of a very onerous nature on one party, the covenant on which such liability is based must be strictly construed, and effect should be given to all the parts of the document.

[P 661 C 2; P 662 C 1]

(b) English Mortgage—Mortgage of leasehold property — Express covenant for payment of rent and royalty by mortgagor — Mortgagee not to ask for money within certain period if mortgagor pays interest regularly—Mortgagor entitled to remain in possession of mortgaged premises and to carry on colliery business therein—Whole of right, title and interest of mortgagor held did not pass to mortgagee — Mortgage held not an English mortgage.

In a mortgage of a leasehold property it was provided that the rent and royalty were payable by the mortgagor. The mortgagee was not to ask for the money within certain period if mortgagor paid the interest stipulated regularly and

the mortgagor was entitled to remain in possession of the mortgaged premises and to carry on colliery business therein:

Held: that the mortgage was not an English mortgage within the meaning of S. 58 (e), T. P. Act, and that the whole of the right, title and interest of the mortgagor did not pass to the mortgagee: 1927 *Cal* 725, *Dist.*

[P 662 C 1; P 664 C 1]

Sarat Chandra Bose, Kamalaksha Bose, Biraj Mohan Roy, Narendra Kumar Bose, A. K. Roy, U. C. Laha, Anil Chandra Ganguli and *Ajendra Nath Dutt*—for Appellants.

Baidyanath Banerji, Sushil Ch. Sen, Muktipada Chatterjee, Gopendra Kr. Banerji and *Dwijendra Nath Dutta*—for Respondents.

Guha, J.—These two appeals have arisen out of a suit in which the plaintiff-respondent in this Court claimed Rs. 27,867-14-0 as the minimum royalty, cesses and price of coal, from the defendants in the suit, basing the claim on a kabuliat executed on 3rd June 1908 (Ex. 11 in the case), evidencing a lease for 999 years of underground right in Chak Sitalpur in Lot Gopinathpur. The history of title of the plaintiff as lessor on which the claim in suit was founded, was given in detail in the plaint, and has been set out in the judgment of the trial Court against which these appeals are directed. It is not necessary for the purpose of these appeals to consider the materials relating to the accrual of the plaintiff's title as lessor, as indicated in the different documents filed in Court, entitling him to claim the amount sought to be realised by him in the suit. In the written statement filed by the contesting defendants the statements made by the plaintiff as to the devolution of interest and accrual of his title were not specially denied or controverted; and no issue was raised on the question of the plaintiff's title as lessor. The plaintiff's claim was resisted by the mortgagees of the interest created by the lease and the transferees from the mortgagees in respect of the underground rights in chak Shitalpur, defendants 2, 5, 6 and 7.

The defence of defendant 2 in the suit does not require consideration in view of the position that in these appeals it was conceded on behalf of the plaintiff-respondent, that defendant 2 was not liable either jointly or individually for any part of the claim in suit. Defendants 2, 5 and 6 denied liability and denied the plaintiff's statement in the plaint that they were in possession. On the pleading of the parties concerned, the material issue raised for determination in the suit was issue 7:

Whether defendants 2, 5, 6 and 7 are necessary parties to the suit? Whether they are in possession of the mortgaged property? Are they or any of them liable for the dues or any part of the dues of the plaintiff.

The Additional Subordinate Judge of Asansol, by whom the suit was tried, passed a decree on the basis of minimum royalty as given in Sch. 2 of the plaint, holding defendants 2, 5, 6 and 7 liable jointly and severally to the plaintiff. As the Judge in the trial Court has observed in his judgment, the point that was "very much debated" before him was this:

Whether the mortgagees and their transferees, the contesting defendants in the suit were liable for the plaintiff's claim for minimum royalty, etc.

The debate centred round the question whether the two mortgages executed on 18th May 1923 (Exs. 2 and 5), were English mortgages or not. The decision of the trial Court on the question whether the mortgages were English mortgages or not, was in favour of the plaintiff; the Subordinate Judge held that on the footing that they were English mortgages, the mortgagees or their transferees were liable to the plaintiff in the suit. On the question of possession, the finding of the Court below was also in favour of the plaintiff; it has held that there was evidence on the record indicating possession of the mortgagees or their transferees. This finding on evidence on the question of possession was not relied upon by the plaintiff-respondent in this Court; and it was conceded in the course of argument of these appeals that there was no such evidence of possession on the record, as could support the view indicated by the Court below in its judgment. The basis of the decision holding defendants 2, 5, 6 and 7 jointly and severally liable for the claim made by the plaintiff in the suit was that the two mortgages under which these defendants claimed to be the mortgagees were English mortgages, and that on the authority of the decision of this Court in 54 Cal 813 (1) a mortgagee in an English form of mortgage, in whom

1. Bengal National Bank Ltd. v. Janaki Nath Ray, 1927 Cal 725=104 I C 484=54 Cal 813=31 C W N 973.

the entire interest of the mortgagor is transferred, and who becomes the owner of the mortgaged property, to all intents and purposes, takes upon himself the liability for rent. Defendant 7 has appealed to this Court from the decision and decree passed by the trial Court; and there is a separate appeal by defendants 2, 5 and 6. The appeal by defendant 7 is appeal from Original Decree No. 212 of 1931; the other appeal is No. 218 of 1931. As already noticed the plaintiff-respondent has not pressed his claim against defendant 2.

The main question in both these appeals is whether the mortgages in question evidenced by the documents Exs. 2 and 5 are the mortgages in English form or English mortgages as contemplated by S. 58 (e), T. P. Act. The documents, although executed on the same date, are not exactly alike in stipulations, provisions and the covenants contained in the same; and they have to be considered separately for the purposes of the two different appeals to this Court. The essentials of an English mortgage have been stated by the Judge in the Court below; the three essentials are : 1. That the mortgagor binds himself to repay the mortgage money on a certain date. 2. That the property mortgaged is transferred absolutely to the mortgagee. 3. That such absolute transfer is made subject to a proviso that the mortgagee will reconvey the property to the mortgagor upon payment by him of the mortgage money on the date on which the mortgagor bound himself to repay the same. In the mortgage Ex. 5, under which defendant 7, the appellant in appeal No. 212, claims, there are undoubtedly certain stipulations satisfying the three essentials of an English mortgage. There were in addition the definite provisions stated below, contained in the document :

It is hereby expressly agreed by and between the parties hereto, notwithstanding anything hereinbefore contained to the contrary that if the mortgagor pays interest payable under these presents to the mortgagee regularly on the day and in the manner hereinbefore applied for the payment thereof, then the mortgagee shall not recall the mortgage money until the eighteenth day of May one thousand nine hundred and thirty-three.

There was further this express stipulation contained in the document Ex. 5 in regard to the payment of rent and royalty as claimed in the suit by the plaintiff by the mortgagor, namely that the mortgagor

shall, during the subsistence of the security, pay all rents, royalty, cesses, taxes, rates assessments and impositions which now are or hereafter may be payable in respect of the said premises . . . ."

These covenants mentioned above contained in the mortgage must be taken into consideration for the purpose of arriving at the decision that the mortgage was an English mortgage as contemplated by S. 58 (e), T. P. Act. The document Ex. 2 in the case under which defendants 5 and 6 claim, has to be considered next. In this mortgage there was no covenant for repayment on a certain date, and one of the three essentials of an English mortgage was therefore undoubtedly wanting. There were, of course, words used in the document supporting the position that there was an absolute transfer by the mortgagor and a provision for retransfer to the mortgagor. There was the definite stipulation for payment of rent and royalty by the mortgagor, contained in these words :

He the mortgagor shall and will as long as money shall remain due and owing on the security of these presents, regularly and in due course pay the rates and royalty reserved by and shall duly observe and perform the several covenants and conditions contained in the hereinbefore recited Potta or lease.

On the position indicated by the provisions contained in the document Ex. 2 the question has to be decided whether it was an English mortgage as contemplated by law applicable to this country. There can be no question that the provisions contained in the documents referred to above are not such as could lead to the conclusion that the transaction evidenced by the same were an English mortgage as contemplated by S. 58 (e), T. P. Act. The intention of the parties concerned has to be gathered from the documents as they stand, taking all the provisions contained in the same, together. As it has been said the real nature of a transaction must always be carefully looked into as the mere form of the instrument is a very delusive guide. In construing documents which, according to the plaintiff in the suit the respondent in this Court, purport to impose liabilities of a very onerous nature on one party to the same, the appellants, the covenant on which such liability is based must be strictly con-

strued, and effect should be given to all the parts of the document.

In view of the above rules of construction it is not possible to hold that the mortgages evidenced by the documents, Ex. 2 and 5 in the case, were such mortgages or transfers with reference to which it could be held that the mortgagees who were not in possession of the mortgaged premises were liable to satisfy the claim for rent or royalty as made by the plaintiff in the case before us. The decision of this Court, in 54 Cal 813 (1), relied upon by the Court, below, and on which very strong reliance was placed in support of the case for the plaintiff respondent, in this Court can have no application regard being had to the provisions contained in the documents Exs. 2 and 5 and to the facts of the case before us. In the case before us, the mortgages are not English mortgages; the mortgagor covenanted with the mortgagees for payment of rent and royalties. There was the express covenant in the mortgages for payment of rent and royalty by the mortgagors; and no liability could be imposed upon the defendants Nos. 5, 6 and 7 on the authority of the decision in 54 Cal 813 (1), referred to above, and on no other basis whatsoever, as the finding as to possession of the mortgaged property as indicated in the judgment of the Court below, was not supported by the plaintiff respondent in this Court on the evidence in the case.

The conclusion arrived at as indicated above is that the mortgages evidenced by the documents, Exs. 2 and 5 in the case, were not English mortgages as contemplated by S. 58 (e), T. P. Act, and that liability for rent or royalty as claimed in the suit could not be fixed on the contesting defendants 2, 5, 6 and 7, the appellants in this Court, on the basis of those mortgages or any other basis, regard being had to the provisions contained in those mortgages. The appeals must be allowed and the plaintiff's suit so far as it related to claim against the defendants 2, 5, 6 and 7 must be dismissed. It may be mentioned that in support of the appeals to this Court some other questions were submitted for our consideration. It is not necessary for the purposes of these appeals to go into these questions; but it may be mentioned that so far the question whether the settlement which was the subject of the mortgages evidenced by documents Ex. 2 and 5 was a lease or not, the question whether an assignment of a lease by way of an English mortgage did or did not by itself create a liability on the mortgagee in respect of royalty as fixed by the lease, are concerned, I do not see any reason to differ from the definite expression of opinion as contained in the judgment of this Court in 59 Cal 1314 (2).

In the result, the appeals are allowed; the decision and the decree passed by the Court below on 20th April 1931, so far as they fix any liability on defendants 2, 5, 6 and 7 in the suit out of which these appeals have arisen, are set aside; and the plaintiff's claim in suit so far as it related to the liability of these defendants is disallowed, the suit being dismissed so far as these four defendants are concerned. The defendants appellants in this Court are entitled to get their costs in the litigation, including the costs in these appeals from the plaintiff-respondent.

Lodge, J.—I agree. The only question for our decision is whether defendants 2, 5, 6 and 7 are liable as mortgagees for the arrears of royalty, cesses and price of coal. It was conceded by the advocate for the respondent that these defendants were never in possession of the colliery in the period for which arrears are claimed. The suit was decreed against defendants 2, 5, 6 and 7 on the ground that the mortgages in favour of Jogendra Lal Mukherji and Satya Charan Srimani were English mortgages as defined in S. 58 (e), T. P. Act.

The Subordinate Judge, relying on 31 C W N 973 (1), held that the mortgagees were liable for the arrears irrespective of any question of possession. The advocates for the appellants have argued firstly that the mortgages in question are not English mortgages as defined in S. 58 (e), T. P. Act, and secondly that even if they are English mortgages as so denied, the mortgagees, not being mortgagees in possession, are not liable for arrears of royalty, cess, etc. The advocate for the respondent has argued that the mortgages are English mortgages; and that in consequence the mortgagees

2. Fala Krista Pal v. Jagannath Marwari, 1932 Cal 775=140 I C 788=59 Cal 1314=36 C W N 709.

and transferees from the mortgagees are liable for arrears of Royalty Cess, etc., irrespective of any question. The doctrine that the mortgagee of a leasehold property under an English mortgage is liable for the rent, whether he enters into possession of the property or not, is derived from the Transfer of Property Act and from the decision in 31 C W N 973 (1). In that case Rankin, C. J., adopted the reasoning of Dallas, C. J., in 1 Br & B 328 (3), which runs as follows :

> The assignment of a lease for the whole term, whether absolute or subject to a proviso for reassignment in a certain event, is as far as concerns the interest to be transferred precisely the same ; and the assignment, as in the present case, is of all the right, title and interest of the assignor in the lease assigned. So completely does the interest pass from the one and vest in the other, that there is a covenant to reassign when the money shall be repaid. The whole interest is therefore assigned, and the whole is to be reassigned. It vests in them absolutely, till such reassignment, in the party who is to reassign, and is not less absolute, because by agreement between the immediate parties, to which the lessor is no party, the assignor may, in any event which may or may not happen, entitle himself to a reconveyance by the money being repaid.

Rankin, C. J., held that that reasoning is equally valid in India, and that in India the lessor parts with his "whole estate under an English mortgage." These are essentials of an English mortgage as defined in S. 58 (e), T. P. Act, viz : (1) that the mortgagor binds himself to repay the mortgage money on a certain date; (2) that the property mortgaged is transferred absolutely to the mortgagee ; and (3) that such absolute transfer is made subject to a proviso that the mortgagee will reconvey the property to the mortgagor upon payment by him of the mortgage-money as agreed. The reasoning of Dallas, C. J., in 1 Br & B 328 (3), quoted above, is based on the second and third of these essentials and would apply equally to anomalous mortgages which possessed these two features. It is not necessary therefore for us to determine whether the mortgages in question are English mortgages as defined in S. 58 (e). We have merely to decide whether by these mortgages, the whole of the right, title and interest of the mortgagor in the property so mortgaged passed to the mortgagees by virtue of the transaction.

The advocates for the appellants have contended that in view of the provisions of the Transfer of Property Act, and in view of the covenants in the two mortgages, the whole of the right, title and interest of the mortgagor in the property mortgaged did not pass to the mortgagees. It was argued that the definition of a mortgage in the Act, and the provisions of the Act as to the rights and liabilities of mortgagor and mortgagee are wholly inconsistent with the view that the whole of the right, title and interest of the mortgagor passes to the mortgagee. It was contended that in no mortgage in British India, to which the provisions of the Transfer of Property Act applies does ownership of the property pass to the mortgagee. It is unnecessary in the present case to determine so general a question. In 36 C W N 709 (2) another Bench of this Court, of which one of us was a member, found great difficulty in applying the reasoning of Rankin, C. J., in 31 C W N 973 (1), in its entirety, to mortgages in British India, and pointed out that in view of the other provisions of the Transfer of Property Act, an English mortgage in India can hardly be regarded as a transfer of the entire estate of the mortgagor to the mortgagee in spite of the definition of an English mortgage in S. 58 (e) of the Act. We share the doubt expressed in 36 C W N 709 (2), and the arguments placed before us have served rather to strengthen than to remove that doubt.

In the present case however the express covenants in the two mortgages seem to us inconsistent with an absolute transfer of the whole interest of the mortgagor to the mortgagees. The mortgage-deed, with which the appellant in Appeal No. 212 is concerned, is Ex. 5 of the lower Court's record. It is true that the deed in question purports to grant, convey and assure to the mortgagee and to his use for ever the entire interest of the mortgagor in the eight annas share of the property of the sublease subject to a proviso that if the mortgagor shall on 18th May 1928 repay to the mortgagee the dues of the latter under the deed the mortgagee will reconvey, retransfer and reassign the said mortgaged premises to the mortgagor. But the same document also provided that the mortgagor shall be liable to pay the rents and royalties and that it shall be lawful for but not obligatory upon

3. Williams v. Bosanquet, (1819) 1 Br & B 238= 3 Moore 500=21 R R 585.

the mortgagee to pay and deposit the same in case of default by the mortgagor. It also provided that if the mortgagor pays the interest on the loan regularly on the day and in the manner agreed upon, the mortgagee shall not recall the mortgage money until 18th May 1933. It further provides that the mortgagor will be entitled to remain in possession of the mortgaged premises and to carry on colliery business therein. In view of these provisions, it seems to us impossible to hold that the whole of the right, title and interest of the mortgagor in the property passed to the mortgagee by virtue of the mortgage.

Similarly in Ex. 2, the mortgage-deed, with which Appeal No. 218 is concerned, it is agreed that the mortgagor shall remain in possession of the mortgaged property and be entitled to work a colliery therein ; and that he shall be liable to pay rents and royalties, and that it shall be lawful but not obligatory upon the mortgagee to pay rents and royalties in case of default of payment by the mortgagor. We are of opinion in this case also that the whole of the right, title and interest of the mortgagor did not pass to the mortgagee by virtue of the mortgage. I agree therefore that the appeals must be allowed.

K S. *Appeals allowed.*

A. I. R. 1935 Calcutta 664

HENDERSON AND R. C. MITTER, JJ.

Bir Bikram Kishore Manikya Bahadur—Appellant.

v.

Khaliler Rahaman—Respondent.

Appeal No. 200 of 1934, Decided on 17th May 1935, from appellate order of Sub-Judge, First Court, Tippera, D/- 21st November 1933.

(a) Execution — Application for execution filed beyond time — Part payment out of Court alleged to save limitation — Notice issued on judgment-debtor for objections— On date fixed for hearing decree-holder not taking steps and application dismissed for default—Subsequent application for execution—Judgment-debtor can raise question of limitation as there was no adjudication impliedly or expressly on such question of limitation.

An application for execution was filed beyond three years from date of decree but the decree-holder alleged a part payment out of Court to save limitation. The application was registered and notice was issued to the judgment-debtor and certain date was fixed for filing objection. On that day, the application was dismissed as the decree-holder had failed to take steps. The decree-holder subsequently filed another application. Thereupon the judgment-debtor contended that the application was barred by time.

Held : that as there was no adjudication on question of limitation either expressly or by necessary implication that the earlier application was in time, it was open to the judgment-debtor to raise that question : 14 *C W N* 114, *Rel. on* ; 8 *Cal* 51, *Dist.* [P 665 C 1,2]

(b) Civil P. C. (1908), Ss. 86 (3), (5) — Two sub-sections are entirely distinct.

Sub-S. (5), S. 86 is entirely distinct from sub-S. (3). The two sub-sections are really dealing with two quite distinct matters. [P 665 C 1]

Jogesh Chandra Roy and *Amarendra Mohan Mitra* for *Birendra Chandra Das* —for Appellant.

Ajit Kumar Dutt—for Respondent.

Henderson, J. — This appeal is against an order rejecting an application filed by the appellant under the provisions of S. 47, Civil P. C. The appellant instituted a suit for ejectment against the respondent. He lost it and was made liable for costs. Why the appellant does not pay this petty sum and put an end to this matter, we cannot conceive. Be that as it may, he paid nothing and the respondent eventually took out execution. Two grounds have been taken, the first being that the application is barred by limitation and the second being that consent is necessary under S. 86, Civil P. C. Prima facie the application for execution was barred by limitation. The respondent attempted to save limitation by an allegation that a sum of Rs. 3 had been paid out of Court. This allegation has not been specifically investigated. A notice for which there is no provisions in the Code, was served on the appellant's agent. Then a notice under O. 21, R. 22 was issued on 1st March 1932. The date fixed for the filing of an objection by the appellant was 29th March 1932. The appellant did not appear and the Munsif passed an order in these terms : "The case is dismissed for default without cost." The present execution was started at a later date.

The contention of the respondent is that it is no longer open to the appellant to raise the plea of limitation. In our judgment that contention cannot be supported. As I have already noted, it was open to the appellant to file an objection on 29th March 1932 and he

did not do so. But the Munsif did not proceed to pass any order which must by necessary implication show that he thought that the decree-holder was entitled to go on with the execution. The only thing which had to be done on 29th March was to see whether the appellant filed an objection or not. The order dismissing the case for default was therefore quite unreasonable. It cannot be interpreted as having any definite meaning. As there is nothing to show that the question of limitation was by implication decided, it is still open to the appellant to raise it. On the second point both the Courts below held that no consent is necessary because the respondent is a tenant of the appellant and therefore is entitled to institute a suit without consent under the provisions of sub-S. (5), S. 86. In our opinion, sub-S. (5), is entirely distinct from sub-S. (3). The two sub-sections were really dealing with two quite distinct matters. In view of the plain terms of sub-S. (3) we are of opinion that the consent referred to is necessary before the respondent can proceed against the property of the appellant.

This appeal must therefore be allowed and the orders of the Courts below dismissing the appellant's objection must be set aside. The appellant must be allowed to file an objection on the ground of limitation, and the matters will be determined upon such evidence as the parties may adduce. The Munsif is also directed to give the respondent requisite time to apply for the consent referred to in S. 86 of the Code. We make no order as to costs.

R.C.Mitter, J.—I agree with the order passed by my brother. The decree for costs was passed on 12th December 1928. The present application for execution of the decree was filed on 23rd February 1933, which is said to have been put in within time by reason of the provisions of Cl. 5 of Art. 182, Limitation Act. To follow the argument of the decree-holder a few dates are necessary. On 2nd January 1932, that is to say, beyond three years of the date of the decree, the first application for execution by the decree-holder was filed. In that application the decree-holder stated that the judgment-debtor had paid him out of Court a sum of Rs. 3 which he wanted to certify under the provisions of O. 21, R. 2; the application for execution was not registered on that date, inasmuch as on the face of it, it was barred by limitation having been presented more than three years from the date of the decree. The Court issued a notice upon the judgment-debtor to file objections, if any with regard to the question of limitation by 28th January 1932. The notice was served on the judgment-debtor but he did not appear with the result that the Court registered the application for execution, on 2nd February 1932. Another notice under O. 21, R. 22 was issued upon the judgment-debtor fixing 28th March as the date for putting in his objections, if any, to the execution of the decree. The 28th March was a holiday and the matter was taken up on 29th March. On that date the Court recorded an order in this form:

> The 28th March being a holiday the case is taken up to-day. Notice served. No further steps taken. The case is dismissed for default without costs.

The judgment-debtor says that Cl. 5 of the Art. 182 does not apply, because the application for execution which was filed on 2nd January 1932 was not an application made in accordance with law within the meaning of that clause, it being an application which was barred by limitation. The question is whether the judgment-debtor is entitled to raise the point as to whether the application for execution which was made on 2nd January 1932 was an application for execution made beyond time. On this point both the Courts below have held that the judgment-debtor was not entitled to raise that question by reason of the principle enunciated in the well known case: 8 Cal 51 (1). I agree with my brother that the lower Courts have taken an incorrect view of the matter. The principle is that if there is an adjudication on the question of limitation either expressly or by necessary implication that the earlier application was in time, the judgment-debtor cannot raise that self same question again. In this particular case there was no adjudication that the application put in on 2nd January 1932 was in time. The only question is whether such an adjudication was made by necessary implication.

1. Mungal Pershad Dichit v. Girja Kant, (1882) 8 Cal 51=11 C L R 112=8 I A 123=4 Sar 248 (PC).

The notice which was issued on the judgment-debtor to file objection, if any, with regard to the question of limitation, by 28th January 1932, is a notice not provided by law at all. When execution of a decree is applied for beyond a year of its date, the only notice provided for under the Code, is notice under O. 21, R. 22 and the judgment-debtor is entitled to come in and object to the execution of the decree on any valid ground after getting the notice under that rule. In this case after the application for execution has been registered such a notice was issued, but on the date on which the judgment-debtor was asked to show cause, the Court dismissed the application for execution stating that the decree-holder had not taken any further steps. If after service of notice on the judgment-debtor under O. 21, R. 22 the executing Court had issued any further process in aid of execution, or had asked the decree-holder to take further steps in that respect, it could have been said that there was an adjudication that the application for execution was in time by necessary implication. But the fact that the application for execution was dismissed for default of the decree-holder of the same date when the judgment-debtor was asked to show cause, militates against the view that there was an adjudication that the application for execution had been made in time, by necessary implication. In this connexion I may quote here the following observation of Mookerjee, J. and Vincent, J, in 14 C W N 114 (2), at p. 117 :

> These cases affirm the doctrine that where the question, whether the execution of the decree is barred by limitation, is not decided because the parties do not appear, there is obviously no bar to the adjudication of the objection when actually raised at a later stage of the proceedings. It is manifest that here the question of limitation cannot be said to have been decided even by implication when the third application for execution was dismissed for default on 28th March 1905. The mere issue of a notice under S. 248, Civil P. C., not followed by any order for execution or by any act of the Court such as attachment of property in furtherance of execution, cannot be construed as an adjudication by the Court that the application is not barred by limitation, and is maintainable under the law.

I should add that the later cases have modified this statement of the law to a little extent, it being held that even if there be no attachment, the question that the application is in time will be deemed to have been decided in favour of the decree-holder by necessary implication if the Court after service of notice under O. 21, R. 22 simply asks the decree-holder to take further steps in aid of execution. For these reasons I agree with my brother, that the question which was raised in the lower Courts, have been wrongly decided. All that is now necessary is that it must be further considered whether the application of 2nd January 1932 was barred or not; and for the purpose of consideration of this question, the fact whether Rs. 3 had been paid by the judgment-debtor out of Court on 2nd October 1931 must be ascertained and if paid, whether under circumstances which will bring the case within the provisions of S. 20, Lim. Act. With regard to the interpretations put upon the different clauses of S. 86 of the Code, I entirely agree with my brother. I am definitely of opinion that Sub-S. (5) is really a proviso to Sub-S. (1). Sub-S. (3) deals with the question of execution and is independent of Sub-S. (1).

K.S. *Appeal allowed.*

2. Khosal Chandra v. Ukiladdi, (1910) 14 C W N 114=3 I C 47.

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* A. I. R. 1935 Calcutta 666

D. N. MITTER AND PATTERSON, JJ.

Bengal Coal Co. Ltd.—Defendant—Appellant.

v.

Sita Ram Chatterjee—Plaintiff and *others* Defendants—Respondents.

Appeal No, 158 of 1930, Decided on 6th March 1935, from original decree of Sub-Judge, Burdwan, D/- 31st March 1930.

(a) Mortgage—Mortgagor or person coming into possession under him is estopped from denying title of mortgagee.

As a rule any person who comes into possession of the mortgaged property under the mortgagor is treated as being in privity with him and is estopped from denying the title of the mortgagee. [P 669 C 1]

(b) Benami—Deed in name of wife—Onus of proving that she is not real owner lies on person asserting it.

Where a deed stands in the name of a wife, the burden lies on those who assert that she is the ostensible owner and not the real owner to prove that she is in fact only an ostensible owner. [P 669 C 2]

(c) Transfer of Property Act (1882 before amendment of 1929), S. 56—More than two properties subject to common charge—S. 56

does not apply—In such cases, for claiming benefit of doctrine of marshalling, purchaser of one of several properties must be bona fide purchaser for value without notice.

Where more than two properties are subject to a common charge, S. 56 (as before amendment of 1929) does not apply. But in such cases in order to claim the benefit of the doctrine of marshalling, it must be shown that the purchaser of one of several properties comprised in the mortgage must be bona fide purchasers for value without notice: 7 *All* 711, *Rel on.* [P 670 C 1]

✲ (d) **Mortgage—Mortgagee having notice of sale of portion of equity of redemption but not impleading purchaser in suit on mortgage—There should be proportionate abatement of mortgage money.**

Where a mortgagee who has notice of a sale of a portion of the equity of redemption does not make the purchaser a party to the suit on the mortgage, there should be a proportionate abatement of the mortgage money as such purchaser is a necessary party. [P 670 C 2]

✲ (e) **Mortgage — Redemption—Mortgagee relinquishing in Court claim against purchaser of portion of equity of redemption—Purchaser of other portion is not entitled to redeem piece-meal.**

Merely because the mortgagee relinquishes in Court in course of suit on mortgage, his claim against a purchaser of a portion of the equity of redemption, the purchaser of the other portion is not entitled to redeem piece-meal, i. e., by paying proportionate share of the mortgage money: 1934 *Cal* 775, *Dist.* [P 671 C 1]

Dr. Mukerjee and *Panna Lal Chatterjee*—for Appellant.

Amarendra Nath Basu, Gopendra Krishna Banerjee, Bankim Chandra Mukherjee, Mukti Pada Chatterjee, Bon Behary Mukerjee and *Surja Kumar Aich* (*Deputy Registrar*)—for Respondents.

D. N. Mitter, J.—This is an appeal by defendant 11, Bengal Coal Co. Ltd. from a preliminary decree in a suit to enforce a mortgage security. The suit was commenced by the plaintiff to recover a sum of Rs. 16,900 alleged to be due on mortgage bond executed on 24th January 1915, by one Ram Saday Nayek, who is the father of defendant 1, and father-in-law of defendant 2. He executed the mortgage in favour of Pran Krishna Chatterjee who was defendant 14 to the suit. The principal amount secured by the mortgage was Rs. 6,700 and the interest was to run at the rate of 12 per cent per annum. The properties which were hypothecated by the deed of mortgage consisted of 19 items which are mentioned in the schedules to the plaint. At the time of the execution of the bond Pran Krishna happened to be a member of a joint Hindu family, governed by Dayabhaga School of Hindu law, consisting of himself, his brothers and his nephews. He had accordingly one sixth share, according to the defence case, in the mortgage money. On 1st September 1919 there was an agreement between him and his five cosharers in which it was recited that the parties had separated in June 1919. It was also recited in the said agreement that all the properties acquired and the monies lent were ejmali properties and whatever would be acquired in future would be separate properties of each individual party who would acquire them. It is said that Pran Krishna had no more than one sixth of the mortgage money after this agreement. He was no longer the karta and it is said that he had nothing more than his individual share. On 1st October 1925, Pran Krishna assigned his rights as mortgagee to the plaintiff Sita Ram Chatterjee, who is a cousin of Pran Krishna Chatterjee. The total sum due on that date was Rs. 15,075 and in that document it was recited that Rs. 8,375 of that amount were kept in deposit to carry on litigation, and the balance of Rs. 6,700 was fixed as consideration of the mortgage bond.

It is said that the plaintiff took the conveyance in the benami of his brother defendant 13. It is now necessary to indicate the position of different defendants with reference to this mortgage. Defendants Nos. 1 and 2 are heirs of the original mortgagor. Defendants 3 to 11 are purchasers of the equity of redemption in the several mortgaged properties. It may be noted here that defendant 10, one of the purchasers of the equity of redemption, is the wife of the plaintiff. Defendant 12 is a lessee under defendant 1, of some portion of the equity of redemption. Defendant 13 is the brother of the plaintiff. Defendant 14 is Pran Krishna Chatterjee, the original mortgagee. Lastly defendants 15 to 19 are the cosharers of Pran Krishna Chatterjee. The plaintiff alleges that no portion of the mortgage money was paid and prays for an ordinary mortgage decree for sale. The defences of defendant 11 who is the appellant are first that if the assignment were legal and valid it could not give the plaintiff more than one-sixth share of his rights as mortgagee in the mortgage security as this was the share which

Pran Krishna had in the mortgage bond when the assignment took place of the mortgage money. It is said that at the time of the assignment he lost his representative character as karta. With regard to this defence the Subordinate Judge has found that Pran Krishna had only one sixth share in the mortgage money and the finding on this point is in favour of the defendants. He has however held that the defendants are precluded from saying that Pran Krishna had no larger interest or interest in the whole of the mortgage money but that he was only entitled to the one-sixth share of the mortgage money. The Subordinate Judge has also found that the other brothers of Pran Krishna who are parties to the present proceeding do not say that they have got any interest in the mortgage money.

The Subordinate Judge also finds that the cosharers of Pran Krishna are estopped from contending that Pran Krishna alone was not entitled to the mortgage money or that the assignment was not in respect of the whole of the mortgagee's right by reason of S. 41, T. P. Act. The second defence raised is that the assignment was not valid as there was no consideration for it and that it was really a collusive document executed with the sole intention of cheating the creditors or defeating the rights of the creditors. The third defence is that defendant 10, who is a purchaser of a portion of the equity of redemption is the wife of the plaintiff and is really his benamidar in the matter of the purchase and it is contended that the mortgagee himself being a purchaser of a portion of the equity of redemption, the integrity of the mortgage has been broken and that the purchasers of this portion are entitled to redeem on payment of a proportionate share of the mortgage money. The finding of the Subordinate Judge is that benami character of the transaction has not been established. The fourth defence taken by defendant 11 is that the company is entitled to rely on the doctrine of marshalling having regard to the provisions of S. 56, T. P. Act as it stood before its amendment by the Act of 1929. The Subordinate Judge has come to the conclusion that right of marshalling is not available to defendant 11 as it is not shown that he has purchased the equity of redemption without notice. The fifth defence is that one Dukharam Banerjee was a necessary party to the suit, that he was a purchaser of a portion of the equity of redemption of property No. 12 of the Schedule to the plaint, that the plaintiff had full knowledge of his purchase, and that as the plaintiff had not impleaded him in the suit, there should be a proportionate abatement and apportionment of the mortgage money. The Subordinate Judge has not acceded to this contention but has granted decree to the effect that the mortgaged properties other than the eight annas share of property No. 12 which belongs to Dukharam will be applied towards the satisfaction of the decree. As has already been stated, the Subordinate Judge has granted a preliminary decree on the lines indicated in the judgment of the Subordinate Judge. See p. 112, of 1st part of the paper book.

It is against this decision that the present appeal has been taken by defendant 11 and all the defences to which reference has already been made have been repeated by Dr. Mukerji, who appears for the appellant (defendant 11). He rests his grounds of appeal on the five defences which have already been set forth above. It is necessary to consider therefore the soundness of the contentions raised by way of defence and raised in the grounds taken before us. With regard to the first ground taken that if the assignment were legal and valid, the plaintiff could not get more than 1/6th share of the mortgage money, as this was the share which Pran Krishna had when the mortgage transaction and assignment took place. It is not necessary to deal with questions on which the Subordinate Judge has founded his decision with regard to this part of the defence as to whether it is open to the purchasers of the equity of redemption to contend that the assignment is not in respect of the entire rights of the mortgagee but it is only in respect of the portion of the rights of the mortgagee as it existed on the date of the assignment, for it is clear that in the present proceedings the other cosharers of Pran Krishna were parties. They would be estopped by reason of the principles embodied in S. 41, T. P. Act, from contending that Pran Krishna has only one-sixth share in the mortgage

money seeing that they have by their conduct represented to the outside world that Pran Krishna was entitled to deal with the entire rights of the mortgagee and they were fully bound by this representation to the outside world.

The Subordinate Judge has rightly applied the principle that estoppel would surely be available against the other cosharers of Pran Krishna. They were all parties to the present suit and defendant 11 is not at all prejudiced if a decree is passed on the footing that Pran Krishna was entitled to deal with 16 annas of the rights in the mortgage money for the decree as against defendant 11 is being passed in the presence of the cosharers of Pran Krishna, that is, defendants 15 to 19, who would be bound by this decree. There can be no question that in so far as the original mortgage transaction is concerned, as between the mortgagor and the mortgagee the principle of estoppel comes into play and it has been conceded by Dr. Mukherjee that it is not open to the mortgagor to dispute the title of the mortgagee and to say that although Pran Krishna at the inception purported to deal with 16 annas of the mortgage money as his own, he was in reality not the owner or possessor of the entire mortgage money. That is the position which is established on the authorities. Reference might be made in this connexion to Dr. Bigelow's well-known treatise on Estoppel (6th Edn.) at p. 588. The same rule applies also to the mortgage transaction in this case and the whole law has been summarised in Sir Rash Behari Ghose's Treatise on the Law of Mortgage (5th Edn.) at p. 322: "As a rule", says the learned author,

> any person who comes into possession of the mortgaged property under the mortgagor is treated as being in privity with him and is estopped from denying the title of the mortgagee.

It has therefore been rightly conceded that as between the mortgagor and the mortgagee the principle of estoppel applies. But as we have said we are relieved from deciding the other question, namely, as to whether the purchasers of the equity of redemption or the mortgagors for the matter of that, can question the rights of the assignee of the mortgagee's right, and contend that the mortgagee is not entitled to the entire mortgage money, seeing that the cosharers of Pran Krishna were all parties to the present proceeding and they did not question the rights of Pran Krishna, defendant 14, to the entire mortgage money.

We are therefore of opinion, although for a somewhat different reason that the learned Subordinate Judge has arrived at the right conclusion in negativing the first defence. The next ground which was indicated by the second defence is that there is no consideration for the assignment. (After examining the evidence, his Lordship held that the assignment was a valid one and was for consideration. The judgment then proceeded.) The third ground taken is that defendant 10 who is the wife of the plaintiff is really a benamidar for him. We have been referred to the evidence which establishes that the wife purchased this property out of funds which belonged to her. It is said that she collected all this sum of Rs. 1,000 which was the consideration for the kobala out of the presents which were given to her grandsons at the time of Anna Prashan ceremony. Then one of the plaintiff's sons has also deposed to the fact that the consideration for kobala which was executed in her favour by defendant 1, proceeded from his mother's funds. The deed stands in her name and the burden lay on those who assert that she is the ostensible owner and not the real owner to prove that she is in fact only an ostensible owner. Such evidence, it has been rightly pointed out, is absolutely lacking in this case. The only witness who has been examined on the side of the defendants in this behalf says at one time that the money might have proceeded from the funds of her husband the plaintiff and at another time that the money might have come from the presents at the Anna Prashan ceremony. In this view we are in agreement with the Subordinate Judge that the benami character of the transaction has not been established. In this view, the other question as to whether there was a splitting up of the mortgage does not arise. The fourth point which has been raised is that the Subordinate Judge has gone wrong in disallowing the marshalling which has been claimed by defendant 11 under S. 56, T. P. Act. The enactment which will govern the present case is the Transfer of Property Act as it stood

before the amendment of 1929. S. 56 of the Act before amendment of 1929 runs as follows:

> Where two properties are subject to a common charge, and one of the properties is sold, the buyer is, as against the sellor, in the abesnce of a contract in the contrary, entitled to have the charge satisfied out of the other property, so far as each property will extend.

This section in terms does not apply to the facts of the present case seeing that more than two properties are subject to a common charge in the present case. The scope of the section has been widened by the amendment of 1929, which provides for cases where there are more than two properties. This section, therefore, is out of way. But it is said that as the statute does not make provisions for cases when there are more than two properties subject to a common charge, they must be governed by the principles which regulate cases of this kind in the English Courts of Chancery. But it has been held in cases which are outside S. 56 that in order to claim the benefit of the doctrine of marshalling, it must be shown that the purchaser of one of several properties comprised in the mortgage must be bona fide purchasers of value without notice. We might refer to 7 All 711 (1), where Mahomood, J., observes that the equities which apply to a puisne incumbrancer in the marshalling of securities apply also to a bona fide purchaser for value without notice of a portion of property, the whole of which was subject to a prior incumbrance. It is true that in the deed of transfer in favour of defendant 11 there is a representation that there are no other incumbrances of properties, but at the same time there is the evidence in this case that defendant 11 made no enquiry whatever as to the existence of encumbrance of property. He had notice within the meaning of the Transfer of Property Act as it existed before the amendment. We are not unmindful of the decision of their Lordships of the Judicial Committee of the Privy Council in 47 I A 239 (2) that mere registration is not notice. Here there was no enquiry and notice and the mortgage can be inferred from the evidence which amounts to gross negligence in not making any enquiry about existence of previous encumbrance. We are of opinion that defendant 11 is not a bona fide purchaser without notice. Therefore he is not entitled to take the benefit of the doctrine of marshalling as understood by the equity Courts. This disposes of the fourth ground.

The fifth ground taken is that Dukharam Banerjee is a necessary party and there should be proportionate abatement of the mortgage money and the mortgage decree should be reduced by a sum of Rs. 299. This is a ground which seems to be well founded and must prevail. The plaintiff had full notice of the fact that Dukharam was a purchaser of a portion of the equity of redemption and not withstanding this he did not make Dukharam a party to the suit. On 28th February 1929 it was stated in one of the written statements that Dukharam should be made a party. On the 29th March of the same year the plaintiff filed his petition for addition of other parties but did not implead Dukharam. In these circumstances we think that the decree of the Subordinate Judge must be varied by reducing the principal amount by Rs. 299. It is next pointed out that the decree is bad in this that it allows interest at one per cent per month on Rs. 6,700 and at six per cent per annum on the rest, namely Rs. 13,928-10-0 annas. This portion of the decree has been taken exception to and very rightly by the advocate for the appellant. The decretal portion which is printed at p. 114 of the paper book runs thus :

> It is hereby declared that the amount due to the plaintiff on account of principal, interest, and costs calculated up to 15th April 1930 is Rs. 20,628-10-0, and out of Rs. 20,628-10-0 the principal sum of Rs. 6,700 shall carry interest at one per cent per month and the balance Rs. 13,928-10-0 shall carry interest at the rate of six per cent per annum until realization.

This decree is wrong. The proper form of a decree should be as follows: It is hereby declared that the amount due to the plaintiff on account of principal is Rs. 6,700 less Rs. 299. The plaintiff is entitled to interest on Rs. 640 at the rate of one per cent per month up to the period of grace which we fix at three months from now and after that the principal with interest shall carry an interest at the rate of six per cent per annum until realization. If the

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1. Rodh Mal v. Ram Harak, (1885) 7 All 711= 1885 A W N 198.
2. Tilakdhari Lal v. Khedan Lal, 1921 PC 112= 57 I C 465=47 I A 239=48 Cal 1 (P C).

sum of Rs. 640 plus interest at one per cent per month be not paid within three months from this date the mortgaged properties will be sold. It is a matter which has been agreed to between the plaintiff and defendant 11 that as it is an option with the plaintiff when the occasion arises for the sale of mortgaged properties to bring the mortgaged properties to sale in any order he likes, the sale of property No. 18 the equity of redemption in which has been purchased by defendant 11 be the last, that is, after selling the other properties covered by the mortgage, this property No. 18, will be sold. We simply record here our judgment in accordance with agreement which has been reached between the plaintiff and defendant 11.

Mr. Bankim Chandra Mukherjee who has appeared for defendants 4, 9 and 10 has raised some grounds by way of cross-objection. A preliminary objection has been taken by Mr. Bose that he is not entitled to urge the cross-objection against co-respondents and reliance has been placed on the decision in 59 Cal 667 (3). It is not necessary to decide on this preliminary objection seeing that the cross-objection fails on merits. The objection is to the effect that as the mortgagee has relinquished his claim against Dukharam in Court the purchaser of the other portion is entitled to redeem piece meal, i. e , by paying proportionate share of the mortgage money. In support of this contention reference has been made to a recent decision of this Court in 59 C L J 473 (4) and I was a party to that decision. That case, however, rested on a very different set of facts. The mortgagee had released a portion of the mortgaged property without any notice of right of a third party who had purchased a portion of the equity of redemption. But that is not so in the present case. Therefore we think that there is no substance in the cross-objection. The cross-objection is accordingly dismissed. The result is that the decree of the Subordinate Judge is varied on the lines which we have already indicated. Subject to that variation the decree of the Subordinate Judge will stand affirmed. As the plaintiff-respondent has substantially succeeded, the plaintiff-respondent is entitled to costs in this appeal. No order is made as to costs in the cross-objection.

Patterson, J.—I agree.

K.S. *Decree varied.*

3. Co-operative Hindusthan Bank Ltd. v. Surendra Nath De, 1932 Cal 524=138 I C 852=59 Cal 667.

4. Pran Ballav Saha v. Bhagaban Chandra, 1934 Cal 775=152 I C 429=61 Cal 894=59 C L J 473.

A. I. R. 1935 Calcutta 671

MUKERJI AND M. C. GHOSE, JJ.

Benoy Krishna Sadhukhan and *others* —Plaintiffs—Appellants.

v.

Panchanan Sadhukhan and *others* — Respondents.

Appeal No. 164 of 1930, Decided on 3rd May 1935, from original decree of 2nd Addl. Sub-Judge, 24-Parganas, D/- 31st January 1930.

(a) Benami — Transaction very old — No direct evidence available — Application of principles of onus is safest course.

Where a transaction is a very old one and no direct evidence is available, in determining the question as to whether the transaction is benami one, the safest course is to keep in view the principles of onus. [P 672 C 2]

(b) Pardanashin Lady — Disposition must be substantially understood—Parties relying on it must satisfy Court that deed has been explained to and understood by party under disability—Mere execution without duress or protest is not sufficient.

In cases of transaction by pardanashin lady, the disposition made must be substantially understood and must really be the mental act, as its execution is the physical act, of the person who makes it. The parties relying on it must satisfy the Court that the deed has been explained to and understood by the party thus under disability, either before execution, or after it, under circumstances which establish adoption of it with full knowledge and comprehension. Mere execution by such a person, although unaccompanied by duress, protest or obvious signs of misunderstanding or want of comprehension is in itself no real proof of a true understanding mind in the executant: *Case law discussed.* [P 673 C 2]

(c) Evidence Act (1872), S. 111 — "Active confidence"—Interpretation.

The words "active confidence" in S. 111 indicate that the relationship between the parties must be such that the one is bound to protect the interest of other; in order that the law may be really protective the words should receive a wider interpretation. [P 674 C 2]

(d) Evidence Act (1872), S. 111 — Gift to person standing in fiduciary relationship to donor— Donee is bound to prove good faith of transaction—This can be proved by showing that donor had independent advice or other circumstances sufficient to establish good faith.

Where a gift is executed to a person standing in a fiduciary relationship to the donor, the donee is bound to establish the good faith of the transaction. For this, the donee may prove that the donor had independent advice or that the fiduciary relation had ceased for so long that the donor was under no control or influence whatever by showing existence of other circumstances sufficient to prove good faith: 1925 *P C* 204, *Foll.* [P 674 C 2]

Jatindra Mohan Choudhury, *Premranjan Roy Choudhury* and *Susil Kumar Lahiri*—for Appellants.

S. C. Basak and *Paresh Nath Mukerji*—for Respondents.

Judgment.—The plaintiffs who were unsuccessful in a suit for declaration of title and recovery of possession with mesne profits and for accounts in respect of a karbar which was a business in oil have preferred this appeal. In the sixties of the last century we first hear of a family consisting of a man named Mohesh Chandra Sadhukhan, his mother Parbati and his wife Muktamani. The family were oilmen by caste and they earned their living by a caste-business, namely a business in oil. In 1864 a plot of land, 1 bigha 12 cottahs in area which then bore Holding No. 67 in a subdivision of Panchannagram in the District of 24-Parganas was acquired by Parbati by purchase and in 1867 she transferred it by way of gift to Muktamani. In 1873 Mohesh took mourashi mokarari settlement of a holding bearing No. 68 and lying adjacent to the west of Holding No. 67 and he transferred this holding along with some other lands which he appears to have also acquired by then to Muktamani by a kobala in 1878. Mohesh died in 1892. In 1920 Muktamani made a gift of the lands of Holdings Nos. 67 and 68 and the structures which she in the meantime had erected on them to one Hari Charan Sadhukhan and his two sons. Hari Charan was a *mamato* cousin of Muktamani, and had been for a long series of years putting up with Mohesh and, as stated in the plaint had been appointed by Mohesh to supervise the business and conduct the shop in which it was carried on. And in 1889 Mohesh who had then apparently fallen into debts, had sold to Hari Charan the ghurs which then stood on Holding No. 67 as also the business itself together with all fittings, appliances etc. Muktamani died in 1927. Hari Charan also is dead and his two sons are the defendants in this suit.

The plaintiffs claim and have been found to be the heirs of Mohesh and also of Muktamani in respect of her stridhan properties. As heirs of Mohesh they alleged that Holding No. 67 belonged to Mohesh, the purchase in the name of Parbati and the gift in favour of Muktamani by her being both benami; and that the sale by Mohesh to Muktamani of Holding No. 68 was also an unreal transaction. On that footing they claimed title as reversionary heirs of Mohesh on Muktamani's death to the two holdings, which are now numbered 40 and 44 and comprise an area of 3 bighas 5 cottahs, together with the pucca structure thereon. The entire property goes by the description of premises Nos. 6-7 Gariahat Road, Ballygunge. In the alternative and as heirs of Muktamani, they impugn the validity of the gift made by her in favour of the defendant and their father Haricharan and claim title to the property as such heirs. The karbar ceased to exist some long time ago, and the claim to it has been given up by the plaintiffs, as appellants in this appeal, and so need not be considered. The defence was that all the transactions referred to above were real and that the defendants have acquired a title which is indefeasible. The usual difficulties which a Court feels in dealing with the question of benami are present in the case. Added to those difficulties the danger of an unconscious leaning on the part of the Court to regard as benami a transaction in the name of a woman when her resources are not apparent, though as a matter of law there is no such presumption. On the top of all this is the fact that the transactions that have to be judged are such in respect of which by reason of the time that has elapsed since then, no direct evidence is available and such little of it as has been produced is obviously untrustworthy.

The safest course in cases of this kind is to keep in view the principles of onus, such as have to be applied from point to point. (After referring to the several documents executed before the gift in question, the judgment proceeded.) We now come to the deed of gift Ex. 6 which Muktamani executed in favour of Hari-

charan and his two sons, the two defendants. The document sets out the relations between the parties, such as they had been ever since, since the death of Mohesh. Its recitals make it perfectly clear, and there is not a particle of evidence to the contrary that she had become a part of Hari Charan's family. It was Hari Charan and her sons who were looking after her, catering to her needs and ministering to her comforts. Prompted by affection and in recognition of and as a reward for their services, she gave them by this document this property which was only one item out of several properties that she had. (Compare the properties described in Ex. 5). The donees were the only people who had ever cared for her since she had become a helpless widow, though she had properties of her own, and it was only natural that having grown old she should be anxious to do them a good turn. The validity of this transaction has been severely challenged on behalf of the appellants, and a large number of judicial decisions have been cited in which the legal position as regards transactions of this nature has been discussed. The principles bearing on the question are firmly established.

In a transaction such as the present, two points generally emerge and they have to be kept distinctly in view; first that the transaction is by a person who by reason of his or her illiteracy or of some such cause has not the usual means of fully understanding the nature and effect of what he or she is doing; and in this category is included transactions by persons, such as pardanashins, whose disabilities under Indian Social usages make them dependent upon or subject to influences of others even though nothing in the nature of deception or coercion may have occurred; and second, that the transaction is in favour of a person who by reason of some fiduciary position that he holds in relation to the one who makes the transfer to his own disadvantage, is under a special liability to establish the good faith of the bargain. The law as regards transactions of the first class has been very fully explained by Lord Sumner in 52 I A 342 (1), at pp. 350-352. The relevant passages from his Lordship's judgment runs in these words :

The law of India contains well known principles for the protection of persons, who transfer their property to their own disadvantage when they have not the usual means of fully understanding the nature and effect of what they are doing. In this it has only given the special development, which Indian social usages make necessary to the general rules of English law, which protect persons, whose disabilities make them dependent upon or subject them to the influence of others, even though nothing in the nature of deception or coercion may have occurred. This is part of the law relating to personal capacity to make binding transfers or settlements of property of any kind. That the instrument here is a wakfnama is a mere accident, and the general and well settled law of wakf is not in question. The case of an illiterate pardanishin lady, denuding herself of a large proportion of her property without professional or independent advice, is one on which there is much authority.

Independent legal advice is not in itself essential : 41 I A 23 (2). After all, advice if given, might have been bad advice, or the settlor might have insisted on disregarding it. The real point is, that the disposition made must be substantially understood and must really be the mental act, as its execution is the physical act, of the person who makes it: 18 I A 144 (3) at p. 148 and 46 I A 272 (4) at p. 278. The appellant clearly had no such advice, nor is it contended that she had. If however the settlor's freedom and comprehension can be otherwise established,or if, as is the respondent's case here, the scheme and substance of the deed were themselves originally and clearly conceived and desired by the settlor, and were then substantially embodied in the deed, there would be nothing further to be gained by independent advice. If the settlor really understands and means to make the transfer, it is not required that some one should have tried to persuade her to the contrary. Again the question arises how the state of the settlor's mind is to be proved. That the parties to prove it are the parties who set up and rely on the deed is clear. They must satisfy the Court that the deed has been explained to and understood by the party thus under disability, either before execution, or after it under circumstances which establish adoption of it with full knowledge and comprehension : 8 I A 39 (5) at p. 43 ; 29 I A 127 (6) at p. 131 and 39 I A 156 (7). Further, the whole doctrine involves the view that mere execution by such a person, although unaccompanied by duress, protest or obvious signs of misunder-

1. Faridunnisa v. Mukhtar Ahmed, 1925 P C 204=89 I C 649=52 I A 342=47 All 703 (PC).
2. Kali Buksh Singh v. Ram Gopal Singh, (1913) 36 All 81=21 I C 985=41 I A 23 (PC).
3. Wajid Khan v. Ewaz Ali Khan, (1891) 18 Cal 545=18 I A 144 (PC).
4. Sunitabala Debi v. Dhara Sundari Debi, 1919 P C 24=53 I C 131=46 I A 272=47 Cal 175 (PC).
5. Sudisht Lal v. Mt. Sheo Bharat, (1882) 7 Cal 245=8 I A 39 (PC).
6. Shambati Koeri v. Jago Bibi, (1902) 29 Cal 749=29 I A 127 (PC).
7. Sajjad Husain v. Abid Husain, (1912) 34 All 455=39 I A 156=16 I C 197.

standing or want of comprehension, is in itself no real proof of a true understanding mind in the executant. Evidence to establish such comprehension is most obviously found in proof that the deed was read over to the settlor and, where necessary, explained. If it is in a language which she does not understand, it must, of course be translated, and it is to be remembered that the clearness of the meaning of the deed will suffer in the process. The extent and character of the explanation required must depend on the circumstances. Length, intricacy, the number and complexity of the disposition, or the unfamiliarity of the subject matter, are all reasons for requiring an increased amount and efficiency of explanation. Thus a matter not likely to attract the attention of the executant in itself ought not to be relied on as binding, unless her attention has been directly drawn to it: 29 I. A. 127 (6) at pp. 132 and 137.

So if the deed, as presented for execution, differs substantially, either by way of addition or of omission, from the scheme and details which the intending settlor has previously laid down, the discrepancy ought to be clearly pointed out and its nature and effect should be fully described, unless, which must be rare, the difference is so obvious that even a person in the settlor's position must perceive and appreciate it for herself. If the description and explanation have been partial or erroneous, or have not been given at all, the question will then arise, as it arises where there has been no independent legal advice, whether, if proper information had been given, it would have affected the mind of the executant in completing the deed. On the other hand, the doctrine cannot be pushed so far as to demand the impossible. The mere declaration by the settlor, subsequently made, that she had not understood what she was doing, obviously is not in itself conclusive. It must be a question whether, having regard to the proved personality of the settlor, the nature of the settlement, the circumstances under which it was executed, and the whole history of the parties, it is reasonably established that the deed executed was the free and intelligent act of the settlor or not. If the answer is in the affirmative, those relying on the deed have discharged the onus which rests upon them. Of course fraud, duress and actual undue influence are separate matters.

It should be observed here that if fraud, duress or undue influence is alleged as a ground for invalidating the transactions the law to be applied is that contained in Ss. 15 to 19, respectively of the Contract Act. And in a case of undue influence which is generally what is either expressly alleged or impliedly suggested, the onus that has to be discharged by one party or the other is clearly enunciated in the section dealing with it. As regards the second class of cases so far as statute law is concerned it is contained in S. 111, Evidence Act. It says:

Where there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position of active confidence the burden of proving the good faith of the transaction is on the party who is in a position of active confidence.

The words "active confidence" it is true indicate that the relationship between the parties must be such that the one is bound to protect the interests of the other. But as Sir Frederic Pollock in his book on Fraud, Misrepresentation and Mistake has observed, the words should, in order that the law may be really protective, receive a wider interpretation. Upon the relations between the parties, such as they appear to have been according to the recitals contained in the document, and in view of the other evidence that there is on the record on this point, it may be conceded that the donees are, on the principle enunciated in S. 111, Evidence Act bound to establish the good faith of the transaction. In the Court of Chancery a class of cases was very familiar in which a donor would come up and impeach a gift which he had previously made. In such cases the rule in the words of Farwell, J., in (1900) 1 Ch 243 (8) was this:

It has been for many years well settled that no one standing in a fiduciary relation to another can retain a gift made to him by that other if the latter impeaches the gift within a reasonable time, unless the donee can prove that the donor had independent advice, or that the fiduciary relation had ceased for so long that the donor was under no control or influence whatever.

In 36 Ch D 145 (9), which was a case of this class, Cotton, L. J. explained the principles in these words:

The question is: Does the case fall within the principles laid down by the decisions of the Court of Chancery in setting aside voluntary gifts executed by parties who at the time were under such influence as, in the opinion of the Court, enable the donor afterwards to set the gift aside? These decisions may be divided into two classes: first, where the Court has been satisfied that the gift was the result of influence expressly used by the donee for the purpose; secondly, where the relations between the donor and donee have at or shortly before the execution of the gift been such as to raise a presumption that the donee had influence over the donor. In such a case the Court, sets aside the voluntary gift, unless it is proved that in fact the gift was the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will and which justify the Court in holding that the gift was the result of a free exercise of the donor's will. The first class of cases may be considered as depending on the

8. Powell v. Powell, (1900) 1 Ch 243=69 L J Ch 164=82 L T 84.
9. All-card v. Skinner, (1887) 36 Ch D 145=56 L J Ch 1052=36 W R 251=57 L T 61.

principle that no one shall be allowed to retain any benefit arising from his own fraud or wrongful act. In the second class of cases the Court interferes, not on the ground that any wrongful act has in fact been committed by the donee, but on the ground of public policy, and to prevent the relations which existed between the parties and the influence arising therefrom being abused.

Another case of this class is (1929) A C 127 (10). On behalf of the appellant a good deal of reliance was placed on the last mentioned decision because there the donee had independent advice from a lawyer and yet the gift was set aside because the lawyer did not fully comprehend the situation that the donee was making a gift of practically the whole of his property and did not bring home to the mind of the donor that she could more prudently and equally effectively benefit the donee by bestowing the property upon him by will. Now there is no reason why the principle governing this class of cases should not be equally applicable to cases in which the transaction is challenged not by the donee himself but by somebody claiming through the donee after the donee's death. The only difference being that in such a case there is the fact, which has to be thrown into the scale by which the facts are to be weighed, that the donee during the period that he was alive did not challenge the transaction. Mr. Choudhury has therefore on the strength of (1929) A C 127 (10) argued that in the case before us it was the duty of the pleader who is said to have helped Muktamani in putting the transaction through to have dissuaded her from making the gift and to have advised her that she could equally effectively make a will bequeathing the property to the intended donee. We are not prepared to regard this argument as well founded. In the first place it should be noticed that it is perfectly plain that in the first of the two classes of cases enumerated above, as Lord Sumner has clearly observed in this judgment in 52 I A 342 (1) independent advice is not necessary but that the burden is capable of being discharged in other ways. And it is also clear from what Lord Hailsham L. C., has said in (1929) A C 127 (10) that that also is the position as regards the second class of cases. He has said:

But their Lordships are not prepared to accept the view that independent legal advice is the only way in which the presumption can be rebutted; nor are they prepared to affirm that independent legal advice, when given, does not rebut the presumption, unless it be shown that the advice was taken. It is necessary for the donee to prove that the gift was the result of the free exercise of independent will. The most obvious way to prove this is by establishing that the gift was made after the nature and effect of the transaction had been fully explained to the donor by independent and qualified person so completely as to satisfy the Court that the donor was acting independently of any influence from the donee and with the full appreciation of what he was doing; and in cases where there are no other circumstances this may be the only means by which the donee can rebut the presumption. But the fact to be established is that stated in the judgment already cited of Cotton, L. J., and if evidence is given of circumstances sufficient to establish this fact, their Lordships see no reason for disregarding them merely because they do not include independent advice from a lawyer. Nor are their Lordships prepared to lay down what advice must be received in order to satisfy the rule in cases where independent legal advice is relied upon, further than to say that it must be given with a knowledge of all relevant circumstances and must be such as a competent and honest adviser would give if acting solely in the interests of the donor.

Nextly, in the present case, Muktamani was not by the transaction, depriving herself of all her properties, but only a small portion of it and it is obvious that she was acting on a motive that is perfectly legitimate and understandable. Lastly, upon the evidence of D. W. 1 the scribe Gopal Sirdar and of D. W. 2 the pleader Pramatha Nath Bhattacharjee there is no doubt whatever that Mukthamani made the gift fully understanding its true nature and effect. The pleader explained to her what the document would mean to her and although the scribe in his cross-examination has tried to help the plaintiff his change of front is too patent to escape detection. We are of opinion that the Court below was right in its decision. We accordingly order that the appeal be dismissed with costs.

K.S. *Appeal dismissed.*

10. Inche Noriah v. Shaikh Allie Bin Omar, (1929) A C 127=98 L J P C 1=45 T L R 1=140 L T 121.

A. I. R. 1935 Calcutta 675

LORT-WILLIAMS AND JACK, JJ.

Mati Lal De and *another*—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 367 of 1935, Decided on 6th August 1935.

Theft—No bona fide right—But no finding that there was no bona fide belief of right—No offence is committed.

The accused had no bona fide claim of right, but there was no finding that they did not bona fide believe that they had such a bona fide claim:

Held: that the accused were not guilty of theft: 1917 *Cal* 648, *Foll.* [P 676 C 2]

Bhupendra Kishore Basu—for Petitioners.

D. N. Bhattacharjee—for the Crown.

Lort-Williams, J.—In this case a Rule was issued to show cause why the convictions and sentences passed upon the petitioners should not be set aside. They were convicted under S. 379, I. P. C., for cutting and taking away paddy from a certain piece of land. They admitted that they did so, but claimed that as they had grown this paddy they were entitled to remove it.

The facts are that the complainant obtained a civil Court decree in respect of this and other lands against a large number of defendants, of whom Ruplal, the father of the petitioners, was defendant 29. The effect of that decision was that it was adjudged that the complainant was entitled to khas possession of this land. Certain of the other defendants appealed. Ruplal did not. The effect of the appeal was that it was decided that the complainant was entitled only to an eight annas undivided share in the land and the rest of his claim was dismissed. It was also ordered that the defendants, who had not appealed including the present accused, were to be treated as not being parties to the appeal.

There was a second appeal and this order was upheld by the High Court. It was argued and has been argued very strenuously by Mr. Bhattacharjya on behalf of the Crown that the result of these orders and appeals was that the present petitioners were bound by the original decree declaring that the complainant was entitled to khas possession of these lands and the fact that that decree has been set aside upon appeal and it has been decided that the original judgment was incorrect and not according to law, and that the complainant was only entitled to an undivided eight annas share, is not to be taken into consideration in discussing the question whether these defendants are to be treated as criminals and whether the facts show that they had a criminal or dishonest intention to steal. I am unable to accept any such contention, and I am fortified in this view by the decision in 44 Cal. 66 (1), where it was held that the removal of property in the assertion of a bona fide claim of right, though unfounded in law and fact, does not constitute theft. That is the exact position of these accused.

The learned Sessions Judge, on appeal, found that the appellants had no bona fide claim of right, but he did not find that they did not bona fide believe that they had such a bona fide claim. He went on to say that because in law they had no bona fide claim of right and they deliberately disobeyed the orders of the Court when their remedy lay in the civil Court, therefore they were guilty of theft. I cannot follow the steps of this reasoning on the part of the learned Judge. If all the facts stated by him are accepted, that will not make the accused guilty of theft for the reason that they thought they had a bona fide claim of right and they were asserting it. I am not at all surprised that cultivators, who have been made tenants in circumstances such as these by some of the other defendants to the original suit and have grown paddy on the land, thought that they had a right to cut the paddy and take it away, especially when the original decree, which dispossessed the defendants who let them the land, was set aside by the judgment of the appellate Court which gave the complainant only an eight annas undivided share in the land.

In these circumstances in my opinion no case has been made out against the accused and the convictions and sentences must be set aside and the accused acquitted. The petitioners who are on bail will be discharged from their bail bonds. The fine, if already paid, must be refunded to the petitioners.

Jack, J.—I agree that in the circumstances the petitioners should be acquitted.

S.R. *Convictions set aside.*

1. Arfan Ali v. Emperor, 1917 Cal 648=36 I C 136=17 Cr L J 456=44 Cal 66=20 C W N 1270.

A. I. R. 1935 Calcutta 677

LORT-WILLIAMS AND JACK, JJ.

Jnanendra Nath Dey—Accused—Petitioner.

v.

Kshitish Chandra Dey—Complainant—Opposite Party.

Criminal Revn. No. 435 of 1935, Decided on 31st July 1935.

(a) Penal Code (1860), S. 498—Scope.

In cases under S. 498 the fact that the girl went away of her own accord is immaterial.

[P 677 C 2]

(b) Penal Code (1860), S. 498—"Taking" does not mean enticing or taking by force—Person actively assisting woman to get away from her husband's house or from custody of some person taking care of her comes under S. 498.

The word "taking" is intended to mean something different from enticing. It cannot mean taking by force, because this would amount to abduction. A case under S. 498 is sufficiently established, if it can be shown that the accused personally and actively assisted the wife to get away from her husband's house or from the custody of any person who was taking care of her on behalf of the husband. Of course the taking must be with the "intention" stated in the section. [P 677 C 2]

Where the accused not only provided the means by which she got away from her relation's house, namely, the boat, but he brought it to the house and himself went away with the girl in the boat from the house and both of them stayed in another house at night:

Held: that he "took" the girl away within the meaning of the section. The fact that accused and the girl stayed together at night at the house was sufficient to show that there was criminal intent within the meaning of the section. [P 677 C 2; P 678 C 1]

Dinesh Chandra Roy—for Accused.

Jitendra Mohan Banerji and *Benode Behary Mukerji*—for Complainant.

Lort-Williams, J.—In this case a Rule was issued to show cause why the conviction and sentence passed upon the petitioner should not be set aside. The petitioner was charged with an offence under S. 498, I. P. C., and sentenced to three months' rigorous imprisonment. The complainant married his wife Shantilata seven years ago. The accused Jnanendra was his sister's husband, that is to say, his brother-in-law, who lived in a neighbouring house. For sometime, the complainant noticed undue intimacy between his wife and Jnanendra. In Agrahayan last, she went to Jnanendra's house for a social ceremony and put off coming back on one pretext or another until the next month. Six days' after that, she again went to Jnanendra's house, whence Jnanendra took her to her mother. From there she refused to return to her husband's house. Later, Jnanendra took her to his house. There was a village Salish and Jnanendra agreed to let the complainant take his wife away. The wife was unwilling to go and there was trouble. Eventually she was taken to the house of Panchanon, the grand-uncle of the complainant. From there, it is alleged, the accused took her away at night to the house of Surobala, a relative of his, where he spent the night with her from time to time. The young woman is about 20 years of age and, according to her evidence, she left Panchanon's house of her own free will. She was a witness for the prosecution, who was declared hostile. She said that she left Panchanon's house at mid-day, because her husband used to beat her and she wanted to escape from his ill-treatment. Her evidence was not believed in either of the Courts below. There was evidence for the prosecution that a number of men, including Jnanendra, came to Panchanon's house in the middle of the night and at 1 a. m. they took Shantilata from the house in a boat.

It is sufficiently obvious that the girl went away of her own accord. But that is immaterial under S. 498. The question is whether the accused took or enticed her away. There is no definition in the Code of the word "taking." It apparently is intended to mean something different from "enticing." It cannot mean "taking by force," because this would amount to abduction. In our opinion, a case under S. 498 is sufficiently established, if it can be shown that the accused personally and actively assisted the wife to get away from her husband's house or from the custody of any person who was taking care of her on behalf of the husband. Of course, the "taking" must be with the "intention" stated in the section. In this case, it is clear that the accused not only provided the means by which she got away from Panchanon's house, namely the boat, but he brought it to the house and himself went away with the girl in the boat from the house. In these circumstances we consider that he "took" the girl away within the meaning of the section. The fact that Jnanendra and the girl stayed together at night at Surobala's house is sufficient

to show that there was criminal intent within the meaning of the section. In these circumstances, the conviction and sentence will stand and the Rule accordingly must be discharged. The petitioner, who is on bail, will surrender to his bail and serve out the remainder of his sentence.

Jack, J.—I agree.

K.S. *Rule discharged.*

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* A. I. R. 1935 Calcutta 678

LORT-WILLIAMS AND JACK, JJ.

A. R. Manuel—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 394 of 1935, Decided on 30th July 1935.

(a) Indian Christian Marriages Act (1872), S. 38—Section governs schedule—Space for age need not be filled.

The section governs the schedule and the space left for age is not necessary to be filled with that particular, because no such provision is made in the section: *Dean* v. *Green*, 8 *P D* 89, *Foll.*; *In re Baines*, 1 *Cr & P* 31, *Diss. from.* [P 678 C 2]

*** (b) Criminal Trial—Burden of proof—Prosecution must prove case, statement or evidence by accused apart.**

In criminal trials it is not for the accused to say anything unless he chooses and in any case the prosecution must prove their case, apart from any statement made by the accused or any evidence tendered by him. [P 679 C 2]

S. N. Banerji (Sr.) and *Ramdas Mukerji*—for Petitioner.

D. N. Bhattacharjee—for the Crown.

Lort-Williams, J.—In this case a Rule was issued to show cause why the conviction and sentence passed upon the petitioner should not be set aside. The Rule was issued on the ground that the age being required to be put in under the schedule to S. 38, Indian Christian Marriages Act (15 of 1872), although not required by the section, the misdescription of the age in the notice form does not amount to an offence under S. 66 (b) of the Act.

Mrs. Gilbert, wife of Ivan Gilbert, filed a complaint against the accused, alleging that he had abducted her daughter Noreen, aged 17 years. That was on 22nd January 1935. On 12th January the accused had applied to the Marriage Registrar in Writers Buildings for a license to be married on 17th January, declaring the girl's age to be 22. The girl left her home on the 17th and could not be traced. Thereupon a warrant was issued for the production of the girl and a summons against the accused under S. 366, I. P. C. The accused appeared in Court on the 29th and the girl was found by the police on 6th February and produced in Court. In course of this trial, Ivan Gilbert filed a complaint on 20th February 1935, against the accused under S. 66 (b), Indian Christian Marriages Act. It is difficult to understand how the proceedings under S. 366, I. P. C., came to be instituted against the petitioner, and if instituted came to be dealt with by a responsible Court; because it must have been obvious to everybody concerned that having regard to the undoubted age of the girl and her willingness throughout there could be no charge under that section. This may explain the reason for the initiation of the present proceedings which, in our opinion, were hardly necessary, for reasons which I will explain hereafter. These proceedings seem to have been taken owing to the disappointment of the complainant over the failure of the proceedings under S. 366.

On the point of law raised by the learned Advocate for the petitioner, S. 38 provides that notice shall be given in the form contained in Sch. 1 thereto annexed, or to the like effect, and shall state therein the name, the surname and the profession or condition of each of the parties intending marriage, the dwelling place of each of them, the time during which each has dwelt therein and the place at which the marriage is to be solemnised. The schedule in addition to this contains a space for the ages of the two persons who desire to be married. In my opinion the section governs the schedule and the space left for age is not necessary to be filled with that particular, because no such provision is made in the section. The truth of the matter in my opinion is that some days later than the passing of the section in its present form, it was considered necessary that ages of both parties should be given in the schedule, but this alteration has not been provided in the section itself. Every particular in the schedule, except the age, is provided for in the section. In 8 P. D. 89 (1), Lord Penzance stated, in respect to a similar section and schedule,

1. Dean v. Green, (1883) 8 P D 89.

Such being the effect of the enacting portions of the statute, it would be quite contrary to the recognized principles upon which Courts of law construe Acts of Parliament, to enlarge the conditions of the enactment, and thereby restrain its operation, by any reference to the words of a mere form, given for convenience sake in a schedule and still more so when that restricted operation is not favourable to the liberty of the subject but the reverse. It is needless to cite authorities for these principles of construction, but it so happens that there is in existence a most apposite one by a Judge of high repute (Lord Cottenham) in relation to the schedule of this very statute. In 1 Cr & P 31 (2), he said speaking of this very schedule,"

if the enacting part and the schedule cannot be made to correspond, the latter must yield to the former. But that does not dispose of the matter, because S. 66 provides, inter alia, that

whoever, for the purpose of procuring any marriage, intentionally makes any false oath or signs any false notice or certificate etc.

Therefore, in spite of the fact that he might have left out the ages in the schedule, nevertheless having inserted them, he is liable under S. 66 if, in fact, that information was false to his knowledge because by signing such a notice he has signed a false notice within the meaning of the section. Notice or no notice, such a marriage would not be valid, because the consent of the father or the guardian is required in the case of a minor who desires to marry, the minor under the provisions of this Act being a person under 21 years of age. According to the accused's statement, he and the girl went to the Registry Office and she dictated the particulars and he wrote them down. This also would not absolve him from the penalties of the section, so long as he was aware that the girl's statement, which he entered in the notice was false. Later on it appears that the girl's father learnt of the proceedings and the accused himself went to the Registry Office and cancelled the notice. The main point for determination was the accused's knowledge about the girl's age. Upon this point the learned Magistrate has proceeded in quite a wrong way. He started off with a consideration of the statement of the accused, instead of considering the evidence adduced by the prosecution on this point. He stated that in all the 11 pages of his written statement, he did not find a single word to show that the accused was not aware of the real age of the girl, and that the accused had not attempted to deny that he was not aware of it.

As we have so often pointed out in criminal trials it is not for the accused to say anything unless he chooses and in any case the prosecution must prove their case, apart from any statement made by the accused or any evidence tendered by him. Moreover, in fact, the learned Magistrate has not found specifically that the accused had any knowledge of the girl's age, though indirectly he has arrived at a conclusion which assumes that he has come to such a finding because he says that the accused had known the girl and her family since 1931 and that the father had refused his consent to the marriage on the ground that she was only 17. Further, the learned Magistrate says that the accused is a Barrister and a company promoter and he ought to know the law. However, without specifically finding that the accused had this knowledge, the Magistrate has found that the accused intentionally made a false declaration. In view of the fact that this objection to the form of the judgment is somewhat technical, and that there is some evidence to show that the accused was aware that the girl was under 21 years of age, we do not think it necessary to send this case back for retrial, and the conviction must be upheld.

With regard to the sentence, the learned Magistrate has expressed himself as being of opinion that the conduct of the accused throughout was despicable. It is difficult to understand what this expression of opinion is based upon, unless it be the disparity in the ages of the two people. But such disparity, as exists in the present case, hardly justifies the expression used by the learned Magistrate. Being of this opinion, the Magistrate sentenced the accused to six months' rigorous imprisonment. I have little doubt that he has been sentenced to this period of imprisonment, not because he signed a false notice, but because of his alleged relations with the parents of this girl and the girl herself. It is obvious from the evidence that this girl was in love with the petitioner and wanted to marry him. In these circumstances the sentence is clearly unjustifiable. In proper cases severe sentences may be inflicted, but in a case such as

2. In re Baines, 1 Cr & Ph 31=10 L J Ch 108=4 Jur 1194.

this, where no damage whatever was caused by the signing of the notice, obviously the position of the accused is that of one who has committed a technical offence, and must be punished for that offence alone. We consider it sufficient if his sentence be reduced to the period during which he was under arrest in the Court of the trying Magistrate; in addition he must pay a fine of Rs. 20; on payment he will be discharged from his bail bond.

Jack, J.—I agree.

S.R. *Order accordingly.*

A. I. R. 1935 Calcutta 680

LORT-WILLIAMS AND JACK, JJ.

Jagnarain Tewari—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 893 of 1934, Decided on 31st May 1935.

Evidence Act (1872), S. 114, Ill. (a) — Stolen property found in possession of accused after six months — Presumption of theft and of knowingly possessing stolen property by accused is weakened to stage of mere suspicion.

Where six months after theft, some of the stolen goods are found in the possession of the accused, it is not possible to rely upon the presumption in Illus. (a), S. 114, owing to the length of time which elapsed between the theft and the finding of the goods in the possession of the accused. The most that can be said is that it is suspicious that this man should have been found in possession of goods. [P 681 C 1]

Sures Chandra Taluqdar— for Appellant.

D. N. Bhattacharjee—for the Crown.

Lort-Williams, J.—In this case the appellant was convicted of an offence under S. 411/75, I. P. C., after previous conviction, and sentenced to rigorous imprisonment for two years and a fine of Rs. 1,000 or in default rigorous imprisonment for six months, and an order under S. 565, Criminal P. C., for three years. The complainant lived at 20 Corporation Street, and he alleged that on 2nd December 1933 he went to see his family at Deoghar and returned on 4th December, when he found that a box containing ornaments and precious stones had been broken open and jewellery valued at Rs. 60,000 or Rs. 70,000 had been stolen. He gave information to the police with a list of the stolen articles. Nothing more happened until 5th June 1934, six months afterwards, when the police upon receipt of certain information sent the complainant to Cuttack. There they showed him certain ornaments which he identified.

The evidence of the police was that they went to the house of a woman named Nishamani Bai, who was also charged along with this appellant. She was a woman of Cuttack town. The accused Jagnarain was found in her house. On the bank of an adjoining tank was found a box containing ornaments, which Jagnarain claimed to be his. The woman had other ornaments which, she said, Jagnarain had given her. Some of these were identified by the complainant. He was able to do so because they had been for a long time in use by his wife and other members of his family. One of the pieces of jewellery was found upon the accused Jagnarain. It was alleged that some of the ornaments were not of the usual cheap bazar pattern, but were of a distinctive pattern, and this enabled the complainant more easily to identify them. There was evidence to show that at one time the accused Jagnarain lived somewhere near the complainant's house, and occasionally went there to see his servants. But no dates of these visits were given in evidence. It was further alleged that an officer had made inquiries in Jagnarain's village, and found that he was the son of a dismissed duffadar on a pay of Rs. 6 per month, and that he had been erecting a house which had cost him about Rs. 20,000 already. The Magistrate remarked that this evidence was significant, and that it almost coincided with the theft. Although it appeared that the house was practically built before the date of theft, yet it had not then been paid for.

The Magistrate was much impressed by this part of the evidence and asked himself a rhetorical question "Where did the accused get the money?" In his written statement he described himself as a Kaviraj who practised in Calcutta and it was suggested that he had a large income. This however was not supported by any evidence. On the other hand, there was evidence that he was in such poverty as prevented him from paying his rent of Rs. 6 per month, and his effects were distrained. It is clear that the evidence of the officer who visited Jagnarain's native village was not admissible being hearsay, and it was

this, more than anything else, which seems to have impressed the learned Magistrate. As the case stood, so far as we are concerned with relevant evidence, it was proved that the complainant had been robbed between 2nd and 4th December 1933. It was proved also that six months afterwards some of the stolen goods were found in the possession of the appellant. That is the whole of the relevant evidence. In such circumstances it is clear that the Crown have failed to prove either theft or knowingly being in possession of stolen goods. The law provides that certain facts and circumstances may be presumed. If the presumption under S. 114, Evidence Act, which is referred to in illus. (a) could be made, it would have been possible to convict this accused either of theft or of knowingly possessing stolen goods. The goods however were found in his possession at least six months after the theft, and, in my opinion, it is not possible to rely upon the presumption in illus. (a), S. 114, owing to the length of time which elapsed between the theft and the finding of the goods in the possession of the accused. That being so, the onus is left upon the Crown to prove the guilt of the accused, either that he stole them, of which they have no evidence whatever, or that he possessed them knowing them to be stolen, of which again there was no evidence. The most that can be said is that it is suspicious that this man should have been found in possession of goods, identified by the complainant as having been stolen more than six months before. Such suspicion however is not enough to found a conviction upon, and, consequently, this conviction and sentence must be set aside and the accused acquitted.

Jack, J.—I agree that the evidence is perhaps consistent with the innocence of the appellant and therefore will not disagree with the order passed by my learned brother, though I think he has taken a view of the circumstances rather formulated to the accused. They are at least most suspicious and a general presumption against him under S. 114, Evidence Act, is almost applicable. Two rather valuable and unusual ornaments out of the stolen property were found on his person, a number of others were found in the premises in which he was residing or with the woman with whom he was living. He gave no explanation of his possession of the ornaments or of the wherein that to build a house worth Rs. 20,000, and I think it is not clear on the evidence whether he commenced the house before or after the theft, up to then he was so poor that his furniture had to be attached for a rent of Rs. 6.

S.R. *Conviction set aside.*

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* A. I. R. 1935 Calcutta 681

LORT-WILLIAMS AND JACK, JJ.

Hem Chandra Chongdar—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 342 of 1935, Decided on 7th August 1935.

*** (a) Criminal P. C. (1898), S. 364 — Statement of accused before Magistrate — Statement beginning by saying that he was guilty — Body showing accused meant not guilty of crime but of handing letters to detenu — Statement held no confession of guilt but amounting to assertion of innocence—Duty of Magistrate to explain law to accused.**

Where the accused made a statement before a Magistrate, where he began by saying that he was guilty but the body of the statement fairly clearly showed that what he meant was that he was not guilty of the crime, but that he was guilty of handing letters from other persons to the detenu and vice versa :

Held : that that was not a confession of guilt, but an assertion of innocence ;

Held further: that the Judge ought to have pointed out to the accused that before he could be found guilty of the offence, it must be shown that he wilfully and intentionally committed an act which he knew to be unlawful in the sense that it was an infraction of the criminal law.

[P 682 C 1]

*** (b) Bengal Criminal Law Amendment Act (6 of 1930), S. 6 with Penal Code (1860), S. 109 — Accused charged with aiding and abetting detenu in contravening conditions of Government order served on detenu — Order not served upon accused — No knowledge of order to him — Order held private order not known to accused, hence he could not contravene conditions thereof nor was order public document imputing constructive knowledge.**

The accused was charged with aiding and abetting the detenu in receiving correspondence in contravention of conditions laid down in the Government order which was never served upon the accused and of which he had no knowledge whatever :

Held : that the order was an order in the sense of a private order served upon this particular detenu ; that the accused could not be convicted of acting in contravention of something of which he had no knowledge and of which he could not obtain any knowledge, because the order was not a public document, in the sense that it is available to the public generally.

[P 682 C 2]

Binayak Nath Banerjee — for Appellant.

D. N. Bhattacharjee—for the Crown.

Lort-Williams, J.—The appellant in this case was charged under S. 6, Bengal Act 6 of 1930, read with S. 109, I. P. C., and was sentenced to rigorous imprisonment for one year. It was alleged that he received letters addressed to certain persons detained under the Bengal Criminal Law Amendment Act. One of the conditions of such detention is that the persons detained are not allowed to communicate with one another or with other persons without the correspondence being inspected by the police. It is alleged that the accused facilitated the conveyance of letters or information from such a detenu to other people. The accused was not aware of the contents of the letters.

It seems to me that a series of mistakes have been made by the authorities in connexion with this prosecution. The accused made a statement before a Magistrate. In that, it is true, he began by saying that he was guilty. But the body of the statement shows fairly clearly that what he meant was that he was not guilty of the crime, but that he was guilty of handing letters from other persons to the detenu or vice versa. Otherwise the statement indicated quite clearly that he had no criminal intention and that he acted purely from ignorance, and that even so he conveyed such letters only for the first few days and then apparently, realizing that his shop was being used as a sort of post office, he at once put an end to the matter, and told the detenu that in future he would not receive for him or give to him letters sent to his shop. Relying upon this alleged confession, the learned Judge assumed that the accused intended to plead guilty, and made the same mistake with regard to his plea under S. 364. The accused said :

> I am guilty. I am a resident of a village and am not very literate. I did not know that I was committing an offence. The moment I came to know that it was an offence I confessed the whole truth to the Sub-divisional Officer of Naogaon and to the officer in charge of Badalgachi. I shall never do such a thing again. I committed an offence without knowing.

That is not a confession of guilt, but an assertion of innocence, and the learned Judge ought to have pointed out to the accused that before he could be found guilty of this offence, it must be shown that he wilfully and intentionally committed an act which he knew to be unlawful in the sense that it was an infraction of the criminal law. If these criticisms were not sufficient to dispose of this case, one has only to observe that the charge was that the accused, between certain dates, intentionally abetted the commission of an offence under S. 6, Bengal Criminal Law Amendment Act (6 of 1930) by detenu Manindra Nath Guha alias Jharu, to wit, that he knowingly and intentionally aided the above detenu in receiving uncensored correspondence, namely, the postcard, Ex. 5, and the two letters, Ex. 3, which he received by post and delivered them secretly to the detenu without submitting them to the officer in charge of Badalgachi police station to be censored in contravention of conditions laid down in paras. 9 and 10 of the Government Order, Ex. 1, which was duly served on Monindra and thereby committed an offence punishable under S. 6. He was therefore charged with aiding and abetting the detenu in receiving correspondence in contravention of conditions laid down in the Government order which was never served upon the accused and of which he had no knowledge whatever.

This order was not an act of the legislature which it is presumed that every citizen has knowledge of. This was an order in the sense of a private order served upon this particular detenu. It is obvious that the accused cannot be convicted of acting in contravention of something of which he has no knowledge, and of which he cannot obtain any knowledge, because the order was not a public document in the sense that it is available to the public generally. In these circumstances it is clear that the conviction and sentences must be set aside and the accused is acquitted. The appellant, who is on bail, will be discharged from his bail bond.

Jack, J.—I agree.

S.R. *Conviction set aside.*

** A. I. R. 1935 Calcutta 683

R. C. MITTER, J.

Bisweswar Ray Chaudhury — Petitioner.

v.

Khagendra Kaibarta and *others* — Oppcsite Parties.

Civil Rule No. 107 of 1935, Decided on 30th July 1935, from order of Deputy Commissioner, Nowgong, D/- 26th November 1934.

*** (a) Workmen's Compensation Act (1923), S. 12—Labourer in Railway Company dying of accident—Dependants claiming compensation from contractor employing deceased—Company held directly liable to dependants as if employer.**

The deceased was a labourer in the employ of a Railway Company and died of an accident whereon the dependants of the deceased claimed compensation from the contractor who had employed the deceased:

Held : that the company was directly liable to dependants as if it was the employer.

[P 683 C 2]

*** (b) Workmen's Compensation Act (1923), S. 10—Claim by dependants of deceased Railway employee—No claim against Company but against contractor—Notice by Commissioner to Company — Notice held ought to have been given to contractor, not to Company.**

Where a claim for compensation was made by the dependants of a deceased labourer in a Railway Company's employment for accidental death of deceased and claim was made against the contractor employing the deceased and not against Railway Company but the Commissioner served notice on the company:

Held : that notice ought to have been served on the contractor and not on the Company.

[P 683 C 2]

**** (c) Workmen's Compensation Act (1923), S. 12 (2)—Claim for compensation—S. 12 (2) making contractor liable to indemnify Railway Company, principal—Contractor is entitled to notice—Hence can dispute claim.**

In a claim for compensation as sub-S. (2), S. 12 puts the contractor under the liability to indemnify the Railway Company, he is entitled to notice of the claim and can certainly dispute the claim of the dependants of the deceased labourer.

[P 683 C 2]

J. N. Sanyal—for Petitioner.

D. L. Kastgir and *Sunil Chunder Dutt* for *Sudhir Kumar Kastgir* — for Opposite Parties.

Judgment.—The petitioner is a contractor employed by the Assam Bengal Railway, opposite party No. 7, in this rule. He employed a labourer of the name of Bhogiram Nadial, the father of the opposite parties Nos. 1 to 6. Bhogiram Nadial fell down from a ballast train on 4th August 1934 and died on the following day. The Commissioner appointed under the Workmen's Compensation Act served a notice on the Assam Bengal Railway under S. 10-A, Workmen's Compensation Act. The Railway Company admitted liability and deposited Rs. 600 under the provision of the said section. Thereafter it is stated that the Railway Company deducted Rs. 600 from the petitioner's bill. The petitioner thereafter made an application before the Commissioner for being given an opportunity to contest his liability, he taking up the position that the dependants of the deceased labourer are not entitled to claim any compensation. The Commissioner passed the following order on the 3rd January 1935 :

> I am not required to make any inquiry now, as the Railway Authority, the real employer, after inquiry, has accepted the liability. If the Railway Authorities were satisfied that there was no liability they would have disclaimed it.

The petitioner has moved this Court against this order. In the explanation submitted by the Commissioner in pursuance of an order of my learned brother McNair, J. he has stated that under S. 12 of the Act the Railway Company was liable to pay compensation and "when the principal," namely the Railway Company

> admitted liability there was no necessity to make any inquiry. It does not appear from the Act that when the principal accepts liability the contractor can deny it.

In my judgment the orders passed by the Commissioner proceed upon misconception. The petitioner was the employer of the deceased labourer and not the Railway Company. The Railway Company is the principal of the employer, namely, of the contractor, and is under the circumstances defined in S. 12 liable directly to the labourer's dependants as if it was the employer. This is quite clear from S. 12 of the Act. The notice under S. 10-A ought to have been given not to Railway Company but to the petitioner, inasmuch as no claim had been preferred by the dependants of the deceased labourer against the Railway Company. Besides as sub-S. (2), S. 12 puts the contractor under the liability to indemnify the Railway Company, he is entitled to notice and can certainly dispute the claim of the dependants of the deceased labourer. R. 36 of the rules framed by

the Government of India is clear on the point. Mr. Kastgir who appears for the Assam Bengal Railway Company does not oppose the rule and he wants the inquiry to be made in the presence of the petitioner. I accordingly set aside the orders passed. If the Commissioner wants to proceed under S. 10-A of the Act he must serve a notice on the petitioner and proceed according to law. The rule is made absolute but without costs.

S.R. *Rule made absolute.*

** A. I. R. 1935 Calcutta 684

LORT-WILLIAMS AND JACK, JJ.

Narayan Chandra Chatterjee—Plaintiff—Petitioner.

v.

Panchu Pramanik and *others*—Defendants—Opposite Parties.

Criminal Revn. No. 90 of 1935, Decided on 25th July 1935.

(a) Contempt — Procedure— Proper procedure in contempt proceedings for interfering with Receiver in suit is that plaintiff himself rather than receiver should apply to Court for protection.

The proper procedure in initiation of contempt proceedings for cutting and taking away crops from the Receiver appointed in a suit is that the plaintiff in the suit should apply to the Court to obtain the protection of the Court after the appointment of a Receiver rather than that the Receiver should make the application himself.

[P 686 C 2]

**** (b) Contempt of Court—Person guilty of contempt—Acts amounting to contempt punishable under Penal Code--Still contempt does not become punishable under the Code and hence High Court has jurisdiction to take cognisance of such contempt.**

Where a receiver has been appointed by the Court and an order has been passed giving him possession of the property and the Court has decided that the tenants from the mortgagor defendant had no right to take the crops nor had any right to remain on the land, the cutting and taking away of crops on such land by such tenants is clearly contempt of Court. The mere fact that these acts which amount to contempt are punishable under the Penal Code does not make the contempt punishable under the Code and it cannot therefore be said that the High Court has no right to take cognisance of such contempt : 1933 *Pat* 204, *Approved but Dist.*

[P 686 C 2; P 687 C 1]

N. C. Sen Gupta and *Mohit Kumar Chatterjee*—for Petitioner.

Krishna Kamal Moitra—for Opposite Parties.

Lort-Williams, J.—In this case a Rule was issued on the opposite parties to show cause why they should not be committed for contempt, or why such other or further order should not be made as to this Court might seem fit and proper. There are 21 persons against whom this Rule has been issued, and, so far as I can understand the affidavit in reply, the acts alleged by the petitioner to have been committed by these respondents are admitted by them, and, if so they clearly amount to contempt of Court. The petitioner as a liquidator of Joakim Nahapiet & Co. Ltd. in liquidation instituted a mortgage suit numbered 114 of 1932 in the Court of the First Subordinate Judge of Pabna for a decree for foreclosure against Badruddin Biswas the mortgagor, and several other persons including the opposite parties who were impleaded as persons who had been inducted or let in as tenants on the land by the mortgagor, who had executed an English mortgage in favour of the company.

Under this mortgage the mortgagor remained in possession, as is usual under an English mortgage, and it is not contended that the mortgagee had any knowledge of the alleged tenancies or leases which, the respondents say, the mortgagor made in their favour. In the counter-affidavit there is a half-hearted suggestion that some of the respondents, without naming anyone, had some possessory right prior to the date of the mortgage. This however was denied by the petitioner, and, in my opinion, his contention must be accepted on this point. During the pendency of the mortgage suit the petitioner was appointed Receiver of the mortgaged properties by an order of the Court dated 13th July 1932 and according to his petition, he was placed in possession of the mortgaged properties after ejecting the opposite parties and others in due course under O. 21, R. 25, Civil P. C., and, as such Receiver he entered into possession of the property and in due course settled bargadars and ticcadars on the land and paid Government revenue and cesses. There is nothing in the affidavit by the respondents which would lead me to think that this statement of the petitioner is inaccurate. The order of 13th July 1932 states that the Pleader for the opposite parties was informed and called but that he did not appear and oppose the application and that it appeared from the affidavit that it was just and proper that a Receiver of the mortgaged

properties should be appointed. The Court directed that the plaintiff Narain Chandra Chatterji, Liquidator to Joakim Nahapiet & Co. Ltd., be appointed Receiver. The order further states :

> The terms of the appointment will be settled later on, on the application of the Receiver. Meanwhile, let the Receiver take possession of the mortgaged properties.

On 20th July 1932 the terms of appointment were settled and an order was made reciting that Narain was Receiver of the mortgaged properties and authorising him to take possession of the mortgaged properties and to realize all income including arrears, and to institute and defend suits and other legal proceedings in respect of those properties and making him liable to render due and proper account. Subsequently, the petitioner seized the standing crop on the mortgaged land. The defendants in the suit other than the mortgagor filed a petition dated 8th August 1932 claiming the standing crops and asking for directions to the Receiver to abstain from seizing the crops on the allegations that the Receiver was not entitled to khas possession or to the standing crops inasmuch as they were tenants settled upon the land by the mortgagor under the mortgage. By the Court's order dated 17th August 1932 it was decided that the Receiver was entitled to the standing crops and none of the defendants had any right to remain on the land or to claim the standing crops. The learned Judge pointed out that it was an English mortgage and that the Receiver had every right to seize the standing crops, because under an English mortgage he has the right to enter upon possession of the property immediately upon the execution of the deed, the mortgagor being liable to ejectment at any time by the mortgagee. The Receiver had stepped into the shoes of the mortgagee and the mortgagor was not entitled to the standing crops which he had grown, and might be ejected by the mortgagee under an English mortgage at any time without notice, and a person who came in as a tenant under the mortgagor could not be in any better position than the mortgagor. Further, he said that it appeared from the leases produced before him that the mortgagor had granted long terms of leases to tenants on receipt of premium, and he found that in the absence of an express reservation of such a right the mortgagor had no power to grant a lease of the mortgaged properties so as to bind the mortgagee.

Then he referred to a number of cases. He held that S. 65, T. P. Act, did not apply to leases of this kind. Further he stated that it had been contended that under sub-Cl. 2 of O. 40, R. 1 these tenants were protected but as the mortgagee or a Receiver appointed, on behalf of the mortgagee had a present right to remove from the possession or custody of property any person in possession that section was not of much avail to the tenant-defendants. The position would have been otherwise had the tenants been in possession of the land from before the English mortgage, but that was not so in this case. Further he stated that in fact the leases were granted with the object of making a large profit at the expense of the mortgagee's interest which had seriously depreciated the value of the property which was khas patit land, and the object of the leases could not be said to be one in the ordinary course of management. This conclusion and the observations of the learned Judge appear to me to be correct. Thereafter when the time came for reaping the crops, the respondents cut and carried away the standing crops and the petitioner made an objection to the Court praying that action be taken against the opposite parties for contempt of Court. An order was made to draw up proceedings for contempt but further proceedings were not taken upon it.

On 20th June 1932 a final decree for foreclosure was passed debarring the respondents and others claiming through and under them from exercising any right to redeem the mortgage and directing them to deliver possession. The petitioner applied for execution of the decree for cess, but an objection was raised under S. 47, Civil P. C., and the same being overruled, an appeal was preferred to the High Court against those proceedings, which is still pending. The petitioner has not as yet entered into possession as decree-holder nor has he applied for discharge of the receiver. In November 1933 while the petitioner was in possession as receiver, the respondents again began to disturb his possession by damaging the winter crops,

and on 22nd November 1933 an order under S. 144, Criminal P. C., was made against the respondents restraining them from interfering with the possession of the receiver. But immediately on the expiry of two months from the date of the said order, the respondents on various dates entered into the lands in possession of the receiver and forcibly took away the winter crops from about 300 bighas of land, and in April 1934 removed all the fish from a Jhill measuring about 140 bighas to the value of several thousands of rupees. These facts alleged by the petitioner are denied on behalf of the respondents who stated that there was no jhill on the property.

As I shall point out hereafter, it is not necessary to consider the correctness of these statements. In August, November and December 1934 the respondents again forcibly took away the crops raised on the disputed lands by the bhagdars and ticcadars settled on them by the receiver. Consequently on 19th January 1935 the petitioner made a report to the Court and the Court started proceedings under S. 476, Criminal P.C., and issued notices to the respondents to show cause why they should not be punished for contempt of Court. During the pendency of the contempt proceedings, the respondents appeared before the settlement officer and filed a petition in which they stated that they were in possession of the lands in dispute and that the receiver had no right to oust them. Further they asserted that every time the receiver attempted to take actual possession they had resisted him. This in itself was obviously a contempt of Court.

It is clear from the affidavit that the respondents did not deny that they had cut the standing crops and that they had resisted and obstructed the receiver. Their contention was that they had every right to do so because they were rightfully in possession of the lands as tenants. Obviously, this assertion was no answer to the charge for contempt.

It is argued that these tenants are illiterate and that they do not understand the position in law. But they certainly ought to have known that an order had been passed by the Court placing the property in the possession of the receiver of the Court, and that they were running a grave risk if they attempted in any way to interfere with the possession of the person whom the Court had put into possession. It is not contended that these respondents were not aware that a receiver had been appointed.

The learned Subordinate Judge with regard to the contempt proceedings held that he had no jurisdiction in the matter and that the application should be made to the High Court, which is the genesis of the present proceedings. I have only referred to this past history in order to show that the respondents cannot contend that what is now complained of was an isolated act and made without knowledge of their position. This previous history shows that repeatedly these respondents have been guilty of obstructing and interfering with the possession of the receiver. But the particular case with respect to which this rule has been issued occurred in March and April 1935 and April, August and November 1934 as set out in paras. 15 and 16 of the petition namely, cutting and taking away growing crops and catching and carrying away fish.

The petitioner moves in this proceeding in his capacity as the plaintiff decree-holder. It has been held in a decision of this Court that that is the proper procedure, and that the plaintiff in the suit should apply to the Court to obtain the protection of the Court after the appointment of a receiver rather than that the receiver should make the application himself. I have no reason to doubt that that is the correct procedure. As I have stated, this seems to me a clear case of contempt. The only real contention that has been raised on behalf of the respondents is that they believed themselves to be rightfully in possession as tenants. But that really is no answer, because they are expected to know the law and they were aware of the fact that a receiver had been appointed by the Court, and that an order had been passed giving him possession of the property. Further they were aware that the Court had decided that they had no right to take the crops nor had any right to remain on the land. In face of these facts it can hardly be contended that these respondents did not know perfectly well that they had no right to obstruct the receiver or interfere with his possession or take away the crops which had been grown on the

lands by the bargadars and ticcadars settled on them. One contention of law that has been raised is that the respondents are really charged with theft of crops and interference with a public servant. These are matters which are punishable under the Penal Code, and therefore no High Court has a right to take cognisance of such contempt because such a contempt is an offence punishable under the Penal Code. This seems to be a misinterpretation of the section. In 12 Pat 172 (1) it was decided that only those contempts which are punishable by the Code as contempts of Court are excluded from the jurisdiction of the High Court by the Act. I find myself in agreement with that decision as the only reasonable construction to be put upon the section.

It only remains to decide what punishment is to be inflicted upon the respondents. Undoubtedly, the contempt is serious. On the other hand, it is clear that the respondents are mere cultivators, and possibly men of little understanding of legal matters, and are illiterate and were perhaps unaware of the seriousness of the steps which they were taking. In the circumstances, it will be sufficient if each of the accused is sentenced to pay a fine of Rs. 5 and the rule is made absolute in these terms.

Jack, J.—I agree.

S.R. *Rule made absolute.*

1. Jnanendra Prosad Bose v. Gopal Prosad Sen, 1933 Pat 204=147 I C 1251=12 Pat 172=14 P L T 77.

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* A. I. R. 1935 Calcutta 687

LORT-WILLIAMS AND JACK, JJ.

Emperor

v.

Tarak Nath Baidya and *others* — Accused.

Criminal Ref. No. 15 of 1935, Decided on 24th July 1935.

*** (a) Penal Code (1860), S. 471—Previous trial — Accused referring to Istafanama, alleged to be forged, in written statement—Istafanama not produced nor filed by accused—Produced and put in evidence by witness for prosecution — Referred by defence counsel in cross-examination—Held no user within S. 471.**

The only evidence of user within the meaning of S. 471 was that at the previous trial accused put in a written statement in his defence in which he referred to certain documents which had been filed and also referred to the Istafanama alleged to be a forged document. The Istafanama was neither filed nor produced nor put in evidence by the accused or on his behalf. It was produced and put in evidence by one of the witnesses for the prosecution. In cross-examination, the Istafanama was referred to by the pleader appearing on behalf of the accused:

Held: that this could not be held to be user within the meaning of S. 471. [P 688 C 2]

*** (b) Practice—Procedure—Sessions trial—Accused cannot file written statement—No such provision exists in Criminal P. C.**

There is no authority for the alleged practice allowing an accused person in a Sessions trial to put in a written statement. There is no provision in the Criminal P. C. for any such practice. [P 688 C 2; P 689 C 1]

(c) Penal Code (1860), S. 471—Document put in evidence by prosecution — Defence counsel's cross-examination on document—Cross-examination is no user under section.

If a document is produced and put in evidence by the prosecution and the pleader of the accused cross-examines the witness upon this evidence, the cross-examination cannot be held to be user within the meaning of S. 471. [P 689 C 1]

D. N. Bhattacharjya—for the Crown.

Dinesh Chandra Ray and *Biswa Nath Naskar*—for Accused.

Benode Lal Ghose — for Complainant.

Lort-Williams, J. — This is a Reference under S. 307, Criminal P. C., The accused Tarak was charged under S. 471 and the other accused under S. 467 read with S. 109, I. P. C. The case was heard by a jury of 5 persons who brought in a unanimous verdict of 'not guilty' on all the charges against all the accused. The evidence given was circumstantial. The learned Assistant Sessions Judge considered it so convincing and clear that he regarded it as essential for the ends of justice to refer the case to this Court on the ground that the verdict of the jury was wrong and perverse and against the weight of evidence.

The case for the prosecution was that Akshoy and Gobardhan held a plot of land under one Hrishikesh. Hrishikesh sold his interest to the accused Tarak and to one Surendra in equal moieties. Surendra brought his 8 annas share in the name of his minor son Krishto. Akshoy and Gobardhan then took a lease of the land for five years from Tarak and Krishto and executed a registered Kabuliyat. When this lease expired, Tarak proposed a fresh Kabuliyat to which Akshoy and Gobardhan agreed, and they all went to the Sub-Registry Office at Alipore on 11th April 1932.

The Kabuliyat was executed, but when they were about to register it, Akshoy and Gobardhan learnt from Tarak that it was in his favour alone for the whole of the land. On hearing this, Akshoy and Gobardhan refused to have the Kabuliyat registered. They continued in possession of the land and executed a Kabuliyat in favour of Krishto, the owner of the other moiety on 2nd July 1932. In December 1932 there was a riot which arose out of the cutting of paddy on the land and Gobardhan was murdered. Tarak and others were committed to Sessions on a charge of rioting and murder and they were tried in May Sessions, 1933.

The learned Judge then says in his letter of reference that Tarak propounded an Istafanama purported to have been executed by Akshoy and Gobardhan in 1932 and used it as a genuine document in support of his case. All the accused were acquitted. Subsequently an inquiry was held under S. 476, Criminal P. C., and a complaint was preferred against the present accused under Ss. 471 and 467. According to the evidence in the present case the signatures of Akshoy and Gobardhan on the Istafanama were not genuine. The learned Judge remarks that the handwriting expert called by the prosecution was comparatively a novice and therefore he left out of consideration the opinion given by him and his evidence and directed the jury accordingly. But he considered that the guilt of the accused was established, because he thought that the evidence showed that Tarak had begun to devise means for ousting Akshoy and Gobardhan from the lands. That was the genesis of the Istafanama. This was shown by the Kabuliyat (Ex. 2) which Tarak had tried to persuade Akshoy and Gobardhan to register.

The defence was that Ex. 2 was fabricated by Akshoy and Gobardhan, in order to attempt to nullify the Istafanama. But the Judge did not accept this defence, because of Kabuliyat, Ex. 3, which was executed in favour of Kristo. Further, he came to the conclusion that the execution of the Kabuliyat, Ex. 3 showed conclusively that the story of surrender was a myth and that Akshoy and Gobardhan continued to be in possession of the lands. Further, certain letters were put in evidence showing that Tarak had tried to get the mother of Kristo to join with him in evicting Akshoy and Gobardhan.

The learned Judge seems to have been impressed very much by the fact that Akshoy and Gobardhan continued to be in possession of the lands and considers that evidence conclusive. I find it difficult to understand the learned Judge's reasoning. Obviously the evidence cannot be conclusive on this point. It may well be that Akshoy and Gobardhan continued to be in possession of the lands without any legal right. The mere fact that they had, as alleged, executed the Istafanama would not necessarily show that they could not subsequently have continued in possession of the lands. It follows, that the facts, which I have stated and which form the basis of the letter of reference of the learned Judge, are not so conclusive that the jury's refusal to accept the story of the prosecution that a forged document was used by the accused in his trial, was necessarily perverse and against the weight of evidence. The jury gave the accused the benefit of the doubt and, it cannot be said that their verdict was so unreasonable that it ought to be set aside. After all, the jury were the judges of fact in this case. But beyond these considerations, I find that the only evidence of user within the meaning of S. 471, I. P. C., was that at the Sessions trial Tarak put in a written statement in his defence in which he referred to certain documents which had been filed and also referred to the Istafanama in the following words:

> The witness Akshoy and the deceased Gobardhan brought me the Istafanama and gave up the disputed land.

The Istafanama was neither filed nor produced nor put in evidence by the accused or on his behalf. It appears that it was produced and put in evidence by one of the witnesses for the prosecution and marked as Ex. 1. In cross-examination, the Istafanama was referred to by the pleader appearing on behalf of the accused. In my opinion, this cannot be held to be user within the meaning of S. 471, I. P. C. In the first place, there is no authority for the alleged practice allowing an accused person in a Sessions trial to put in a written statement. There is no provision in the Criminal

Procedure Code for any such practice and in considering this case, we must regard the written statement as something which is no part of the record of the trial of the accused charged with rioting and murder. But assuming for the purpose of argument that the written statement can be regarded as part of the trial and of the record, in that case it certainly is not evidence, and the mere reference in the written statement to a document which is produced and put in evidence by the prosecution cannot be held to be user by the accused within the meaning of the section. Further, I am of opinion that if a document is produced and put in evidence by the prosecution and the pleader of the accused cross-examines the witness upon this evidence, including the evidence which he has given about the written document, the cross-examination cannot be held to be user within the meaning of S. 471. To hold that such action on the part of a pleader for the accused amounts to user within the meaning of the section would most seriously interfere with the rights of the accused and his pleader in putting forward the defence of the accused. For example, the accused cannot be charged with any offence arising out of any verbal statement that he may make from the dock or any answer which he may give in reply to the question put by the learned Judge. Such a statement may be full of inaccuracies and falsehoods. But it is clear that he cannot be charged with perjury in respect of it, because in the first place, the statement is not made on oath or affirmation. Similarly, it would lead to grave interference with the freedom and privileges of the accused if, because his pleader has cross-examined upon some document produced and put in evidence by the prosecution, the accused by such action makes himself liable to be prosecuted for using a forged document under S. 471. For these reasons I am of opinion that the reference of the learned Judge must be rejected and the accused are acquitted. The accused, who are on bail, will be discharged from their bailbonds.

Jack, J.—I agree that the use, which was made of the document, cannot be said to bring the accused under the provisions of S. 471, inasmuch as the written statement is not, strictly speaking, a part of the record and the reference to the document in cross-examination, the document having been put in by the prosecution, also does not bring the offence within the purview of S. 471, I. P. C.

S.R. *Reference rejected.*

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* * A. I. R. 1935 Calcutta 689

D. N. MITTER AND NARSING RAU, JJ.

Ram Krishna Prodhan—Defendant 1—Appellant.

v.

Sm. Kousalya Mani Dasi and *others*—Respondents.

Appeal No. 250 of 1931, Decided on 16th May 1935, from original decree of Sub-Judge, Third Court, Midnapore, D/- 27th July 1931.

*** (a) Hindu Law—Widow — Surrender — Insignificant part of estate left out—Terms of the surrender substantially indicating to pass entire estate—Surrender is valid.**

Though surrender should be of the entire estate held by the widow, a surrender to the reversioners is nonetheless a valid surrender if the property left out forms only an insignificant part of the estate and the terms of the deed of surrender substantially indicate an intention to convey the entire estate of the widow : 1928 *Bom* 26, *Foll.* [P 691 C 2]

(b) Hindu Law—Surrender—Doctrine has basis in Smritis—It is not evolved by Courts on principles of jurisprudence.

It is not correct to say that the whole doctrine of surrender and consequent acceleration of the reversioners has no basis in Hindu Smritis but has been evolved by Courts of justice on general principles of jurisprudence: *Kumaraswami Sastri, J.* in 1918 *Mad* 469 (*FB*), *Diss. from.* [P 692 C 2]

*** (c) Hindu Law — Widow — Widow's estate is not life estate but one of inheritance to herself and her husband's heirs—Her power to alienate estate for term not exceeding her life-time is not absolute—She can alienate for her own life but alienation is questionable by reversioners if widow surrenders estate.**

A Hindu widow's estate is not a life estate but it is an estate of inheritance to herself and to the heirs of her husband : 5 *Cal* 776, *Foll.*

While in the enjoyment of the estate, the power of a Hindu widow to alienate the property for a term which does not exceed her life-time is not absolute. She may give, sell or transfer the estate for her own life ordinarily, but this sale or gift is liable to be questioned by the reversioners if by her voluntary act she causes her death. [P 694 C 2]

*** * (d) Hindu Law—Widow—Surrender—Consequence of—Logical consequence of surrender is that prior alienations by widow in excess of her powers are challengeable immediately after surrender—Alienee takes risk—Object of Hindu law is to prevent improper**

alienations by limited owner—Alienee without inquiry as to necessity takes risk in case estate is surrendered.

The logical consequence of the doctrine of surrender which means a self-effacement of the widow and amounts to civil death and complete extinguishment of the title of the widow in her husband's estate is that all prior alienations in excess of her powers are liable to be challenged immediately on her civil death just as they could be impeached after she had died. Those who deal with limited owner take a certain amount of risk. The object of Hindu law is to prevent improper alienations by the widow or other limited owner. The alienee who deals with a limited owner without any inquiry as to necessity takes a risk in case of surrender by the widow which has the same effect as her death : *Case law discussed.* [P 695 C 2, P 696 C 1]

✲ **(e) Hindu Law — Widow—Surrender—Alienation by widow in excess of her powers—Subsequent bona fide surrender—Reversioners can challenge alienation at once.**

When a Hindu widow, who has made an alienation of her deceased husband's estate in excess of her powers, subsequently makes a bona fide surrender of her estate to the nearest reversioner, the reversioner may challenge the alienation at once : *Case law discussed.*

[P 699 C 2, P 702 C 1]

(f) Hindu Law—Widow—Surrender can be effected even when estate is taken by female.

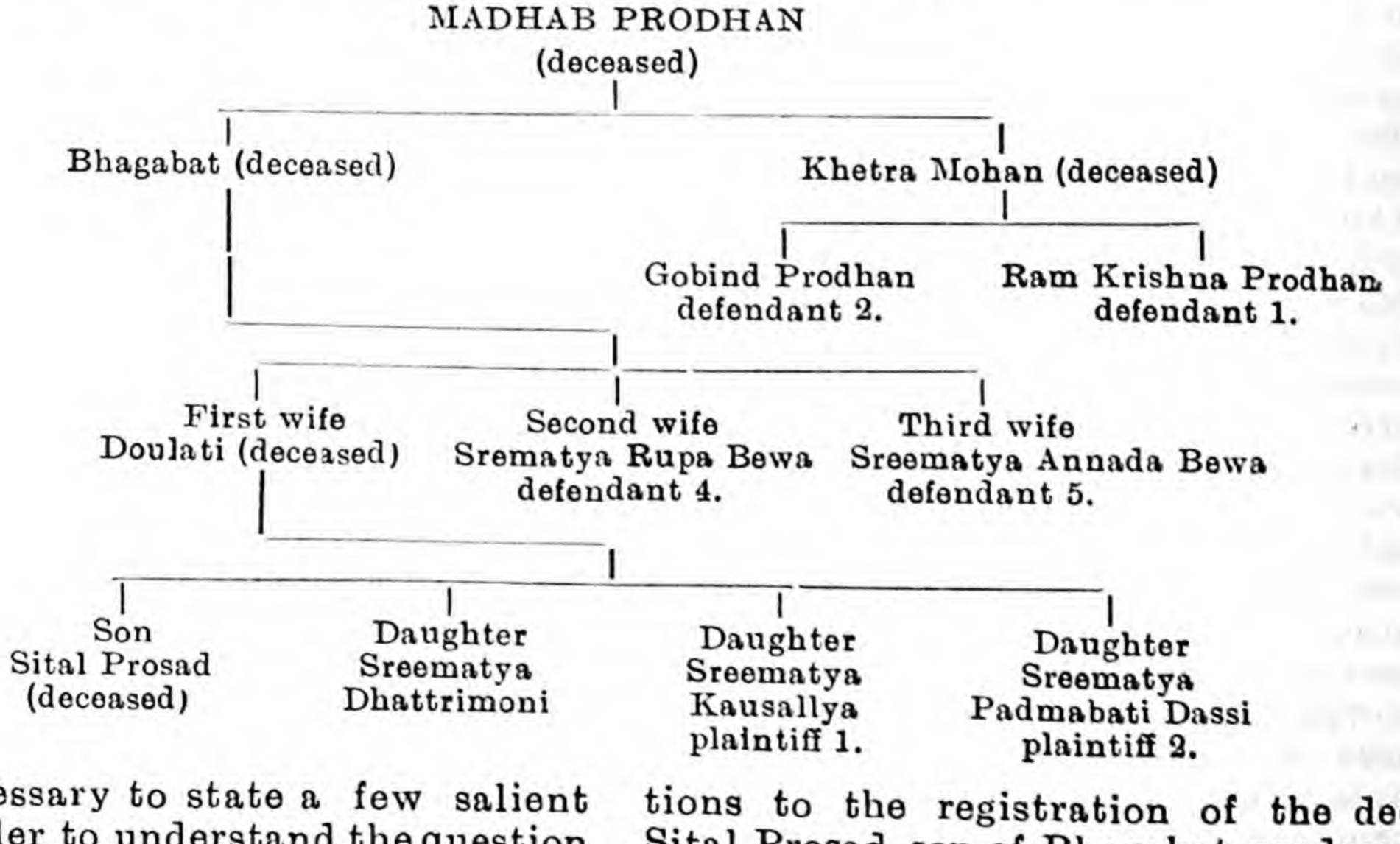
A widow can accelerate the succession to her husband's estate by relinquishing to his reversionary heir the whole or the whole less what is necessary for her maintenance, although the heir to whom the estate is transferred is a female and consequently takes a life estate only: 1934 *P C* 105 and 1924 *All* 166, *Rel. on.*

[P 692 C 1]

Gopendra Nath Das and *Hemanta Kumar* for *Amar Nath Rai*—for Appellant.

Saroj Kumar Maiti — for Respondents.

D. N. Mitter, J.—This is an appeal by defendant 1 and arises out of a suit brought by the plaintiffs who are the daughters of Bhagabat to whom the properties in suit belonged, for declaration of title to the half-share of the plaint properties, to a decree for recovery of possession after such declaration for partition of the properties by metes and bounds and for costs. The suit has been partially decreed by the Subordinate Judge and a preliminary decree for partition has been passed. Hence the appeal by defendant 1. A genealogical table has been appended to the plaint (see p. 8, part I of the paper-book) and shows the relationship between the parties to the suit:—



It is necessary to state a few salient facts, in order to understand the question of law which falls for determination in this appeal. They are these : On 8th July 1920 a deed of adoption was executed by Bhagabat Prodhan in favour of defendant 1 and three days later Bhagabat died. On 13th August 1920 the deed of adoption was presented for registration. Defendants 4 and 5, the two surviving widows of Bhagabat viz., Rupa Bewa and Annada Bewa, put in objections to the registration of the deed. Sital Prosad, son of Bhagabat, predeceased his father. Defendant 5, the youngest widow of Bhagabat, started proceedings under S. 107, Criminal P. C. An inquiry was held on 11th September 1920. There was village arbitration with the result that four documents were executed : (1) one Nadabi deed was executed by Rupa Bewa, defendant 4, in favour of defendant-appellant on 29th September 1920, Ex. E, p. 1. By this document,

on receipt of Rs. 560 for maintenance, pilgrimage etc., she gave up her rights to the inheritance. On the same day she also executed a deed of relinquishment, Ex. E, p. 4 (part. II). By this document she received 5 bighas 19 cottahs as life tenant and 3 bighas absolutely. The third and fourth documents were executed by defendant 1 confirming the grant of these properties. They are Ex. F, p. 7, Part II and Ex. J, p. 9, Part II, and are both dated 2nd October 1920.

By these two documents defendant 1 conveyed 5 bighas 19 cottahs, etc., of mourasi mokarrari Jal lands to defendant 5, Ananda Bewa, for life and 3 bighas of lands absolutely to the said defendant respectively, and the proceedings under S. 107, Criminal P. C. terminated. The younger widow wanted to re-open these transactions, and on 23rd December 1920 defendant 5 instituted a suit for a declaration that defendant 1's adoption was invalid and for a further declaration that the Nadabi deed was an invalid and fraudulent document. The suit was numbered as Title Suit No. 140 of 1920. On 9th January 1922 the suit was dismissed for default. In this suit the co-widow was joined as a party. On 30th January 1923 defendant 5 disposed of the properties obtained by her from defendant 1 by two separate kobalas, one in favour of Niranjan Bera (Ex. A) and the other in favour of defendant 1 (Ex. A, p. 17, Part II). She sold 5 bighas 19 cottahs to defendant 1 for Rs. 500, and out of this sum of Rs. 500, Rs. 200 was applied in liquidation of her costs in Title Suit No. 140 of 1920 and the balance was paid in cash. We will have to advert to this document (Ex. A-1) again when considering one of the questions of law which falls for determination in this appeal.

Another chapter of events must now be narrated. Plaintiffs 1 and 2 as remote reversioners instituted a suit on 20th November 1923 for a declaration that the adoption was not valid. The suit was decreed on 30th November 1925 as the adoption was not proved. On 20th February 1926 the two widows of Bhagabat, defendants 4 and 5, executed a deed of surrender in favour of the plaintiffs, the two daughters of Bhagabat, they being the next reversioners (see Ex. 1, p. 31, Part II) and the present suit was brought by the plaintiffs on the strength of this deed of surrender for the reliefs indicated in the beginning of the judgment. The defences to the suit were: (1) the surrender was a partial surrender and therefore invalid under the Hindu law; (2) assuming the surrender was valid the daughters cannot get possession so long as the widows are alive, and the suit for possession is premature. The Subordinate Judge framed 13 issues in the suit which are to be found at pp. 59 and 60 of the judgment. After taking evidence he has granted a partial decree in favour of the plaintiffs. In this appeal by defendant 1 two questions have been debated before us. It is argued in the first place that the surrender is not a total surrender but a partial one and is invalid under the Hindu law. That there must be a total surrender in order to make the surrender valid is now firmly established by the pronouncement of their Lordships of the Judicial Committee in several recent cases: see 46 I A 72 (1) and 47 I A 233 (2). It appears however that while the defendant took in his written defence the plea of partial surrender he did not state specifically what part of the estate of Bhagabat has been omitted from the deed of surrender. It is contended before us that about 7 bighas of lands recorded as belonging to Bhagabat's estate has not been included in the deed. This was not the objection which was taken in the trial Court. In the trial Court reference was made only to C. S. plot No. 22. From the settlement record it appears that it measures ·56 acres only. With regard to this plot it appears that this plot has passed out of the family on the basis of a compromise decree to which defendant 1 and his father was a party, see Ex. 6, p. 55, Part 2.

But even if it be supposed that the widows had a subsisting interest in the same at the date of the surrender it was such an insignificant part of the inheritance that it might be disregarded as substantially on the terms of the deed of surrender every thing which belonged to Bhagabat was intended to pass: see 51

1. Rangaswami Goundan v. Nachiappa Goundan, 1918 P C 196=50 I C 498=46 I A 72=42 Mad 523 (P C).
2. Suresher Missir v. Mt. Maheshrani, 1921 P C 107=57 I C 325=47 I A 233=48 Cal 100 (P C).

Bom 1019 (3). In para. 3 the deed of surrender, p. 32, Part 2, it was expressly stated that the widows relinquished whatever interests they had in the estate of their husband. In para. 4 of the deed the reversioners were asked to take possession of "all movable and immovable properties left by our husband." There can be no doubt therefore that the widows intended to surrender the entire inheritance in favour of their daughters. In this case the alienation was in favour of the daughters who take life estates. The principle of Hindu law that a widow can accelerate the succession to her husband's estate by relinquishing to his reversionary heir the whole or the whole less what is necessary for her maintenance, applies although the heir to whom the estate is transferred is a female and consequently takes a life estate only: see 61 I A 200 (4); see also 46 All 59 (5). We agree with the Subordinate Judge that there was a valid surrender. On this finding a very important question of Hindu law falls to be determined. That question is this: whether the plaintiffs are bound by the alienation by the widows who made the surrender in excess of their powers, i. e., not for justifying necessity, so long as the widows are alive, in other words whether they are bound by the alienation by Ex. A-1 in favour of defendant 1 and Ex. A in favour of Niranjan Bera who is no party to the suit during the life-time of the widows? The Subordinate Judge has not determined the question for reasons which may best be expressed in his own words which follow:

> If defendant 1's purchase of 6 bighas of land from defendant 5 by kobala Ex. A-1 be bona fide and for valuable consideration no question of refund of that consideration money arises, for the land would be allotted to the plaintiff's share in the partition and defendant 1 would be competent like Niranjan to sue for it in a suit separately framed for the purpose.

Niranjan is no party to the suit; we are not therefore concerned with the alienation by Ex. A. It is argued for the appellant that the trial Court should not have left the determination of the question in a separate suit but should have decided it in the present suit. As to the genuineness and bona fides of Ex. A-1 there can be no question on the evidence before us. At the same time it appears that the alienation was not for justifying necessity. That being so we are asked by the appellant to hold that the alienation of lands covered by Ex. A-1 cannot be challenged by the plaintiffs so long as the widows are alive, for the alienation, even if unauthorized, is good during the widows' life time; on the other hand it is said on behalf of the respondent that the widows' surrender of their husband's estate has the effect of causing their civil death and should have the same effect as if the widows had died a natural death and the alienation can be challenged at once. There is divergence of opinion in this Court on the question, but the Madras, the Allahabad and the Patna High Courts have taken the view contended for by the appellant; while in this Court, Page, J., as he then was, has taken the view favourable to the respondent; Walmsley, J., on the other hand being of opinion that the view contended for by the appellant is right. There was a difference of opinion between Walmsley, J., and Page, J., and although there was an appeal under S. 15 of the Letters Patent the question now in controversy was not decided: 52 Cal 1018 (6). We have the difficult task of deciding in the present case which of the conflicting opinions is right.

It is necessary to premise at the outset that the theory of surrender by a Hindu widow of her husband's estate in favour of the entire body of reversioners for the time being is one which finds a place in the texts of Hindu law and it is not correct to say as has been said by Kumaraswami Sastri, J., that the whole doctrine of surrender and consequent acceleration of the reversioners has no basis in Hindu Smritis but has been evolved by Courts of justice on general principles of jurisprudence: 41 Mad 75 (7) at p. 99. So far as the Bengal School of Hindu law is concerned, the theory of surrender or relinquishment finds support in the ancient Smritis. See the following text of Katyayana quoted in Dayabhaga, Ch. 11, S. 1,

3. Sakharam Bala v. Thama Bala, 1928 Bom 26=107 I C 265=51 Bom 1019=29 Bom L R 1571.
4. Sitanna v. Viranna, 1934 P C 105=148 I C 828=61 I A 200=57 Mad 749 (P C).
5. Sartaji v. Ramjas, 1924 All 166=79 I C 25=46 All 59=21 A L J 796.
6. Prafulla v. Bhabani, 1926 Cal 121=91 I C 897=52 Cal 1018.
7. Vaidya Nath v. Savithri, 1918 Mad 469=42 I C 245=41 Mad 75=33 M L J 387 (F B).

para. 56: "*Aputrashaya nag vartu-shalayanti teroyu-sthita vhunji-ning—Umaranyatkshanto daradaurdha-mapthayu*" which has been translated thus:

The childless widow preserving unsullied the bed of her lord and abiding with her venerable protector should enjoy the property with moderation until her death. After her the heirs should take it: Ch. IX, S. 1, para. 56.

Jimutvahana evolves out of the above text of Katyayana the rule that the persons who would be the next heirs on failure of prior claimants succeed to the residue of the estate remaining after her use of it upon the demise of the widow in whom succession has vested in the same manner as they would have succeeded if the widow's right had never taken effect. As has been pointed out by Sir Asutosh Mookerjee, J., in 40 Cal. 721 (8) at p. 772, the words used by Jimutvahana "*Jatadhi karaya patna adhikar prabdhang shehopi vogabashishtang dhanag grinhiyou . . .*"

(If her right ceases or never takes effect are comprehensive enough to include not merely the case of the death of the Hindu widow but all cases where her right ceases, in other words, the reversioners take the estate not merely when the widow dies but also when her title is extinguished by renunciation, remarriage or the like).

It has been an accepted principle of Hindu law that the widow can destroy her life estate in her husband's inheritance by surrendering the entire estate in favour of the immediate reversioners for the time being. The earliest case that I have been able to discover is 1 W. R. 98 (9) where Trevor and Campbell, JJ., said this:

We think it admits of no reasonable doubt that under the Hindu law, a Hindu lady in possession can relinquish and by relinquishing ancitipate for the reversioner their period of succession.

In 19 I. A. 30 (10), Lord Morris in delivering the judgment of the Judicial Committee explained the theory of relinquishment in these words:

It may be accepted that according to Hindu law the widow can accelerate the estate of the heir by conveying absolutely and destroying her life estate. It was essentially necessary to withdraw her own life estate, so that the whole life estate might get vested at once in the grantee.

The scope of the doctrine of surrender has been more fully explained in the more recent decision of their Lordships of the Judicial Committee in 46 I. A. 72 (1) where their Lordships point out:

That it is the effacement of the widow and an effacement which in other circumstances is effected by actual death or civil death—which opens the estate of the deceasd husband to his next heirs at that date. Now there cannot be a widow who is partly effaced and partly not so.

If the surrender means the self-effacement of the widow, the destruction of her life-estate or the withdrawal of her life estate it would seem to follow logically that it should have the same consequences as if the widow had died, and just as the reversioner would be permitted to challenge alienations without necessity on her death, it would seem that it would be open to him to challenge the alienation immediately on the surrender of the life estate.

This brings me to consider the decision of the Madras High Court in 39 Mad. 1035 (11), in which it was held that a surrender by a Hindu widow of her interest in her husband's estate in favour of the nearest male reversioner cannot affect alienations which were made by her prior to the surrender and which though not binding on the reversioners were binding on her during her life. It is necessary to analyse the reasoning on which this decision is founded. At the time when this decision was given the view taken by Bhasyam Aiyangar, J., one of the most eminent Judges of the Madras High Court prevailed, viz., that on the adoption by a widow although it destroyed the widow's estate it could not affect prior alienations made by the widow in excess of her authority which enured during her life-time. See 26 Mad. 143 (12). A large part of the decision in 39 Mad. 1035 (11) is based on the analogy between the effect of adoption on a Hindu widow's estate and the effect of surrender in favour of the nearest reversioner, and as the law prevailed in Madras then was that adoption did not affect prior alienations during the widow's life-time surrender could not be placed on a higher footing. But this view of Bhasyam Aiyangar, J., was overruled by a Full Bench of the Madras High Court in the case already referred

8. Debi Prosad v. Golap Bhagat, (1913) 40 Cal 721=19 I C 273 = 17 C L J 499 = 17 C W N 701 (F B).
9. Protab Chandra v. Joymoni, (1864) 1 W R 98.
10. Behari Lal v. Madho Lal, (1892) 19 Cal 236= 19 I A 30=6 Sar 88 (P C).
11. Subbamma v. Subrahmanyam, 1917 Mad 473 =32 I C 813=39 Mad 1035=30 M L J 260.
12. Sreeramalu v. Kristamma, (1903) 26 Mad 143 =12 M L J 197.

to, 41 Mad. 75 (7), Sadasiva Aiyar, J., observed:

The artificial mediaeval doctrine of a widow having no full power of alienation and the consequent doctrine super-imposed by the Bengalee lawyers on this doctrine namely the doctrine of acceleration of the reversion through a surrender by the widow of her rights as her husband's heir (this second doctrine having been adopted for South India also by the Madras High Court) cannot, in my opinion, be pushed to the extent to which Mr. Narasimha Rao wishes that they should be extended, namely, so as to defeat the claims of alienees for value who as Sir Bhashyam Ayyangar said in 26 Mad 143 (12) were entitled to be protected in their reasonable expectation that they obtain a transfer valid for the widow's life except in the rare case of remarriage : see 39 Mad 1035 (11) at p. 1040.

I am not unmindful of the fact that even after the decision of the Full Bench in 41 Mad 75 (7) with regard to the effect of adoption on prior alienations by the adopting widow the Madras High Court has stuck to the view taken by Sadasiva Aiyar, J. and Napier, J., in 39 Mad 1035 (11) : see 48 Mad 933 (13) (Coutts Trotter, C. J. and Krishnan, J.). Another reason given at the end of the judgment in 39 Mad 1035 (11) is that the reversioner can stipulate for a right to be maintained out of the husband's property for her life time and this shows that she does not become civilly dead by the surrender nor does she cease to retain the status of widowhood. It is now established by the pronouncement of the Judicial Committee that the circumstance that a small portion of the inheritance is retained by the widow for her maintenance does not make the surrender invalid. The widow can by her own voluntary act cause her civil death. As their Lordships of the Judicial Committee put it : that is to say she can so to speak by voluntary act operate her own death : see 46 I A 72 (1) and 47 I A 233 (2). These Madras decisions above referred to as Page, J., observed in 52 Cal 1018 (6), are vitiated by two fallacious assumptions. The learned Judge observed :

In my opinion, the ratio decidendi of these two cases in substance was the same, namely that during the life-time or widowhood of the widow unauthorised alienations by the widow made while she was in the enjoyment of her widow's estate are valid and unimpeachable. With great respect to the learned Judges who decided those cases the reasoning upon which the decisions rest, in my opinion is vitiated by two fallacious assumptions : (1) that a Hindu widow inherits from her husband an estate for a term which is coterminous with her life-time or at any rate with her widowhood; (2) that while she is in the enjoyment of the estate a Hindu widow possesses absolute power to alienate the property, or any part thereof, for a term which does not exceed the period of her life-time or of her widowhood. No doubt, an estate inherited by a Hindu widow from her husband in some cases has been loosely described as her "life-estate" or an "estate for her widowhood", but such expressions must be read with reference to the context in which they appear, and for the reasons which I have stated in my opinion the estate which passes to a Hindu widow by way of inheritance from her husband subsists until it is determined by the happening of some event which, according to the principles of Hindu law, puts an end to it. It is settled law that one of the events which effect the determination of a widow's estate is the surrender of her entire interest in the inherited property to the next reversioner.

I agree in the reasoning of Page, J. A Hindu widow's estate is not a life estate, but it is an estate of inheritance to herself and to the heirs of husband: 5 Cal 776 (14). She represents the estate absolutely for some purposes. Her estate determines not only on her death but also by her own voluntary act which causes her civil death, i. e , by surrender of her life estate. I agree with Page, J. when he considers it a fallacious argument to say that while in the enjoyment of the estate a Hindu widow has absolute power to alienate the property for a term which does not exceed her life-time. In my opinion she may give, sell or transfer the estate for her own life ordinarily, but this sale or gift is liable to be questioned by the reversioners if by her voluntary act she causes her death. The powers of a Hindu widow to deal with her limited estate has been likened to that of a shebait of an endowment and we have the recent pronouncement of the Judicial Committee in 60 I A 124 (15) at p. 130 that

A Mohant has power (apart from any necessity) to create an interest in property appertaining to the math which will continue during his own life or to put it perhaps more accurately which will continue during his tenure of office of Mohant of the Math.

Their Lordships in the same case laid down at p. 131:

In each case the operation of the purported grant is effective and endures only for the period

13. Sundara Siva Rao v. Viyyamma, 1925 Mad 1267=91 I C 401=48 Mad 933=49 M L J 266.

14. Moniram Kolita v. Keri Kolitani, (1880) 5 Cal 776=7 I A 115=6 C L R 322 (PC).

15. Ram Charan v. Naurangi, 1933 P C 75=142 I C 214=60 I A 124=12 Pat 251 (PC).

during which the Mohant had power to create an interest in the property of math.

Applying what has been said with regard to the Mohant of a math to a Hindu widow's estate we may say that the widow has power apart from any necessity to create an interest in her husband's estate which will continue during her own life or to put it more accurately which will continue so long as she does not destroy her life estate by her own voluntary act or so long as she is not dead or civilly dead and the passage in the Dayabhaga quoted before would seem to place both kinds of death on the same footing. The Allahabad High Court has taken a similar view, similar to the Madras High Court. In 49 All. 334 (16) Boys, J. observed in the course of his judgment that the doctrine of surrender having been imported by judicial decisions the complementary rule that a widow cannot by making a surrender defeat the rights created by herself and creation of which was within her authority should be imported. Here again it seems to me that the learned Judge has made the erroneous assumption that the doctrine of surrender is not sanctioned by Hindu law texts but has been imported by judicial decisions. As I have already shown the theory of relinquishment or surrender finds support in Hindu law. Sulaiman, J., as he then was, observed that if the matter was res integra he would have adopted the view that it was open to the reversioner to challenge the alienation immediately on the surrender taking effect but yielded to the weight of authority and thought that to take the other view might open a wide door to fraud. The Patna High Court, Fazl Ali, J., adopts the Madras view and they follow the Madras view without any independent discussion of the soundness of the view: see 1935 Pat. 175 (17). Fazl Ali, J. uses language which suggests that it was not a final opinion. The learned Judge says:

It appears to me, however, that it is unnecessary to decide this question because having regard to the state of authorities on the subject, even if the surrender was valid, the plaintiffs could not challenge the family arrangement between Mt. Loha and the reversioners of Maheshdut during the life-time of Mt. Loha. Reference was made on behalf of the appellants to the dissenting judgment of Page, J. in 1926 Cal. 121 (6); but as at present advised I feel inclined to agree with the view expressed by the Madras High Court in 1925 Mad. 1267 (13) and by the Allahabad High Court in 1927 All. 258 (16).

It remains to notice a remark of Ashutosh Mookerjee, J. in 48 Cal. 605 (18) at p. 611 to which my learned brother drew my attention. In the course of argument in a case of surrender by a tenant under the Bengal Tenancy Act the learned Judge put the question in this way: Take the case of a Hindu widow transferring a part of the property of her husband and then surrendering the whole property to the next reversioner. Can the reversioner turn out the transferee? . . . . Do you not see the injustice? The remarks were made in the course of discussion with reference to the general effect of surrender on prior alienations and cannot be regarded as the considered opinion of the learned Judge on the question with reference to surrender under Hindu law. Such remarks have less weight than even obiter dicta of learned Judges in a particular case.

In a case which came before the High Court of Bombay, 51 Bom. 1019 (3), where the limited owner had made a gift of the entire inheritance and then made the surrender it was held that the surrender was inoperative seeing that there was nothing on which surrender could operate. The learned Judge rather inclined to the view that Page, J's. opinion might not represent the correct rule of Hindu law. This is the state of the authorities in the different High Courts and they reveal a divergence of opinion. So far as this Court is concerned the question is an open question. For the reasons we have given we think the logical consequence of the doctrine of surrender which means a self-effacement of the widow and amounts to a civil death and complete extinguishment of the title of the widow in her husband's estate is that all prior alienations in excess of her powers are liable to be challenged immediately on her civil death just as they could be impeached after she had died. In some instance this may possibly work out an injustice, but those who deal with limited owner take a certain amount of risk. On the

16. Lachmi v. Lacho, 1927 All 258=100 I C 764 =49 All 334=25 A L J 161.
17. Basudeo v. Baidya Nath, 1935 Pat 175=156 I C 774.
18. Mohsenuddin v. Bhagaban Chandra, 1921 Cal 444=61 I C 443=48 Cal 605=25 C W N 29 (FB).

question of injustice again it has to be observed that the object of Hindu law is to prevent improper alienations by the widow or other limited owner. If the alienation is for necessity the surrender does not affect the alienee. The alienee who deals with a limited owner without any inquiry as to necessity takes a risk in a case of surrender by the widow which has the same effect as her death.

The analogy of surrender by a tenant to his landlord need not detain us very long. The principle of those decisions in such class of cases is that a surrender only affects what the surrenderer can surrender and when he has granted subordinate terms or subleases they are not discharged: see 5 M & S 146 (19), where Lord Ellenborough lays down the proposition that a surrender operates between the parties as an extinguishment of interest which is surrendered, it does not so operate as to third persons who at the time of surrender have rights which such extinguishment would destroy: see (1910) 2 K B 32 (20) and (1911) 2 K B 473 (21) at pp. 479 and 487 C. A. In these cases we are not troubled with the fiction of Hindu .law that in certain circumstances a Hindu widow can be civilly dead and thereby accelerate the succession of the next reversioner and that such civil death has the same consequences as if she had died a natural death. From the date of the surrender the reversioner gets the property freed from any alienation in excess of the powers of a Hindu widow as if she had died.

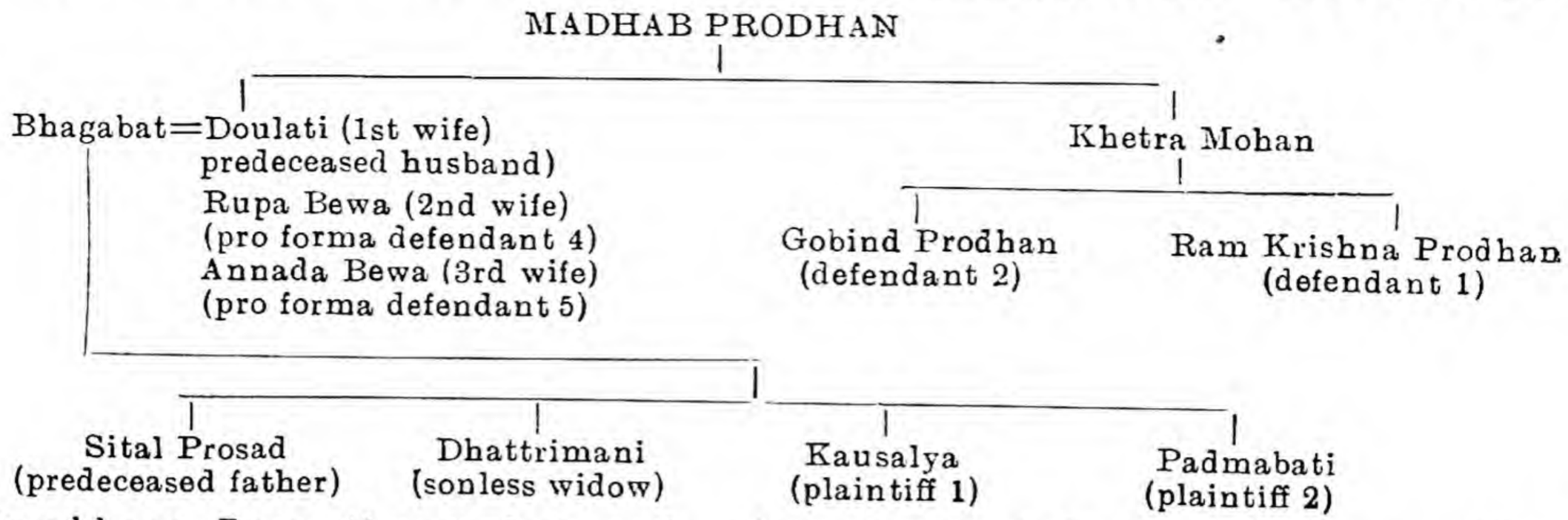
The result therefore is that the decree of the Subordinate Judge must be varied in this way : (1) the lands of Ex. A must be kept out of partition as Niranjan is no party to the suit; (2) the lands covered by Ex. A (1) must be included in the partition and should be included in the plaintiff-respondent's allotment when allotments are made by the Commissioner. There must be a further variation with regard to mesne profits. In assessing mesne profits the trial Court has not excluded the land of Ex. A which was sold by Ananda to Niranjan Bera who is not a party. The area of the land being 3 bighas there should be a proportionate reduction taking the entire area to be 24 bighas. The mesne profits should be reduced to 3/24 of Rs. 972 or roughly Rs. 120; (3) the amount of mesne profits therefore decreed against the defendant-appellant should be Rs. 972 minus Rs. 120, i. e. Rs. 852. Subject to these three variations the appeal will stand dismissed with two-thirds costs of the appeal including the hearing fee. The hearing fee is assessed at nine gold mohurs.

Narsing Rau, J.—This appeal arises out of a suit brought by the plaintiffs-respondents for the establishment of their right to a half-share of the lands described in Schs. (ka) and (kha) to the plaint and for recovery of khas possession of the same after partition. There was also a prayer for mesne profits against defendants 1 and 3. The suit was decreed in part, the plaintiffs' right to a half share of the lands of Sch. (kha) with the exception of certain plots being declared, and a direction for partition being made. Specific directions were given that at the partition, the land of certain sale-deeds, viz., Ex. A and Ex. A (1), were to be allotted to the plaintiffs and plot No. 10 of Sch. (kha) was to be kept joint. As regards mesne profits, the learned Subordinate Judge made a decree for Rs. 972 against defendant 1 in respect of the three years preceding the institution of the suit. Defendant 1 has filed the present appeal. To understand the nature of the plaintiffs' claim, it is necessary to bear in mind the relationship between the parties as shown in the genealogical tree given below:

[*For genealogical tree, see next page*]

Bhagabat Prodhan died on 11th July 1920 leaving surviving him two widows Rupa Bewa (pro forma defendant 4) and Ananda Bewa (pro forma defendant 5), three daughters Dhattri Mani (a sonless widow), Kausalya (plaintiff 1) and Padmabati (plaintiff 2) a brother Khettra Mohan, and Khettra Mohan's two sons, Ram Krishna (defendant 1) and Gobind (defendant 2). The plaintiffs' case is that the property in suit was joint between Bhagabat and his brother Khettra Mohan, and that on Bhagabat's death, his widows inherited his estate, with the two plaintiffs as the next reversioners. (The family being governed by

19. Beadon v. Pyke, (1816) 5 M & S 146.
20. Parker v. Jones, (1910) 2 K B 32=79 LJ K B 921=26 T L R 453=102 L T 685.
21. Wilkes v. Spooner, (1911) 2 K B 473.



the Dayabhaga Law, the sonless and widowed daughter Dhattri Mani is excluded). But it is said, Khettra Mohan, taking advantage of the youth and inexperience of the widows set up his own son Ram Krishna (defendant 1) as the adopted son of Bhagabat and not only produced a deed of adoption, but also got it registered. Then there was further harassment of the widows, whereupon one of them commenced proceedings under S. 107, Criminal P. C., which however ultimately failed. Khettra Mohan continued to oppress them and, by cleverly misrepresenting the nature of the documents, got them to execute two separate nadabi ekrarnamas in which, amongst other things, they admitted Ram Krishna to be Bhagabat's adopted son.

As a corollary to this admission, they declared in the same documents that they had no right, title, or interest in their deceased husband's property. When subsequently one of them, Annada Bewa (pro forma defendant 5) discovered the true nature of the documents, she brought a suit in the Subordinate Judge's Court (No. 140 of 1920) to have them as well as the deed of adoption declared fraudulent and inoperative, but Khettra Mohan was too clever for her, won over the tadbirkar (defendant 3), and got the suit dismissed. The present plaintiffs then took up the fight and brought another suit for the same purpose, as the nearest reversioners entitled to succeed on the death of the widows. This time the suit was decreed, the Court holding that Ram Krishna was not the adopted son of Bhagabat and that the deed of adoption was wholly unreliable. There was an appeal against the decree, but it did not succeed. Nevertheless Ram Krishna and his father continued illegally to possess all the disputed lands and after the father's death, Ram Krishna alone possessed them, the only exception being a small plot of $2\frac{1}{2}$ bighas with which the father won over to his side defendant 3.

We now come to the last stage of the story. On 20th February 1926 the widows surrendered their estate in favour of the plaintiffs thereby accelerating the inheritance and entitling them to bring the suit out of which this appeal has arisen. Such in substance is the case of the plaintiffs. Defendant 1, who is the appellant in this Court, contested the suit. In the written defence he filed, he maintained that the deed of adoption was in fact executed by Bhagabat and that the nadabi deeds and certain connected transactions represented a family settlement of the disputes arising out of the adoption. These connected transactions were (1) that Rupa Bewa received Rs. 560 in cash for maintenance and (2) that Annada Bewa received for the same purpose (a) an absolute gift of 3 bighas of land and (b) the gift of a life-interest in another 5 bighas 19 cottahs 2 chittaks. The nadabi deeds were executed on 29th September 1920, and the deeds of gift on 2nd October 1920.

The defendant also mentioned that on 30th January 1923, Annada Bewa, in order partly to defray the costs of her unsuccessful suit, sold back to him for Rs. 500 the life-interest (b) which she had received from him ; of this sum, she received Rs. 300 in cash, the balance being applied in liquidation of the costs decreed to him in that suit. This sale-deed is Ex. A (1) in the case. She also sold, in 31st January 1923, the other 3 bighas to one Niranjan Bera, who is not a party to the present suit. Ex. A is a certified copy of the sale-deed. The importance of these transactions from the point of view of the defence will appear presently.

The defendant further claimed the lands of Sch. (ka) and plots 16 and 19, Sch.(kha) as the separate property of his father Khettra Mohan ; he disclaimed any interest in certain other dags of Sch. (kha) ; he denied having transferred any property to defendant 3. On these points the decree under appeal is in his favour ; but he contends that on certain other points also the lower Court should have found for him. His main contentions in appeal are: (1) that the surrender relied upon by the plaintiffs was invalid, inasmuch as it was not in respect of the entire estate ; (2) that it was not a bona fide surrender, because it was obviously a mere device to defeat the family settlement embodied in the nadabi deeds and connected transactions ; (3) that in any case the decree is erroneous as to the lands of Exs. A and A (1) ; and (4) that the basis on which mesne profits have been allowed by the lower Court is wrong. I shall proceed to discuss these points seriatim. First, as to the surrender not being in respect of the whole estate, it has been argued that besides the cadastral survey plot No. 22 of interest No. 201 dealt with in the Subordinate Judge's judgment, there are certain other plots which though belonging to Bhagabat's estate do not figure in the deed of surrender (Ex. 1).

These are plot No. 7 of interest No. 14 in mouza Mahesdarbar Baibartachak and plots Nos. 16 and 87 of interest No. 32 in mouza Ukilchak ; it is pointed out that these are mentioned amongst the joint lands of Bhagabat and Khettra Mohan in the record-of-rights [Ex. O (1) and O (5)], but find no place in the deed of surrender. It would appear, however, that so far as these additional plots are concerned, no objection was taken either in the written statement or even subsequently in the lower Court. If it had been taken in good time, the plaintiffs might have been able to produce evidence to explain the position, e. g. it is possible that these plots ceased to form part of Bhagabat's estate in consequence of some valid alienation between the record-of-rights and his death. It is impossible to entertain the objection at this late stage.

The next contention is that the surrender was not a bona fide one. It is argued that the nadabi deeds were part of a perfectly good family settlement and were in no way vitiated by the circumstance that the widows had entered into them under a mistake of fact or law as to the adoption of Ram Krishna by Bhagabat. Even if there was such a mistake and the Courts subsequently found against the adoption the settlement, it is urged, must stand; and if the settlement stands the surrender must fall, for you cannot surrender that of which you have already divested yourself. To this argument, there is at least one fatal objection; it has been found by a competent Court that not only was there no adoption, but that the deed of adoption set up was "a highly suspicious document" and utterly unreliable (vide Ex. 6). Out of this fictitious adoption grew the disputes which led to the alleged family settlement. When a party, by its deliberate fraud, creates a dispute, it can hardly be called a bona fide dispute and any resulting family settlement can hardly be upheld. If the family settlement alleged in the present case falls on this ground, as I think it must, it cannot be an obstacle to any subsequent surrender. As the Subordinate Judge has justly observed, no device was needed to avoid the nadabi deeds; they were doomed, once the adoption was pronounced a myth. The real reason for the surrender in this case is to be found in the deed of surrender itself, Ex. 1; the widows, defrauded and defeated at every turn by defendant 1 and his father felt that they were incapable of looking after their husband's property and consequently surrendered their estate to their more capable step-daughters—a perfectly natural step to take in the circumstances. There is therefore no substance in this contention.

The third contention is that in any event the decree is erroneous as to the lands of Ex. A and A (1). I think this contention is clearly right so far as Ex. A is concerned. By this sale deed, Annada Bewa sold to Niranjan Bera 3 bighas of land in mouza Ukilchak which formed part of the property in suit and which Ram Krishna had purported to transfer to her, as Bhagabat's adopted son. The sale as well as the transfer took place while Annada Bewa was still under the impression that the adoption was a fact. Ultimately it

turned out that the adoption was not a fact, so that, in reality, at the time of the sale to Niranjan Bera, Annada Bewa had an interest in the land as one of Bhagabat's widows and not the absolute interest which might have been hers if the adoption had been true. What was the effect of a sale in such circumstances is a question which cannot be decided in the absence of the vendee Niranjan Bera, who, as already stated, is not a party to the present suit. It follows therefore that so far as this suit is concerned, we must exclude the lands of Ex. A from the property to be partitioned. Ex. A (1), however, stands on a different footing: The vendee in this instance is defendant 1 himself and the effect of the sale has therefore to be decided. Let us see exactly what the document purported to convey; for this purpose it must be read with Ex. F. By Ex. F Ram Krishna, in his assumed capacity as Bhagabat's adopted son, made over to Annada Bewa in lieu of maintenance, etc., 5 bighas 19 cottahs 2 chittaks of land for the term of her life and by Ex. A (1) she sold that life-interest back to him for Rs. 500.

One view to take of this double transaction possibly the correct view—is that as in fact Ram Krishna was not Bhagabat's adopted son at all, nothing passed under Ex. F and as Ex. A (1) purported to convey back precisely what the widow obtained under Ex. F, nothing could pass under Ex. A (1) either, in spite of the fact that she had at the time an independent title to the land, derived not from Ram Krishna under Ex. F, but from her deceased husband. Let us, however, assume that Ex. A (1) must, in the circumstances, be deemed to be an alienation from whatever estate she actually had in the property. What she actually had was a Hindu widow's interest (the co-widow is said to have been a consenting party to Ex. A (1)— vide para. 11 of the written statement) : what she conveyed in terms by means of Ex. A (1) was her life-interest. It is now a commonplace that a Hindu widow's estate is not an estate for life, being (among other incidents) terminable by such events as re-marriage, adoption and surrender. Strictly speaking, therefore, the conveyance ceased to have effect as soon as the widow's estate itself was extinguished by the surrender. But there have been differences of opinion on the effect of surrender on prior alienations. The general question may be put thus : When a Hindu widow who has made an alienation of her deceased husband's estate in excess of her powers subsequently makes a bona fide surrender of her estate to the nearest reversioner, what is the reversioner's position as regards the right of challenging the alienation ? Two views have been taken : (A) that the reversioner may challenge the alienation at once; (B) that he must wait until the widow's death.

The Madras and Allahabad High Courts have adopted (B), although even they appear sometimes to admit that (A)is the more logical view: (see Curgenven, J.'s judgment in the Madras case reported in 1927 Mad. 429 (22) and Sulaiman, J.'s judgment in the Allahabad case reported in 49 All. 334 (16). So far as this Court is concerned, the question arose in 52 Cal. 1018 (6) where Walmsley, J., took view (B) while Page, J., took view (A) ; on a Letters Patent Appeal, it was held that there had been no proper surrender in the case at all, so that the question of the effect of a proper surrender was left open. In addition must be mentioned Mookerjee, Ag. C. J.'s expression of opinion in favour of view (B) in the course of the hearing of the case 48 Cal. 605 (18) which related to surrender by an occupancy raiyat.

Analysis of the decisions and opinions in favour of view (B) whether in this Court or in other High Courts shows that they are mainly based on the principle that no one can be permitted to derogate from his own grant. Having made an alienation, the widow ought not to be permitted to defeat it by a wholly voluntary act like surrender : such is the argument. Speaking with great respect, this does appear to give due weight to three factors peculiar to the problem under discussion : (1) that the grantor in our case—a Hindu widow —is not a full owner, but only a qualified owner, (2) that the original grant, even apart from any question of surrender, is, generally speaking, not only in excess of her disposing power, but also known to be so to both parties (e. g., everybody

22. Karuppa Pillai v. Irulayee, 1927 Mad 429= 100 I C 580=52 M L J 195.

knows that a Hindu widow cannot, except within certain narrow limits, make an absolute gift of any portion of her deceased husband's property); (3) that the subsequent surrender, though in some respects akin to a grant is really equivalent to renunciation of, or retirement from the estate. Translated into these terms, the principle that no one can be permitted to derogate from his own grant would almost seem to take the form: No qualified or limited owner can be permitted to retire from his estate after making a grant in abuse of his powers—which is by no means a self-evident proposition. But apart from this, view (A) does not really violate the principle; for, once it is settled by authority that (A) is the right view, every grantee would know beforehand that the grant made to him, whatever its face value, is liable to be impeached immediately upon a surrender. The grant being thus known to be terminable by surrender, the surrender, when it comes, cannot be said to derogate from the grant.

In answer to this, it will probably be said that such would doubtless be the position when view (A) has been established by authority but, it will be asked, what about grants already made? They may already have created expectations that they would not be affected by surrender and it would be most unjust to allow those expectations to be defeated. Now the question as to what are the expectations of an alienee in a particular case and to what extent they deserve recognition must depend largely on the facts of that case. Take, for instance, a case of gift. It is well known that a Hindu widow cannot, except within certain narrow limits, make an absolute gift of any portion of her deceased husband's estate. The donee in such a case does not expect to get its full face value; he knows that sooner or later it is likely to be impeached, and as he has paid nothing for it, it cannot matter very much that it is impeached sooner rather than later. There is no obvious injustice involved in holding in such a case that the gift comes to an end as soon as there is a valid surrender. Or, take the case of a sale without justifying necessity. Here again the legal position is well-known, and it may safely be asserted that the alienee, though he purports to buy an absolute title, usually pays only the price of a limited interest. We have not here the case of a person who buys in good faith his vendor's life estate and expects to get what he has bought: rather have we a transaction in the nature of a gamble whose object is to secure the chance of an absolute title for the lowest possible price. A Hindu widow's estate lends itself to such a gamble, because for certain purposes it is more than a life estate and in certain events it may prove to be less; the buyer often profits from the former circumstance and cannot fairly ask to be relieved of the latter risk. Let us look at the matter for a moment from the reversioner's point of view. On a strict interpretation of the doctrine of surrender, he has undoubtedly the right to impeach the alienation at once. Ex hypothesi, he was no party to the alienation; if he were, the question of his challenging it would not arise at all. Again, the surrender postulated being a bona fide one, we have no right to assume that it was procured by his fraud. Now it is a well-recognized rule that a person in whom a legal right is vested is not to be deprived of its benefit by equity unless some fraud, negligence, or other misconduct can be proved against him. On what ground, then, is the reversioner to be deprived of his right to impeach the alienation immediately upon the surrender? In a good many cases, therefore, view (A), which rests on the principle that when the original estate ceases, that which is derived from it also ceases, can be rigorously enforced without any injustice. It seems to me to be an unwarrantable assumption to make that in every case equity requires us to hold in favour of view (B). So much for considerations of equity. Let us now consider a few analogies. When a widow re-marries, there is the same fiction of death as in the case of surrender. The relevant part of S. 2, Hindu Widows' Remarriage Act (Act 15 of 1856) runs:

> All rights and interests which any widow may have in her deceased husband's property .... shall, upon her remarriage, cease and determine, as if she had then died; and the next heir of her deceased husband, or other persons entitled to the property on her death, shall thereupon succeed to the same.

Surrender also has been authoritatively described as an act whereby the widow

operates her own death: 46 I. A. 72 (1). Now the effect of re-marriage on prior alienations was discussed in the case of 8 C. L. J. 542 (23) and Mookerjee, J., had no difficulty in rejecting the contention urged before him that the reversionary heir ought not to be permitted to recover possession of the property alienated until the termination of the widow's natural life. In other words, the learned Judge holds the view corresponding to (A), and so far as the effect of remarriage under the Act is concerned, the correctness of the view does not appear ever to have been questioned.

Consider now another class of cases, namely those where the widow renounces the world, as in S. D. A. 595 (24). In this case, Radha Binode sued for possession of certain properties improperly alienated by his widowed aunt Taramonee, on the ground that as she had renounced the world by becoming a bairagini he had succeeded as reversioner to her husband's estate and was entitled to impeach the alienations. Against him, it was contended that the so-called renunciation was no renunciation at all; that the widow had taken the step with the fraudulent object of getting rid of her debts and liabilities, and that the Court should not assist a party claiming on the ground of such fraudulent act. An issue was framed in the following terms :

> Whether plaintiff's allegation that Taramonee has become a bairagini be proved or not; and even if it be, whether plaintiff has a right to bring a suit like the present, whilst she is living ?

On both points the Sudder Dewany Adalat decided in the affirmative, observing:

> the act (i. e., renunciation) having been proved to have been done, the legal effect of the act followed by the immediate succession of plaintiff in this suit as full heir to the rights of his maternal uncle Ramdoolal Roy, and with that succession, the right to sue for them.

Although the suit ultimately failed on other grounds, it is clear from the above that when a widow's estate is terminated by her renouncing the world, the reversioner is held to be immediately entitled to impeach any alienations made by her in excess of her powers. Surrender being supposed to be equivalent to renunciation of the world, the same rule should apply to cases of surrender also. Let us next take the case of adoption. It is now settled that the adopted son can at once proceed to avoid any improper alienations made by the adoptive widow; he need not wait until her death. At one time, a different view prevailed in certain parts of India, mainly on those very grounds of equity which are now urged in the case of surrender: see, for instance 26 Mad. 143 (12). But since the Privy Council judgment in 32 I. A. 80 (25) there has been no doubt in the matter and the decision in the Madras case cited above has been overruled by a Full Bench in 41 Mad. 75 (7).

Indeed, in one respect, cases of surrender stand on stronger ground than cases of adoption; for whereas in cases of adoption, the Courts may to some extent recognize the validity of ante-adoption agreements reserving a life interest to the adopting widow, any such reservation by the widow in a deed of surrender invalidates the surrender. In other words, the widow's estate may to a certain extent co-exist with adoption, but never with surrender. For a proper surrender there must be a complete withdrawal of the widow's estate and it is this necessity which is said to operate as a check on the frequency of such transactions: 19 I. A. 30 (10). If so, it is difficult to see how any portion of that estate can be held to survive in the hands of an alienee. Take again the case of a shebait or mahant, who like a Hindu widow, is a qualified owner of property. It now appears to be settled that when a mahant makes a disposition of a portion of the property appertaining to the math (apart from any question of necessity) the disposition is effective and endures only for the period during which he had power to create an interest in the property of the math: 60 I. A. 124 (15). It does not necessarily endure for the term of his life; it is valid only during his tenure of office, and can be impeached by his successor as soon as that tenure ceases:

> Whatever the intended duration of the attempted grant may be, it is good, but good only for the limited period indicated.

The only analogy on the other side would appear to be from the law of land-

23. Nitya Madhab Das v. Srinath Chandra, (1908) 8 C L J 542.
24. Hafzoonissa v. Radha Binode, (1856) S D A 595.
25. Banomali Roy v. Jagat Chandra, (1905) 32 Cal 669=32 I A 80=8 Sar 784 (P C).

lord and tenant. When a lessee surrenders his term to the lessor, the surrender does not as a rule affect under-leases. But supposing an under-lease was in excess of the lessee's powers (just as in our case, the alienation postulated is in excess of the widow's disposing power) how far would the rule apply? In (1910) 2 K. B. D. 32 (20), there was such an under-lease, the lessee having sublet in breach of a covenant that he would not do so without the lessor's consent; and it was held that the lessee's subsequent surrender did not terminate the under-lease. But Darling, J., pointed out that if the question had arisen between the lessor and the under-lessee, that is, between the reversioner, and the holder of the interest derived from the surrender the decision might have been otherwise. In the class of cases we are considering, the question is in fact between the person corresponding to the reversioner (this person also happened to be called a reversioner, although in a different sense from that of the English law of real property) and the holder of the interest derived from the surrender, so that even this limited analogy can hardly be said to point in favour of view (B).

For all these reasons I am of opinion that (A) is the right view; if in any particular case its strict enforcement leads to injustice, the Court can, in setting aside the alienation, impose such terms as it thinks fit in order to compensate the alienee.

Applying this rule to the facts of the present suit, it is clear that the plaintiffs-respondents must be allowed to impeach the sale effected by Ex. A (1), the vendor's estate having been extinguished by surrender on 20th February 1926. There is nothing in the circumstances to entitle the vendee to any compensation from the plaintiffs-respondents. Coming now to the last of the appellant's contentions, namely as to the basis on which mesne profits have been allowed, it is clear that a modification of the Subordinate Judge's order is necessary. In computing the area available for mesne profits, the 3 bighas sold to Niranjan Bera, who is not a party, should have been excluded. The amount of mesne profits awarded against the defendant-appellant should therefore be reduced proportionately. In the result I agree in the order proposed by my learned brother.

S.R. *Appeal dismissed.*

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* A. I. R. 1935 Calcutta 702

DERBYSHIRE, C. J. AND
R. C. MITTER, J.

Hemendra Nath Roy Choudhury — Plaintiff—Appellant.

v.

Jnanendra Prasanna Bhaduri and *others*—Respondents.

Appeal No. 84 of 1933, Decided on 14th May 1935, from appellate decree of Sub-Judge, Third Court, Mymensingh, D/- 20th July 1932.

*** (a) Limitation—Life tenant dispossessed—Reversioner's suit for possession within 12 years of death of tenant is in time—Successive life estates — Reversioner's suit for possession is in time if within 12 years of death of last holder.**

If a life tenant be dispossessed the reversioner or remainderman is in time if he institutes the suit for possession of immovable property within 12 years of the death of the life tenant, and if successive life estates had been created the remainderman or the reversioner will be in time if he institutes the suit for possession within 12 years of the death of the last life tenant. [P 703 C 2]

(b) Adverse Possession — Adverse possession against life tenant is not adverse possession against reversioner.

Adverse possession against a life tenant will not be adverse possession against the reversioner or the remainderman: 23 *Bom* 725 and 1929 *P C* 166, *Foll.* [P 703 C 2]

*** (c) Limitation—Cause of action arising in lifetime of last full owner—Subsequent interposition of life estate—Art. 140 or 141, Lim. Act, does not apply—Art. 142 applies.**

If the cause of action has arisen during the life time of the last full owner, the subsequent interposition of a life estate or a widow's estate would not bring into operation either Art. 140 or Art. 141, Lim. Act, on the principle formulated in S. 9 of the said Act. Art. 142 of the Act would apply, time running from the date of the dispossession: 1929 *P C* 158 and 1921 *Mad* 272, *Foll.* [P 704 C 1]

*** (d) Evidence Act (1872), S. 114—Presumption—State of things found to exist at particular time—Presumption is that it continues—No rule of evidence for presumption backwards exists.**

There is a presumption that a state of things found to exist at a particular point of time continues, but there is no rule of evidence by which one can presume backwards: 1934 *Cal* 707, *Foll.* [P 704 C 2]

(e) Limitation Act (9 of 1908), Arts. 140, 141—Plaintiff's suit prima facie under Arts. 140 and 141—Defendant to avoid operation of articles must prove that limitation started from time of last full owner, i. e., he was dispossessed when full owner.

When plaintiff brings his case prima facie under Arts. 140 and 141, and the defendants want to avoid the operation of these articles they must prove that limitation began to run from the time of the full owner, that is to say he was dispossessed when he was the full owner: 1915 *Cal* 629, *Dist.* [P 704 C 2]

(f) Hindu Law—Adoption—Anti-adoption agreement by adoptive mother with natural father of adoptee—Agreement is valid apart from custom.

Though the real ground on which an anti-adoption agreement can be validated is custom, such agreements between the adoptive mother and natural father have been recognised as valid by Indian Courts apart from the question of custom: 1927 *P C* 139 and 1918 *Cal* 395, *Foll.* [P 705 C 2]

(g) Custom—Custom or usage separately brought to Court's notice—Courts may hold custom or usage as introduced in law without proof thereof in each case.

When a custom or usage, whether in regard to a tenure or a contract or a family right is repeatedly brought to the notice of the Courts of a country, the Courts may hold that custom or usage to be introduced into the law without the necessity of proof in each individual case: 1918 *P C* 81, *Foll.* [P 705 C 2]

Atul Chandra Gupta and *Gunendra Krishna Ghosh*—for Appellant.

Dr. Basakh and *Jatindra Nath Sannyal*—for Respondents.

R. C. Mitter, J.—The plaintiff who is the appellant before us sued for possession of some plots of land, his case being that they form parts of his estates bearing touzi Nos. 1624, 1644 and 1647 of the Mymensingh Collectorate. The defendants claim the said lands to be parts and parcels of their estate bearing touzi No. 1646 of the aforesaid Collectorate. Both the Courts below have found that portions of the lands in suit surrounded by red lines in Commissioner's map fall within the plaintiff's estates, but on the question of limitation the Courts below have differed.

For the purpose of deciding the question of limitation it is necessary to consider the following facts: Golak Nath Roy was the proprietor in the past of the estates claimed by the plaintiff. He died on 10th May 1846, without any issue but survived by a widow, Jahnvi Choudhurani. He had given his wife power to adopt a son to him. Shortly after his death his widow, Jahnvi Choudhurani adopted Baikuntha Nath Roy Choudhury, who on his adoption become the full owner of the properties left by Golak Nath. On 6th September 1865, Baikuntha Nath however executed an ekrarnama (Ex. 3) in favour of his adoptive mother, Jahnvi Choudhurani. It is not disputed that by the said document a life estate was created in favour of Jahnvi Choudhurani, in respect of the properties left by Golak Nath, and Baikuntha Nath was to get possession on her death. Jahnvi Choudhurani died on 24th February 1900. Baikuntha died on 27th April 1887 leaving him surviving a widow, Rani Dinomani. He left no son, but gave Rani Dinomani power to adopt a son to him. On the death of Jahnvi Choudhurani Dinomani went into possession of the estate, in which, according to Hindu law, she had a widow's estate till 3rd August 1914, when she adopted the plaintiff. Ordinarily the estate would have vested in the plaintiff in absolute right from the date of the adoption and he would have been entitled to take possession, but a few days before the adoption his natural father, he being a minor then, entered into an agreement with the adoptive mother, Rani Dinomani, by which Rani Dinomani was to remain in possession of the estate as a life tenant and on her death the plaintiff was to get possession. This agreement was executed on 17th July 1914 and has been marked Ex. 3 (a). Rani Dinomani died on 9th September 1918 and the suit was filed on 8th September 1930 and registered on 10th September 1930. The plaintiff contends that his suit is in time, Arts. 140 and 141, Lim. Act, being the articles applicable to the case.

It is well settled that if a life tenant be dispossessed the reversioner or remainderman is in time if he institutes the suit for possession of immovable property within 12 years of the death of the life tenant, and if successive life estates had been created the remainderman or the reversioner will be in time if he institutes the suit for possession within 12 years of the death of the last life tenant.

Adverse possession against a life tenant will not be adverse possession against the reversioner of the remainderman. This has been settled by the decision of the Judicial Committee of the Privy Council in 26 I. A. 71 (1) and whatever doubts had been raised after

1. Runchordas v. Parbatibhai, (1899) 23 Bom 725=26 I A 71 (P C).

that decision in India in regard to suits for possession of immovable property by a reversioner succeeding on the death of a Hindu widow has been removed by the later decision of the Judicial Committee in 56 I. A. 267 (2). It is also well settled that if the cause of action arose during the lifetime of the last full owner, the subsequent interposition of a life estate or a widow's estate would not bring into operation either Art. 140 or Art. 141, Lim. Act, on the principle formulated in S. 9 of the said Act. Art. 142, Lim. Act would apply, time running from the date of the dispossession. This has been laid down in 44 Mad 951 (3) at pp. 957 and 958. The same principle is involved in the judgment of Lord Atkin in 56 I. A. 192 (4). In the case before us the plaintiff alleged that Jahnvi Choudhurani had been dispossessed in the year 1878, when she was holding the estate as a life tenant. He satisfied the learned Munsif but the learned Subordinate Judge has held that he has failed to prove the said fact. The learned Subordinate Judge has held further that the defendants had taken possession of the lands in suit before 1865 that is, at a time when Baikuntha was the absolute owner, but we do not consider that his said finding is based on evidence. The learned Subordinate Judge first observed that the oral evidence adduced by the parties was unconvincing. He then referred to the evidence of D. W. 3. He then referred to the defendants' chitas (Ex. A series), the earliest of which is of the year 1871 and came to the conclusion that the defendants were in possession through tenants from before the year 1865. We have gone through the evidence of the said witness which is vague to a degree, and does not carry the defendants' possession to a period prior to 1865. The chittas also do not carry the defendants' possession to a period earlier than 1870 or 1871. Feeling this difficulty the learned Subordinate Judge made the following observations:

> It gives a clear indication that the jotes of Gagan and Ashraf (defendants' tenants on the lands in suits) were old tenancies and were created before the landlords' (defendants) survey of 1278 B. S. (1871). In the circumstances it would be a quite proper thing to presume possession retro in favour of the defendants.

It is on this observation that he based his finding that the defendants' possession began in 1865. We do not consider that this is the proper way of deciding the said question. There is a presumption that a state of things found to exist at a particular point of time continues, but there is no rule of evidence by which one can presume backwards: 38 C W N 763 (5) at p. 769.

For these reasons we hold that the finding of the learned Subordinate Judge that the defendants' possession began before 1865 is not binding on us. It must therefore be taken that the plaintiff has failed to prove that the dispossession was after 1865 and that the defendants have also failed to prove that they began to possess before 1865. The question therefore turns upon the question of onus. The plaintiff came to Court on the allegation that the estate was in possession, firstly, of a life tenant (Jahnvi Choudhurani), then in the possession of Rani Dinomani as the holder of a widow's estate up to the date of the adoption of the plaintiff, and then in her as the holder of a life estate under the ante-adoption agreement, Ex. 3 (a) with the natural father of the plaintiff till her death on 9th September 1918.

He brings his case prima facie under Arts. 140 and 141, Lim. Act. If the defendants want to avoid the operation of these articles they must prove the necessary facts, namely that limitation began to run from the time when Baikuntha was the full owner, that is to say he was dispossessed when he was the full owner. Dr. Basakh has urged that the onus is on the plaintiff to prove that the dispossession was after 1865 on the authority of the case of 21 C L J 157 (6), and has laid emphasis on a sentence to be found at p. 164 of the report. We do not think that the learned Judges in that case intended to decide the question of onus. In that case the last full owner, Satya Kinkar Ghoshal, died in

2. Jaggo Bai v. Utsava Lal, 1929 P C 166=117 I C 498=56 I A 267=51 All 439 (P C).
3. S. Sesha Naidu v. Peria Sami Odyar, 1921 Mad 272=68 I C 734=44 Mad 951=41 M L J 163.
4. Skinner v. Nauni Lal Singh, 1929 P C 158=117 I C 22=56 I A 192=51 All 367 (P C).
5. Manmatha Nath Haldar v. Girish Chandra Ray, 1934 Cal 707=153 I C 170=38 C W N 768.
6. Mohendra Nath v. Shamsunnessa Khatoon, 1915 Cal 629=27 I C 954=21 C L J 157=19 C W N 1280.

the year 1833. The defendants proved by documentary evidence that their predecessors had been in possession since 17th August 1831, at least they carried their possession to the year 1834. Mukherjee, J., pointed out that there was no article in the Limitation Act then in force corresponding to Art. 141 of the Act of 1908 a corresponding article being first introduced in the Limitation Act of 1871. It was also pointed out that the law in force till 1873, when the Limitation Act of 1871 came into force, was that adverse possession which extinguished the title of a female heir taking a limited estate under the Hindu law also extinguished the title of the reversioner, and that if the possession of the defendants began before 1861 the title of the plaintiffs would have been extinguished before the Limitation Act of 1871 came into force, and once the title was extinguished, while the Limitation Act of 1859 or Regn. 3 of 1793 or 2 of 1805 was in force, it could not have been revived by the introduction of the Limitation Act of 1871. These facts and observations, in our judgment, considerably weaken the force of the observations made by the said learned Judge at p. 164 that:

> Before the plaintiffs can rely on Art. 141 they must consequently prove that their predecessor, Satya Kinkar Ghoshal was in possession at the time of his death on 5th November 1833.

Dr. Basakh has taken a further point before us which was not taken in either of the Courts below. He says that there is evidence that the defendants had taken possession in the year 1871. The chittas Ex. A series certainly prove the defendants' possession in 1871. He says that the suit would have been in time if brought within 12 years of Jahnvi Choudhurani's death. This position he is bound to concede, for in two cases decided by this Court brought within 12 years of that lady's death, Art. 140 was applied: see 34 C L J 129 (7) and 34 C L J 141 (8). But he says that a suit brought beyond that time is barred. The basis of his contention is that the ante-adoption agreement Ex. 3 (a) is void and conferred no estate on Rani Dinomani. He says that an ante-adoption agreement by which the possession of an adopted son is postponed is invalid under the law but can be held valid only if there is custom to support it, and as no custom is alleged or proved in this case, the plaintiff was from the date of his adoption the full owner entitled to possession and he not having sued within 12 years from date of his adoption within three years of his attaining majority the suit is barred. For supporting his main proposition that such an ante-adoption agreement is void unless there is a custom, he relies upon the case reported in 54 I A 248 (9).

In that case Viscount Dunedin examined the Bombay and Madras cases in detail and summarised the various reasons given in them for upholding an ante-adoption agreement postponing the enjoyment of the adopted son. He held that the real ground on which such agreements could be supported was custom, and his observations indicate that such a custom had grown up in India and has been recognized repeatedly by the Courts. No Calcutta case was considered there, but there are decisions of this Court upholding such agreements: see for instance 27 C L J 274 (10). Apart from the question as to whether Dr. Basakh will be allowed to raise the point for the first time here, which involves investigation of facts not put in issue in the Court of first instance, we do not consider the point to be of any substance for as Lord Dunedin observed in 45 I A 148 (11) at p. 154 that:

> When a custom or usage, whether in regard to a tenure or a contract or a family right, is repeatedly brought to the notice of the Courts of a country, the Courts may hold that custom or usage to be introduced into the law without the necessity of proof in each individual case. It becomes in the end a matter of process and pleading.

We accordingly allow the appeal, set aside the judgment and decree passed by the learned Subordinate Judge and restore those of the learned Munsif. The appellant will have his costs of this Court and of the lower appellate Court.

Derbyshire, C. J.—I agree.

S.R./V.V. *Appeal allowed.*

7. Pramatha Nath Roy v. Dinomani Choudhurani, (1921) 34 C L J 129=65 I C 826.
8. Secy. of State v. Wazed Ali, 1921 Cal 687=65 I C 866=34 C L J 141.
9. Krishna Murthi Ayyar v. Krishna Murthi Ayyar, 1927 P C 139=101 I C 779=54 I A 248=50 Mad 508 (P C).
10. Panchanon Mazumdar v. Benoy Krishna Banerjee, 1918 Cal 395=44 I C 538=27 C L J 274.
11. Rama Rao v. Raja of Pittapore, 1918 P C 81 =47 I C 354=45 I A 148=41 Mad 778 (P C).

A. I. R. 1935 Calcutta 706

R. C. MITTER, J.

Raijaddi Shaikh and *others* — Plaintiffs—Appellants.

v.

Sarjan Biswas and *others* — Respondents.

Appeal No. 718 of 1932, Decided on 10th December 1934, against decree of Dist. Judge, Khulna, D/- 17th August 1931.

Estoppel — Patta describing status of grantor as raiyat at fixed rate and conferring heritable right on grantee—Representatives of grantor accepting patta and basing claim for rent on it — They cannot subsequently treat heirs of grantee as trespassers.

Where a patta describes the status of the grantor as a raiyat at fixed rate and on that footing a heritable right is conferred on the grantee and the representatives of the grantor accept the patta and base their claim for rent on it, they cannot subsequently go back upon the grant and treat the heirs of the grantee as trespassers : 1921 *Cal* 451 (*FB*), *Appl.* [P 706 C 1, 2]

Khitish Chandra Chakraburty, *Durgacharan Ray Choudhury* for *Panchanan Ghosal*—for Appellants.

Sarat Chandra Basu and *Nirmal Kumar Sen* for *Bhudhar Haldar*—for Respondents.

Judgment.—This appeal is in a suit instituted by the plaintiffs-appellants for recovery of khas possession. Their case is that one Kaem Biswas held under them and their predecessors the lands in suit in under-raiyati right, and on his death the defendants, who are his heirs, are trespassers inasmuch as under-raiyati interests are not inheritable in law. The main defence is that the defendants are entitled to remain on the land as tenants as they are under-raiyats with the right of occupancy and as a heritable right had been conferred on their predecessor, Addas Biswas, by the predecessor of the plaintiffs, Aber Muhammad by a registered patta (Ex. C) dated 24th Assar 1303. Both the Courts have dismissed the plaintiffs' suit.

The said patta described the status of the grantor, Aber Muhammad, as that of a raiyati at fixed rates and on that footing a heritable right was conferred on the grantee, Addas Biswas. The position therefore is that even if the status of the grantor Aber Muhammad had in fact been that of an occupancy right he and his representatives could not have gone back upon the grant and treated the heirs of Addas Biswas as trespassers on the footing that an under-raiyati interest is not heritable. The principle of estoppel formulated by the Full Bench in 48 Cal. 783 (1) would have been a complete answer to them. Aber sold 4-annas share of his jote to the plaintiffs who on a partition got all the lands included in Addas' lease in their allotment. Thereafter the superior landlord Narendra Nath Ghosh, obtained a rent decree against the plaintiffs in respect of their jote and at the sale in execution thereof one Preonath Sen purchased the holding. Thereafter Preonath Sen sold the jote to one Tota Bibi who has been found to be a benamidar of the plaintiffs. She served a notice under S. 167, Ben. Ten. Act, on the defendants' predecessor, Kaem Biswas, the son of Addas Biswas, and thereafter sued him for khas possession, but the said suit was dismissed on the ground that Tota Bibi was the benamidar of the plaintiffs, the defaulting tenants. Thereafter the plaintiffs brought successive suits for rent against Kaem Biswas and recovered decrees.

Mr. Chakraburty appearing for the appellants contends that the plaintiffs are entitled to succeed. He says in the first instance that the defendants predecessor Kaem Biswas, who was an under-raiyat, had no doubt acquired an occupancy right by custom, but the defendants cannot resist the plaintiffs claim unless they prove that by custom such a right is heritable and there is no proof of the same. There is great force in this part of Mr. Chakraburty's argument, but it is not necessary to consider it as the ground on which the Subordinate Judge has dismissed the suit is a substantial and good ground. The Subordinate Judge has held that the plaintiffs are estopped from pleading that they are mere occupancy raiyats or that the patta Ex. C is invalid by reason of the provisions of S. 85, Ben. Ten. Act. Mr. Chakraburty contends that there can be no scope for the application of the doctrine of estoppel as his clients are not claiming under their purchase from Aber Muhammad, but under a title derived from Preonath Sen, the purchaser of the jote at a rent sale. I do not

1. Chandra Kanta Nath v. Amjad Ali, 1921 Cal 451=65 I C 466 = 48 Cal 783 = 25 C W N 4 (FB).

think that this contention is sound. After their purchase from Preonath Sen in the benami of Tota Bibi the plaintiffs instituted three rent suits for rent against Kaem Biswas. These suits are Rent Suits No. 1057 of 1915, No. 96 of 1917 and No. 1186 of 1919. In all these suits the plaintiffs accepted the patta Ex. C and based their claim to get rent on the basis thereof. The jote came back to them after the rent sale and thereafter they accepted the patta Ex. C in the plaints in the said rent suits. These facts, precluded them from going back upon the terms of the patta Ex. C, and they are bound by all its covenants. The appeal is accordingly dismissed with costs. Leave to appeal under the Letters Patent asked for is refused.

K.S. *Appeal dismissed.*

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* A. I. R. 1935 Calcutta 707

NASIM ALI AND HENDERSON, JJ.

Indu Bhusan Roy Choudhury—Plaintiff—Petitioner.

v.

Secy. of State—Opposite Party.

Civil Rule No. 1591 of 1934, Decided on 16th July 1935.

*** (a) Court-fees—Refund—Principle is that Government should not profit by mistake of litigant or Court.**

The principle underlying the refund of court-fees seems to be that Government should not profit by the mistake of a litigant or of Court as to the amount of court-fees payable under the Court-fees Act, and in cases of such mistakes the Court should order refund for ends of justice : *Case law referred.* [P 709 C 1]

*** (b) Inherent powers—S. 151, Civil P. C., confers no new power but empowers Court to make necessary orders for justice and prevention of abuse of process — Court cannot exonerate litigant from obligation under statute.**

Section 151, Civil P. C., does not confer new power on the Court. It simply saves the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court in cases and circumstances which are not covered by the express provision of the Code which deals only with procedure and not with substantive rights and obligations ; by the exercise of inherent power the Court cannot exonerate a litigant from an obligation imposed upon him by the statute. [P 709 C 1]

*** (c) Court-fees—Refund — Legally stipulated fees paid — Court cannot by ordering refund under inherent power exempt litigant from statutory obligation — Cases under Ss. 13, 14 and 15, Court-fees Act, are however exempted.**

Where a litigant has paid fees which he was bound to pay under the law for his plaint or memorandum of appeal, the Court by ordering refund under the inherent power cannot indirectly exempt him from the obligation imposed upon him by the statute and thereby nullify the provisions of S. 6, Court-fees Act. The legislature however has made certain exemptions and these are to be found in Ss. 13, 14 and 15, Court-fees Act : 1934 *Cal* 615, *Diss. from.* [P 709 C 2]

Gunada Ch. Sen and *Bhupendra Nath Das Gupta*—for Petitioner.

Dr. Basak—for Opposite Party.

Henderson, J. — This is a Rule obtained by the petitioner calling upon the Secretary of State for India in Council to show cause why the petitioner should not be granted a certificate authorizing him to receive back from the Collector a certain sum paid as court-fees on a plaint. The facts which require to be noted are as follows : The petitioner is the common manager of a certain estate in the district of Bakargunj. His predecessor instituted a suit for rent in the Court of the Subordinate Judge at Khulna : the plaint was insufficiently stamped ; several adjournments were granted in order to enable the plaintiff to pay the deficit but eventually the plaint was rejected on 20th July 1933. Then on 13th March 1934 the petitioner applied to pay the deficit court-fees and he was given five days within which to do so. The Subordinate Judge then restored the suit to the file, purporting to act under S. 151, Civil P. C. One of the defendants then obtained a rule from this Court, which was eventually made absolute it being held that the petitioner's proper remedy was by way of appeal and that the Subordinate Judge's order was passed without jurisdiction : it was accordingly set aside. The petitioner then obtained this Rule and asks us to give him a certificate authorizing him to receive back from the Collector the whole sum which was paid on account of court-fees.

From what has been said above it is clear that the petitioner is not entitled to any relief under the provisions of the Court-fees Act. But we are asked to grant a certificate under the inherent jurisdiction which is preserved to Courts under S. 151, Civil P. C. On behalf of the opposite party Dr. Basak has contended firstly that the Courts have no such power in relation to a refund of court-fees and secondly that the facts of the present case do not entitle the petitioner

to any relief. I should certainly not be prepared to hold that the Courts have no jurisdiction to grant relief in suitable cases, though there may be some doubt as to the precise form which the relief ought to take. This matter was considered by the Madras High Court in the case reported in I. L. R 55 Mad 641 (1). In that case the petitioner had paid excess court-fees. The learned Judges held that it would be unjust and unreasonable for the High Court to refuse to assist him to recover them and granted him a certificate to the effect that excess court-fees had been paid leaving it to the revenue authorities to decide whether a refund should be made or not. With that decision I respectfully agree. I am not prepared to say that the particular form of certificate provided for in Ss. 13, 14 and 15, Court-fees Act, ought to be granted in cases which are altogether outside the scope of the Act. I should therefore be prepared to grant the petitioner a certificate to the effect that he ought to be granted a refund provided that he could persuade us that his petition has any merit in it.

The reported cases generally deal with petitions for a refund of court-fees, which have been improperly levied. The present case is not one of that character and it is not even suggested that the court-fees paid were improper. The only ground upon which the prayer for a refund is based is that the suit was not tried out. I would understand a principle by which an unsuccessful plaintiff or appellant should be held entitled to a refund of court-fees on the ground that he gained no benefit by the litigation. Mr. Sen did not even contend that we ought to give effect to any such principle. But if we are to stop short of that, we should find it difficult to draw the line anywhere with any show of reason. In the present case we are asked to grant relief to a litigant who failed because he did not follow the correct procedure. If we were to do that, it would be difficult to refuse relief to a litigant who failed on any preliminary ground. It would then be difficult to resist the conclusion that mere failure was in itself a sufficient ground for a refund. The result is that in my opinion relief ought not to be granted under S. 151, Civil P. C., in cases where the proper court-fees have been paid. We were asked by Mr. Sen to make this Rule absolute on the authority of the case reported in 38 C W N 185 (2). The facts are these: The petitioner filed an appeal to this Court out of time. He filed an application for extension of time under S. 5, Lim. Act, and obtained a rule on the opposite party, which was eventually discharged. He then applied under S. 151, Civil P. C., for a certificate authorising a refund and was successful. With great respect to the learned Judges, who decided that case it is clear that, if the view which I have taken is correct, that case was wrongly decided. I should therefore have desired to refer the matter to a Full Bench, if the facts in the present case had been similar. But as the cases are clearly distinguishable, it is not necessary to do so. We accordingly discharge this rule with costs hearing fee one gold mohur.

Nasim Ali, J.—I agree. The present application admittedly is not covered by Ss. 13, 14 and 15 of the Court-fees Act. We are asked however to issue a certificate under the inherent power of the Court. The learned Senior Government pleader contends that the Court has no power to issue certificate apart from the provisions of the Court-fees Act. The reported cases however show that this Court as well as other High Courts have issued certificate under the inherent power of the Court in cases (1) where excess court-fees have been paid by inadvertence: 14 W R 49 (3), 40 Cal 365 (4) and 52 All 546 (5). (2) Where a litigant has made excess payments under an erroneous view of the provisions of the Court-fees Act: 55 Mad 641 (1), 57 Mad 542 (6), 46 I C 271 (7) and 107 I C 320 (8). (3) Where the Court has realized excess

1. Thammyya Naidu v. Venkataramanamma, 1932 Mad 438=139 I C 131=55 Mad 641=62 M L J 541.
2. Gastaun G C v. Janaki Nath, 1934 Cal 615=152 I C 215=38 C W N 185.
3. Ameeroonissa Bibi v. Woomaroodin Mohamed, (1870) 14 W R 49.
4. Harihar Guru v. Ananda Mahanty, (1913) 40 Cal 365=20 I C 498.
5. In the Matter of Munna Lal, 1930 All 471=122 I C 188=52 All 546=1930 A L J 805.
6. Vijyalakshmi Ammal v. Srinivasa Ayyangar, 1934 Mad 84=148 I C 1108=57 Mad 542=66 M L J 35.
7. Chandra Hari Singh v. Tipan Prosad Singh, 1918 Pat 496=46 I C 271=3 Pat L J 452.
8. Muhammad Reza v. Rajballabh Nath Singh, (1928) 107 I C 320.

court-fees on an erroneous interpretation of the section of the Court-fees Act: 36 C W N 190 (9) and107 I C 825 (10). The principle underlying these cases seems to be that Government should not profit by the mistake of a litigant or of a Court as to the amount of court-fees payable under the Court-fees Act, and in cases of such mistake the Court should order refund for ends of justice. This is an intelligible principle. Government cannot reasonably object to refund the excess as it is not legitimately due under the statute.

The present case does not come within the principle. There is one reported case however, 38 C W N 185 (2), in which this Court issued a certificate for refund of court-fees paid on a memorandum of appeal presented to this Court out of time on the ground that the delay in filing the appeal was not due to any negligence on the part of the appellant but to some gross negligence on the part of his legal adviser. The facts of the present case are not similar to the facts of that case. Further that case has gone beyond the principle referred to above. S. 151, Civil P. C., does not confer new power on the Court. It simply saves the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court in cases and circumstances which are not covered by the express provision of the Code, which deals only with procedure and not with substantive rights and obligations. By the exercise of inherent power the Court cannot exonerate a litigant from an obligation imposed upon him by the Statute. Under S. 6, Court-fees Act, no plaint or memorandum of appeal can be filed in Court unless the fee prescribed by the Act for such document is paid. When a plaint is filed out of time under O. 7, R. 6 the plaintiff is entitled to show the ground upon which he claims exemption from the law of limitation. When an appeal is presented out of time the appellant explains the delay and the Court may excuse the delay if he can make out a case under S. 5, Limitation Act. Whether the suit or the appeal will be entertained or thrown out on the ground of limitation will depend upon the decision of the Court.

But the condition precedent of the filing of the suit or the appeal is that the fees prescribed by the Court-fees Act must be paid. The Statute is not at all concerned with the question of the success or failure of the litigant. Under the inherent power of the Court, it cannot exempt a litigant from the statutory obligation to pay the prescribed fees. If the litigant is made to pay fees in excess of what he is liable to pay under the Statute, the Statute does not stand in the way of refunding such excess fees as it never authorised the receipt of such excess. In such cases the litigant has got the right to get a refund because the excess is his money and has by mistake or inadvertence passed into the hands of Government. Under such circumstances the only question is about the procedure for the enforcement of such right, and the Courts have rightly assumed jurisdiction under the inherent powers to give relief to the litigant. But where a litigant has paid fees which he was bound to pay under the law for his plaint or memorandum of appeal, the Court by ordering refund under the inherent power cannot indirectly exempt him from the obligation imposed upon him by the Statute and thereby nullify the provisions of S. 6, Court-fees Act. The legislature however has made certain exemption and these are to be found in Ss. 13, 14 and 15, Court-fees Act. Under the circumstances with great respect to the learned Judge who decided *Galstaun's* case (2) I am inclined to think that the issue of certificate for refund in that case was not warranted by law.

S.R. *Rule discharged.*

9. Girish Chandra Mali v. Girish Chandra Dutta, 1932 Cal 450=137 I C 791=36 C W N 190.

10. Sasi Bhusan Majumdar v. Manik Lal Chandra, (1928) 107 I C 825.

A. I. R. 1935 Calcutta 709

R. C. MITTER, J.

Harish Chandra and *another* — Appellants.

v.

Sheikh Kadir and *others*—Defendant 1 —Respondents.

Appeal No. 823 of 1932, Decided on 5th December 1934, from appellate decree of Sub-Judge, 3rd Court, Mymensingh, D/- 30th November 1931.

Occupancy Rights — Auction sale of non-transferable holding—Landlords of portion sold treating holding as abandoned and

granting settlement to others — Auction-purchaser has no right for khas possession against tenant with whom land is settled by landlord.

Where land in a non-transferable occupancy holding is sold in execution of a mortgage decree, and the landlords of a portion of it treat the holding as abandoned and grant a settlement to others, the auction-purchaser is not entitled to khas possession of such land against the person with whom the lands are settled or his tenants. [P 710 C 1,2]

Ramendra Chandra Roy — for Appellant.

Birendra Kumar De—for Respondents.

Surajit Chandra Lahiri—for Deputy Registrar.

Judgment.—This appeal is on behalf of the plaintiff and arises out of a suit for possession on declaration that the plaintiff has a jote right in the lands in suit. The plaintiff's case is that he purchased the lands in suit which comprise the holding of one Wahed Ali at an auction-sale in execution of a decree based on a mortgage. Thereafter, he took delivery of possession through Court and settled the lands with Adhidars, the said Adhidars having surrendered, he took possession in khas but thereafter was dispossessed by the defendants. The defendants' case is that the holding of Wahed Ali was a non-transferable occupancy holding. On the transfer of the entire holding at the mortgage sale from the original tenant Wahed Ali, the Chowdhuris who are admittedly the landlords to the extent of 12 annas 15 gandas share treated the holding as abandoned, granted a settlement to them, and it is on the basis of this settlement that they are rightfully in possession of the land.

The learned Subordinate Judge has found that the defendants are the tenants of the Chowdhuris although he has disbelieved the payment of selami by the defendants for the purposes of taking the settlement from the Chowdhuris. He has however believed the dakhilas which the Chowdhuris granted to the defendants. It has also been found that on the mortgage sale the holding in the eye of the law was abandoned. Certainly the Chowdhuri defendants could resist the claim to possession on behalf of the plaintiff in respect of that share and inasmuch as the principal defendants claim a derivative title from the Chowdhuris and as that title has been found in their favour the plaintiff can have no claim for khas possession against them. In my judgment, the learned Subordinate Judge is quite right in dismissing the plaintiff's claim to possession in respect of 12 annas 15 gandas share which the principal defendants have got as tenants under the Chowdhuri landlords. The result is that this appeal is dismissed with costs to defendant 1. The Deputy Registrar's costs having already been put in, the other appearing defendants-respondents have got their costs.

K.S. *Appeal dismissed.*

A. I. R. 1935 Calcutta 710

M. C. GHOSE, J.

Bhupendra Krishna Ghose — Petitioner.

v.

Abdur Rahaman and *others* — Opposite Parties.

Civil Rules Nos. 800 and 801 of 1934, Decided on 3rd December 1934, from order of Munsif, Second Court, Chittagong, D/- 22nd February 1934.

Record of Rights—Presumption—Conflict between old and recent Record of Rights—Recent one is to be presumed correct unless proved incorrect.

When there is a conflict between old Record of Rights and a recent Record of Rights, the recent record is to be presumed to be correct unless it is proved by evidence to be incorrect. [P 711 C 1]

Ramaprasad Mukherji and *Sambhunath Bandopadhya*—for Petitioner.

Imam Hossain Choudhury—for Opposite Parties.

Judgment.—These are two petitions by the landlord in two cases under S. 26-J, Ben. Ten. Act. The two opposite parties in these cases, owned each half of the Revenue Survey plot 6897 and each of them sold his half portion namely, fourth of an acre. In the documents of transfer it was stated that these were tenures and that as such no transfer fee was to be paid under S. 28-D. The landlord made an objection and stated that the lands transferred were raiyati holdings. Both parties adduced evidence. The landlord, the petitioner, produced the latest Record of Rights of 1931 showing that this plot of land was held as raiyati land by the opposite party under the petitioner. The opposite party produced a record of 1898 and certain unregistered pottas of earlier dates to show that these were

tenures. If the matter had been decided according to evidence by the Court below, there would have been nothing to challenge in this Court. But it appears that the Court below misdirected itself on the point of burden of proof. When there is a conflict between old Record of Rights and a recent Record of Rights the recent record is to be presumed to be correct unless it is proved by evidence to be incorrect. The Court below erroneously threw the burden of proof upon the petitioner. The Court below thought that it was the duty of the petitioner to show that the Record of Rights of 1931 was correct and that it was the duty of the petitioner to show upon what materials the Record of Rights of 1931 was based. In this the Court below has erred in law and this has vitiated his finding. The recent Record of Rights must prevail.

In this view the rules are made absolute. The landlord is entitled to the transfer fee claimed and he will also get a quarter of the same sum as compensation.

The petitioner will be entitled to his costs in these two rules, hearing fee in each rules being assessed at one gold mohur.

S.R. *Rules made absolute.*

A. I. R. 1935 Calcutta 711

NASIM ALI AND HENDERSON, JJ.

Prokash Chandra Sil and *another*—Defendants—Appellants.

v.

Abdul Jabbar and *others*—Plaintiffs—Respondents.

Appeals Nos. 1876 and 1877 of 1932, Decided on 10th July 1935.

(a) Bengal Alluvion and Diluvion Regulation (11 of 1825), S. 4, Cl. (1)—"Gain" in S. 4, Cl. (1) means gain from public river.

The "gain" as contemplated by Cl. (1) must be gain from a public river and not a river the bed of which belongs to private individuals : 13 *M I A* 467 (*P C*), *Foll.* [P 712 C 1]

(b) Bengal Alluvion and Diluvion Regulation (11 of 1825), S. 4, Cls. (1) and (4)—Proviso to Cl. (1) when applied to shallow rivers in Cl. (4) does not infringe right of private owner.

The proviso to Cl. (1), when applied to accretions in small and shallow rivers mentioned in Cl. (4), does not infringe the proprietary right of the private owner. [P 712 C 2]

(c) Equity—No positive law or local usage—Private property cannot be confiscated or destroyed wholly or partially.

In the absence of any positive law or established local usage it is not permissible to confiscate or destroy private property either wholly or partially on general principles of equity and justice. [P 713 C 1]

(d) Bengal Alluvion and Diluvion Regulation (11 of 1825), S. 4, Cl. (5)—Cases not covered by other clauses—Court can apply general principles of equity and justice—Such principles must not be inconsistent with object of Regulation.

Clause (5), S. 4 no doubt empowers the Court to apply general principles of equity and justice in cases not covered by the other clauses of the section. But such principles of equity and justice must not be inconsistent with the object of the Regulation. [P 713 C 1]

Ramendra Chandra Roy—for Applts.

Jogesh Chandra Roy, *Birendra Chandra Das* and *Nripendra Chandra Das*—for Respondents.

Nasim Ali, J.—These two appeals arise out of two suits for recovery of possession of certain lands. The plaintiffs' case is that the disputed lands are alluvial lands formed on a part of the bed of the river Haura, the proprietary right of which belongs to the Maharaja of Tippera and that they took settlement of these lands from the Maharaja. The plaintiffs further allege that they were in possession of those lands after they took settlement, but they were dispossessed from these lands in execution of decree obtained against them under S. 9, Specific Relief Act. The defence of the defendants is these lands are accretion to their tenancies which they hold under a Talukdar under the Maharajah. The trial Court held that the disputed lands were accretions to the defendants' tenancies and in that view dismissed the suits. On appeal by the plaintiffs to the lower appellate Court, the learned Judge has affirmed the finding of the trial Court that the disputed lands are accretions to the defendants' tenancies. He has however decreed the plaintiffs' suit on the ground that the defendants cannot claim these lands as accretions to the tenancies under Cl. (1), S. (4), Regn. 11 of 1825, as the river Haura is a shallow river belonging to the Maharajah. Hence the present appeal by the defendants. The point for determination in these appeals is whether the defendants can claim the disputed lands as accretions to their tenancies and resist the plaintiffs' claim for possession. The decision of the question depends upon the interpretation of Cl. (4), S. 4, Regn. 11 of 1825 which runs as follows :

In small and shallow rivers, the beds of which with the julkar right of fishery, may have been

heretofore recognized as the property of individuals, any sandbank or chur that may be thrown up shall, as hitherto, belong to the proprietor of the bed of the river, subject to the provisions stated in the first clause of the present section.

The contention of the learned Advocate for the appellants is that the closing words of Cl. (4) attract the operation not only of the proviso to Cl. (1) of the section but also of the substantive part of it. In 13 M I A 467 (1) their Lordships of the Judicial Committee observed that:

When the whole words are looked at not only of that clause (Cl. 1) but of the whole Regulation (Regn. 11 of 1825) it is quite obvious that what the legislative authority was dealing with was the gain which an individual proprietor might make in this way from what was part of public territory, the public domain not usable in the ordinary sense, that is to say to the sea belonging to the State or a public river belonging to the State.

From the principle laid down in that case it is clear that the "gain" as contemplated by Cl. (1) must be gain from a public river and not a river the bed of which belongs to private individuals. The Regulation therefore does not contemplate confiscation of private property. If the substantive part of Cl. (1) is read as incorporated in Cl. (4) by operation of the closing words of Cl. (4) the earlier part of Cl. (4) becomes meaningless. It is however contended that when the owner of the bed of the river is also the proprietor of the adjoining land and the claimant to the accretions are his tenants' in respect of the adjoining land to which the accretions have taken place, the principle laid down in 13 M I A 467 (1) cannot apply. It is argued that in such a case, there is really no confiscation of the private property as the tenants do not set their claim any higher than this : that they claim to possess the land on payment of rent. But the right of the proprietor to enjoy or to deal with the alluvial land in any way he likes, is an important and valuable right. Ownership in its full and normal compass is the ownership of a right to the entirety of the lawful uses of a corporeal thing. If by operation of the closing words of Cl. (4) the tenants are entitled to claim tenancy right the proprietor simply retains the *jus in re propria* which on account of the incumbrance in favour of the tenants cannot straightway expand to its normal dimensions as the universum jus of general and permanent use. There cannot be any doubt therefore that if the substantive part of Cl. (1) is allowed to operate on rivers, the beds of which belong to private individuals, there is partial confiscation of private property. It is however contended by the learned advocate for the appellant that the general observations in 13 M I A 467 (1) must be read along with the facts of that case and must not be extended to a state of affairs which was not under the consideration of their Lordships of the Judicial Committee. In substance the argument is that the "gain" in Cl. (1) is not restricted to public domain but can be claimed from private property as well. I am unable to accept this contention. In view of the definite pronouncement of the Judicial Committee that the "gain" within the meaning of Cl. (1) must be a gain from a public domain, small and shallow rivers, the beds of which belong to private individuals cannot come within the operation of the substantive part of Cl. (1). In order therefore to give a meaning to the closing words of Cl. (4), in view of the object of the Regulation as explained in 13 M I A 467 (1) they must refer to the proviso to Cl. (1) which makes the accretions liable to be assessed to revenue: see 49 Cal 103 (2). The principle founded on universal law and justice is that you cannot take away anybody's property. If the positive law intends to encroach on common law rights, such intention must be expressed in very plain words, or must be made out by very plain and necessary implication. In 13 M I A 467 (1) their Lordships of the Judicial Committee observed :

There are no words which imply the confiscation of any private person's property whatever.

The proviso to Cl. (1), when applied to accretions in small and shallow rivers mentioned in Cl. (4), does not infringe the proprietary right of the private owner. Proprietary right is one thing and assessability is another. These rivers which were included in the permanent settlement were not taken into consideration at the time when the revenue was assessed and fixed at the time of

1. Lopez v. Muddun Mohan Thakur, (1870) 13 M I A 467=14 W R 11=5 Beng L R 521 (PC).

2. Secy. of State v. Maharajah of Burdwan, 1922 P C 6=67 I C 835=48 I A 565=49 Cal 103 (P C).

the permanent settlement. The assessment of the additional revenue therefore is not really an encroachment on the proprietary rights. If it is, the positive law has sanctioned encroachment to that extent and no further. In the absence of any prositive law or established local usage it is not permissible to confiscate or destroy private property either wholly or partially on general principles of equity and justice. Cl. (5), S. 4 no doubt empowers the Court to apply general principles of equity and justice in cases not covered by the other clauses of the section. But such principles of equity and justice must not be inconsistent with the object of the Regulation, which declares that confiscation or destruction of private property is not sanctioned by universal law and justice. The learned Judge was therefore right in decreeing the suit. The appeals therefore fail and are dismissed with costs.

Henderson, J.—I agree. This interpretation of Cl. (4), S. 4 of the Regulation is in conformity with a long series of decisions of this Court. It is true that the case reported in 45 I C 929 (3) supports the appellants. That decision was founded upon the decision of the Full Bench in the case reported in 21 Cal 233 (4). But with great respect to the learned Judges, they appear to have overlooked the fact that the Full Bench case does not deal with Cl. (4) but with Cl. (1). On the other hand I should like to refer to two old decisions of this Court on the point. In the case reported in 4 W R 54 (5) Trevor and Campbell, JJ., observed as follows:

> In small and shallow rivers, the beds of which are private property, churs thrown up belong to the proprietor of the bed of the river. This is opposed to the doctrine laid down in Cl. (1), S. 4. . . . In the one case, the ownership of the bed of the river carries the right to the accretion with it; in the other, riparian ownership does the same.

Then again in the case reported in 10 W R 68 (6) Glover, J., said:

> The appellant's vakil wishes to construe the last words of this clause (subject to the provisions, etc) as meaning that such lands belong to the estate to which they join; but it is clear from reading the latter part of the section in question in conjunction with Cl. (4) that these words do not apply to the formation or position of the newly accreted lands, but to the owner's right in them, in relation to the Government after they are formed in fact; any other explanation would result in the contradiction that Cl. (4), S. 4 would in one and the same sentence declare that the owner of the bed of a shallow river had a right to all churs thrown up in it. . . and that the same churs belonged not to him, but to the riparian proprietor to whose estate they were joined.

In my opinion the law has been correctly explained in those decisions. There is no reason why a different law should apply when the dispute is between the zamindar and a subordinate talukdar.

S.R. *Appeals dismissed.*

3. Gobinda Hota v. Kristapada Singha, 1918 Cal 205=45 I C 929.
4. Gour Hari v. Bhola Kaiburto, (1894) 21 Cal 233 (F B).
5. Chunder Monee v. Sreemuttee Chowdhrani, (1865) 4 W R 54.
6. Syfoolah v. Bhuttun, (1868) 10 W R 68.

* A. I. R. 1935 Calcutta 713

NASIM ALI AND HENDERSON, JJ.

Sm. Sudhamoyee Basu and *another*—Appellants.

v.

Bhujendra Nath Biswas and *others*—Respondents.

Appeal No. 289 of 1934, Decided on 17th May 1935, from appellate order of Dist. Judge, Burdwan, D/- 19-2-1934.

(a) Civil P. C. (1908), S. 50—Word "dies" in S. 50 means natural and not civil death.

The word "dies" in S. 50 has been used in its natural meaning. It does not include civil death: 1931 *All* 306, *Foll.* [P 714 C 2]

(b) Legal Representative—Decree against daughters for arrears of rent accrued due after death of last male holder—Daughters in enjoyment of profits—Daughter surrendering estate to reversioners—Liability under decree is personal liability of daughter and is not attachable to reversion unless tenure itself proceeded against—Reversioners are not legal representatives of daughter, judgment-debtor, in respect of property sought to be sold, within S. 50, Civil P. C.

A decree for rent was passed against daughters for arrears which accrued after the death of the last male owner. As the daughters were in enjoyment of the rents and profits of the tenure the liability for rent ought to be regarded as their personal liability and ought not to be held as attaching to the reversion unless the appellants proceeded to bring the tenure itself to sale under the special provisions of the Bengal Tenancy Act. The respondents reversioners therefore are not the legal representatives of the judgment-debtor, in respect of the properties which the applicants want to sell in execution of the rent decree within the meaning of S. 50, Civil P. C. [P 715 C 1]

(c) Civil P. C. (1908), S. 100—Notice.

The question of notice is not a pure question of law. [P 715 C 1]

*** (d) Practice—New plea — Plea based on notice of nature of claim made in previous suit against party—Plea not raised in lower Courts—Nothing on record of present case showing nature of notice—No finding of Courts below whether notice was actually served—Plea held could not be raised for the first time in second appeal.**

Where a plea based on notice of the nature of a claim made in a previous suit was made against a party in second appeal, and the plea was not raised in the lower Courts, neither was there anything on record of the present case showing the nature of the notice, nor was there any finding of the Courts below as to whether any notice was actually served on party:

Held: that the plea could not be raised for the first time in the second appeal. [P 715 C 1]

✻ (e) **Estoppel—Estoppel is not cause of action—It is rule of evidence—It is not pure question of law.**

Estoppel is not a cause of action. It is a rule of evidence which comes into operation if a statement has been made by a defendant with the intention that the plaintiff should act upon the faith of that statement and the plaintiff does act upon the faith of that statement. The question of estoppel is not a pure question of law.

[P 715 C 1, 2]

J. C. Hazra, *P. C. Basu*, *S. C. Bose*, *Nirode Bandhu Roy* and *Kamalakshya Basu*—for Appellants.

A. N. Bose, *Panchanon Ghose* and *Hirendra Chandra Ghose*—for Respondents.

Nasim Ali, J.—This is an appeal by the decree-holders against an appellate order of the District Judge of Burdwan dated 19th February 1934 in a proceeding under S. 47, Civil P. C. The appellants obtained a decrée in the first Munsif's Court at Krishnagar (Nadia) on 1st February 1932 for Rs. 1,636-10-11 against three ladies, Jagmaya, Padmabati and Bhababhabini for arrears of rent of a tenure inherited by them from their father which accrued after the death of their father. On 6th February 1932 Jagmaya died and on 5th May of the same year Padmabati died. On 22nd June 1932 the sole surviving daughter Bhababhabini surrendered her life interest in the estate left by her father by a deed of surrender in favour of the reversioners. Simultaneously with this deed of surrender, a deed of family arrangement and partition was executed between the reversioners by which the properties surrendered by Bhababhabini were partitioned between them. It appears from the deed of partition that the respondents in the present appeal took upon themselves the liability to pay the outstanding debts of Jogamaya and Padmabati in respect of certain properties including the tenure the rent of which was in arrears. On the application of the appellants a certificate was sent by the Nadia Court to the first Court of the Munsif at Burdwan about the non-satisfaction of the decree on 30th March 1933. An execution case was thereupon started in the Burdwan Court on 1st May 1933 against the reversioners including the respondents in this appeal. Certain properties which the respondents got by the deed of surrender were thereafter attached and time was taken by the judgment-debtors to pay off the decretal dues and from time to time certain amounts were paid towards the satisfaction of the decree. Ultimately on 28th November 1933 the respondents objected to the execution of the decree on the ground that they were not personally liable for the decretal amount. The learned Munsif rejected that objection and allowed the execution to proceed. On appeal by the judgment-debtors to the appellate Court, the learned Judge has set aside the order of the learned Munsif. Hence this second appeal by the decree-holders.

The decree under execution is a rent decree. The appellants however do not want to execute it under the provisions of the Bengal Tenancy Act, by attachment and sale of the defaulting tenure which lies in Nadia district. The decree was transferred to Burdwan Court to be executed there as a money decree. It has been already stated that certain immovable properties within the jurisdiction of the Burdwan Court which the respondents have got absolutely by the deed of surrender have been attached by the Burdwan Court. Bhababhabini is not a party to the execution case. The decree is being executed against the reversioners as a money decree. The point for determination is whether the present execution case is maintainable in law in its present form.

The appellants' case is that the present application for execution is maintainable against the respondents under S. 50, Civil P. C. The word "dies" in that section in my opinion has been used in its natural meaning. It does not include civil death: 53 All 529 (1). Again the respondents are not the legal representatives of the judgment-debtor within the meaning of S. 50, read with S. 2, Cl. 11, Civil P. C. The contention of the appellant however is that as the daughters of the last male owner were sued in the rent suit in representative character

1. Madhu Rao v. Gur Narain, 1931 All 306=131 I C 598=53 All 529=1931 A L J 263.

the estate which the respondents got by surrender as reversionary heirs is liable for the decree which was obtained in that suit. I have already pointed out that the decree for rent was for arrears which accrued after the death of the last male owner. As the daughters were in enjoyment of the rents and profits of the tenure the liability for rent ought to be regarded as their personal liability and ought not to be held as attaching to the reversion unless the appellants proceeded to bring the tenure itself to sale under the special provisions of the Bengal Tenancy Act : see 30 I A 81 (2).

The respondents therefore are not the legal representatives of the judgment-debtor in respect of the properties which the appellants want to sell in this execution case within the meaning of S. 50, Civil P. C. The learned counsel however contended on the authority of I L R 8 Cal 51 (3) that the respondents were precluded from reopening the question of substitution under S. 50 inasmuch as the order of substitution was made by the Nadia Court after notice to them, and they did not raise any objection to the substitution. Now in order to apply the doctrine of constructive res judicata it must be shown that the respondents had clear notice of the nature of the claim made against them in the Nadia Court. The question of notice is not a pure question of law. This plea of res judicata was not raised by the appellants in the Court below. There are no materials on the record of the present execution case to show the nature of the notice issued by the Nadia Court upon the respondents. There is no finding of the Courts below as to whether any notice was actually served upon the respondents by the Nadia Court. The bar of res judicata cannot be therefore allowed to be raised for the first time in second appeal in this Court.

The learned counsel also raised the question of estoppel. It is argued on behalf of the appellants that the payment of money by the respondents from time to time towards the satisfaction of the decree estops them from contending that they are not personally liable for the decretal debts. Now estoppel is not a cause of action. It is a rule of evidence which comes into operation if a statement has been made by a defendant with the intention that the plaintiff should act upon the faith of that statement and the plaintiff does act upon the faith of such statement. The question of estoppel is not a pure question of law. Whether by the payments the appellants were misled in any way or were induced to alter their former position in any way are questions of fact. This plea was not raised in any of the Courts below. These payments were relied on in the trial Court only as tacit admissions of the personal liability of the respondents. This contention therefore cannot be given effect to this second appeal. I am clearly therefore of opinion that the execution case is not maintainable in the present form. In view of the above conclusions the question as to whether the sale of any portion of the estate other than the defaulting tenure which the respondents have got by surrender in an execution against the surviving daughter Bhababhabini will affect the respondents' title cannot possibly arise in the present execution case. But as some arguments were advanced on this question I would like to say a few words in this connexion.

The learned counsel for the appellants argued that the decree being a decree for arrears of rent which the daughter did not pay it must be assumed that they did not pay as they could not pay out of the income of the estate and consequently it must be held that the estate was liable for the decretal debt. There is however no foundation for such an assumption. This is not a debt contracted by the limited owner for legal necessity. Therefore if the appellants wanted to realise their decretal dues before surrender by sale of properties other than the defaulting tenure in execution against Bhababhabini they could only sell her right, title and interest and such sale could not in any way affect or bind the reversioners' interest. Again if the execution had been taken against the surviving daughter after the surrender and her interest in properties other than the defaulting tenure had been sold the purchaser would have got nothing as her interest in the estate ceased after the surrender.

2. Jiban Krishna Rao v. Brojo Lal Sen, (1903) 30 Cal 550=30 I A 81=8 Sar 444 (PC).
3. Mungul Pershad Dichit v. Grija Kanta, (1882) 8 Cal 51=8 I A 123=4 Sar 248 (PC).

In this view of the matter the learned District Judge was right in observing that the proper procedure for the decree-holders was to proceed against the defaulting tenure in respect of which the decree for rent was obtained. For the above reasons I dismiss the appeal with costs hearing fee five gold mohurs.

Henderson, J.—In my judgment the main question for determination in this appeal is whether the rent decree that was passed against the ladies binds the estate. These execution proceedings were taken out on the footing that the last surviving lady surrendered her estate in favour of the reversioners thereby undergoing a civil death and it is from that point of view that the matter has now to be considered. The whole estate is in the hands of the reversioners. Mr. Amarendra Nath Bose, who appeared on behalf of the respondents, did not contest that the appellants were certainly entitled to proceed against the reversioners for the sale of the defaulting tenure. Similarly they can proceed against and bring the other properties to sale provided that the decree binds the estate. In these circumstances it is not a matter of much importance whether the respondents were brought on the record by a misconceived application, assuming that they were liable to the extent of the assets of the deceased in their hands, or whether a new execution case was started against them, as the persons in possession of an estate bound by the decree. Somehow or other, they die before the Court and in my judgment the only question for consideration is whether the properties other than the defaulting tenure are liable to sale. On this point I entirely agree with my learned brother. There is no principle by which such a decree should bind the estate. This is not a case in which the limited owner borrows money for some purpose which comes within the meaning of legal necessity. The debt in fact was not contracted by those persons at all. No question of legal necessity arises in this case; nor was any real attempt made in either of the Courts below to justify the execution of such a decree against the reversioners. I therefore agree that this appeal must fail.

S.R. *Appeal dismissed.*

** A. I. R. 1935 Calcutta 716

GUHA AND LODGE, JJ.

Sasanka Bhusan Chowdhury—Defendant—Appellant.

v.

Gopi Ballav Mondal and *others*—Plaintiffs—Respondents.

Appeal No. 122 of 1932, Decided on 3rd July 1935, from original decree of Sub-Judge, Murshidabad, D/- 23rd December 1931.

**** (a) Will — Construction — Object should be to ascertain intention from wording—Effect should be given to intention—Intention should be gathered from entire will according to ordinary meaning and prediliction of testator's class.**

In construing the will, the object should in all cases be to ascertain from its wording the expressed intention, and effect has to be given to the same. The intention has to be gathered from the words of the entire will, taking them in the ordinary meaning, not overlooking the prediliction of the class to which the testator belonged: 37 *Mad* 199 (*P C*) *Foll.* [P 717 C 2]

**** (b) Hindu Law—Adoption—Authority—Widow's authority is not extinguished by her first adopted son attaining competency before death—Power is not exhausted at death of such son.**

A widow's authority to adopt is not extinguished by the mere fact that her first adopted son attained ceremonial competence before death; the power of adoption under the husband's authority is not exhausted at the death of the son first adopted by the widow: 1933 *P C* 155, *Foll.* [P 720 C 1]

(c) Res judicata — Order rejecting appellant's application for substitution of his name for deceased previous holder—Application based on valid adoption—Subsequent suit against applicant challenging validity of adoption—Held order on application is not res judicata as validity was not considered and decided by Court.

Where on the death of the previous holder of an estate an application was presented by the appellant for mutation of his name in place of the deceased and the application was based on a valid adoption of the applicant but the application was rejected and subsequently a suit was filed against the applicant challenging the validity of his adoption:

Held: that the order rejecting the application did not operate as res judicata as the validity of adoption was not considered and decided by the Court during the proceeding on the application. [P 720 C 2]

Brojolal Chakravarti, *S. C Jana*, *Dwijendra Nath Dutt*, *Susil Kumar Bose* and *Byomkesh Bose*—for Appellant.

Gunada Charan Sen, *Bijon Kumar Mukherjee* and *Pramatha Nath Mitra*—for Respondents.

Judgment.—This is an appeal from the decision of the learned Subordinate Judge of Murshidabad, in a suit for possession, on declaration of the plaintiffs'

title to the properties in suit. Plaintiffs 1 to 3 claimed to be the reversionary heirs of one Indu Bhusan Chowdhury, the adopted son of Sasi Bhusan Chowdhury. Plaintiff 4 claimed title to the properties in litigation as the purchaser of one-fourth share of the same from the first three plaintiffs. The history of the title on which the claim in suit was based may be briefly stated: One Sasi Bhusan Chowdhury died on 7th January 1908, without issue, but leaving two widows surviving him, Basanta Kumari Chowdhurani and Raseswari Chowdhurani. By a will dated 3rd August 1907, Sasi Bhusan Chowdhury appointed the widows as executrices. There was a provision made in the will for adoption of sons by the widows. The elder widow Basanta Kumar Chowdhurani adopted a son, Indu Bhusan Chowdhury, on 22nd July 1909, after probate of the will of Sasi Bhusan Chowdhury was obtained by the executrices under the will on 22nd July 1908.

The adopted son attained majority on 8th April 1923; and according to the terms of the will the properties left by Sasi Bhusan Chowdhury were made over to the adopted son. Thereafter the adopted son died unmarried on 20th February 1925. The junior widow Reseswari Chowdhurani then adopted Sasanka Bhusan Chowdhury, the defendant in the suit, on 26th April 1926. Basanta Kumari Chowdhurani, the elder widow who had adopted Indu Bhusan Chowdhury under the terms of the will of Sasi Bhusan Chowdhury, died on 27th December 1925. According to the plaintiffs, the adopted son Indu Bhusan Chowdhury having died while in possession of the estate of his father Sasi Bhusan Chowdhury in absolute right as his father's heir, and having died unmarried, the adoptive mother Basanta Kumari Chowdhurani inherited the estate of Sasi Bhusan Chowdhury, mentioned as the Dengapara Estate in the proceedings, as the only heir of Indu Bhusan Chowdhury. The aforesaid Basanta Kumari Chowdhurani having died, plaintiffs 1 to 3 were the reversionary heirs of Indu Bhusan Chowdhury as his nearest sapinda agnates, and were entitled to have their title to the properties in litigation declared, as such heirs, on the footing that the adoption of the defendant Sasanka Bhusan Chowdhury by Raseswari Chowdhurani was invalid. It was asserted by the plaintiffs that Raseswari Chowdhurani could not validly adopt a son under the terms of the will of her husband Sasi Bhusan Chowdhury, as the authority to adopt so far as Raseswari Chowdhurani was concerned came to an end as soon as Basanta Kumari Chowdhuri, the senior widow of Sasi Bhusan Chowdhurani, inherited his estate, as heir of the deceased adopted son Indu Bhusan Chowdhury.

The claim in suit was resisted by the defendant Sasanka Mohan Chowdhury, the son adopted by Raseswari Chowdhurani; and the issue, as stated by the Judge in the trial Court, on which the parties fought the litigation was issue 3 raised for determination in the suit, on the pleadings of the parties concerned:

Is the adoption of the defendant by Raseswari Chowdhurani invalid in law and void? Had Raseswari Chowdhurani power to take the defendant in adoption? Did the authority to adopt if given by Raseswari Chowdhurani's husband become incapable of execution, and did such authority come to an end as soon as the Dengapara Estate became vested in or possessed by Indu Bhusan Chowdhury's mother Basanta Kumari Chowdhurani?

The issue thus raised for decision in the case was decided by the trial Court in favour of the plaintiffs in the suit. Hence this appeal. It must be noted that the other questions raised in the suit, to which several other issues related, were not argued before us in this appeal. The only question for consideration in the appeal is whether the Judge in the trial Court is right in his decision that the adoption of the defendant by Raseswari Chowdhurani is invalid.

The power of adoption was conferred by Sasi Bhusan Chowdhury on his two widows by his will; and the extent of that power has to be determined with reference to the contents of the will. In construing the will, the object should in all cases be to ascertain from its wording the expressed intention, and effect has to be given to the same. The intention has to be gathered from the words of the entire will, taking them in the ordinary meaning, not overlooking the prediliction of the class to which the testator belonged. As was observed by their Lordships of the Judicial Committee of the Privy Council in 41 I A

51 (1) surrounding circumstances have to be considered, and among such surrounding circumstances which the Court is bound to consider, none would be more important than race and religious opinions; and the Court is bound to regard as presumably (and in many cases certainly) present to the mind of the testator influences and aims arising therefrom.

The relevant portions of the will of Sasi Bhusan Chowdhury, bearing upon the question in controversy in the case before us are those contained in paras. 1 and 2, and those in the last part of para. 7:

1. I have no issue. I have two married wives living. The name of the first wife is Basanta Kumari Chowdhurani and that of the second wife is Raseswari Chowdhurani. After my death my aforesaid two wives shall be in possession in equal shares, widow's estate, till the attainment of majority by the adopted son, of the movable and immovable properties left by me and shall perform the Seva and Puja of the Goddesses Saraswati and Kali and also the Dewali and other festivals and ceremonies which are being performed from before. In no way shall they be competent to sell or alienate any property. On the adopted son attaining majority, the executrices shall hand over the charge of the entire estate to the adopted son. From that time, i. e. from the time the adopted son, after attaining majority takes the estates in his own hand, my aforesaid two wives shall get monthly allowance of Rs 200 each receiving Rs. 100, so long as they will live, and the adopted son shall be bound to pay that, and that shall be a charge upon the estate. My aunt (father's sister) Khantomoni Dassya, shall receive a monthly allowance of Rs. 10 till her death from my estate. Finis.

2. I give my aforesaid two wives permission to adopt sons. According to my permission they both of them shall be entitled to adopt six sons in succession, each adopting three, i. e., to say, my first wife Basanta Kumari Chowdhurani, will adopt a son first; and after the death of that adopted son, my second wife, Raseswari Chowdhurani, will next adopt a son. In case of death of the said adopted son, my first wife will again adopt a son. In this way, both of them together shall be entitled to adopt six sons successively. In case of death of one out of my two wives, the surviving wife shall be entitled to adopt the remaining number of sons successively. My two wives shall not be entitled to partition the properties, etc. of the estate, but if they do not pull on well they shall be entitled to make a division of the profits so long as the estate shall be under their charge. If the two wives do not pull on well with the adopted son from after the adoption and during the minority of the adopted son, then the adopted son shall receive a monthly allowance of Rs. 50 from the estate for his own personal expenses. The executrices shall pay the expenses of the education of the adopted son from the estate.

7. If my aforesaid two wives do not adopt any son within reasonable time or if they die before adopting any son then the income of all the properties of my estate shall be spent in the Seva and Puja, etc. of the aforesaid idols Radha Krishna Thakur and the executrices or the co-adjutors or any of them who shall be living shall appoint a religious and proper person as shebait and that shebait shall appoint his successor and so on. This is my last will. By this will I cancel the will which I executed on 26th Pous 1312 B. S., dated 18th Sraban 1314 B. S.

Applying the rule of interpretation referred to above, to the aforesaid provisions contained in the will before us, there can be no doubt that the primary intention of the testator Sasi Bhusan Chowdhury was to perpetuate his line of succession by lineal descendants. That was the intention underlying the provision for the adoption of six sons, one after another, by the two widows. There was no idea in the testator, that the properties left by him were to pass over to the agnatic relations as the first three plaintiffs are; that is what is clearly expressed in the last part of para. 7 of the will, and that is what is in consonance with the ideas of a Hindu governed by the Dayabhaga Law prevalent in Bengal, with all his predilliction in the matter of inheritance, religion and otherwise. If the two wives did not adopt for any reason whatsoever, the income of all the properties of the estate were to be spent in the Seva and Puja of the family deities. There was no idea prevalent in the mind of the testator that the properties were to pass to any but the direct descendants. It is significant that the widows were merely to have the power of enjoyment over the properties left by their husband; and the direction contained in their husband's will was to hand over the same to the adopted son, as soon as he attained majority. The provision for six successive adoptions by the two widows indicated the keen desire on the part of the testator to perpetuate his line by sons adopted by his wives.

In the matter of adoption, the two wives were to be considered as one person, acting under the authority bestowed upon them by the husband, so far as adoption of sons was concerned. The importance of the aspect of the provisions of the will is that although a son duly adopted might attain majority, entitling

1. Venkata Narasimha Apparow v. Parthasarathy Apparow, (1913) 37 Mad 199=23 I C 166=41 I A 51 (PC).

him to get possession of the properties left by Sasi Bhusan Chowdhury, the power of adoption remained in the widows, in the event that happened, the adopted son dying unmarried. Regard being had to the intention of the testator, there was no vesting of the estate in the senior widow as the heir of the son adopted by her ; the power of adoption conferred on the two widows, taken together, remained in abeyance ; and there was no bar to the exercise of that power by the junior widow, on the son adopted by the elder widow dying unmarried. The testator did not intend that his estate should pass to any of the widows absolutely, or vest in any of them, nor was there the intention that the authority to adopt was not to be exercised in the event that happened, namely the son adopted dying without leaving a male lineal descendant. The vesting of the estate in one of the two widows, and the passing of the same to the distant agnates on the death of one of the widows was not a thing intended or contemplated by Sasi Bhusan Chowdhury ; what was contemplated was in the events that happened, that one of the two widows would exercise the power of adoption that was still in existence. That was what was done by the junior widow Raseswari Chowdhurani on 26th April 1925, after the son adopted by the elder widow Basanta Kumari Chowdhurani had died unmarried on 22nd February 1925 ; and it was in accordance with the intention of the testator Sasi Bhusan Chowdhury as expressed in his Will. It may be noticed in this connexion that the widow's death, and for the purpose of the case before us, the death of both the widows who have to be taken to be one, so far as the authority to adopt was concerned, is the limit of time within which, and the existence of male issue in the male line the condition, subject to which the power of adoption conferred by the will of Sasi Bhusan Chowdhury could be exercised.

As a general rule there is no limit of time for the exercise of the power of adoption by the widow in whom her husband's estate has vested ; she may adopt at any time she pleases, when the estate is vested in her : see 33 I A 55 (2). In the case before us, no vesting of the estate in any of the two widows was intended, and the estate could not under the clear terms of the Will, vest in one of the widows on the death of the son adopted by her. The position created by the adoption of Sasanka Bhusan Chowdhury by the junior widow Raseswari Chowdhurani in the case before us, was something similar to the position which came up for consideration of this Court in the year 1900, and which was dealt with by the eminent Judge Sir Gooroo Das Banerji, in his judgment in 5 C W N 20 (3), where on a review of the authorities bearing on the question under consideration, it was stated that the weight of authority was in favour of the view that a Hindu widow adopting a son under the authority of her deceased husband upon the death of a son adopted or begotten, whose estate he inherited as mother, divests herself of that estate by the act of adoption in favour of the son last adopted ; and it was held that the correct view would be to hold that when a Hindu widow adopts a second son, upon the first son dying unmarried, the second adopted son takes the estate immediately on his adoption. The differentiating element in the case before us is that there were two widows with power of adoption given to them to be exercised alternately up to the number six; and the vesting of the estate even if such could be contemplated under the terms of the will, which as already indicated could not be. There could not be any vesting of the estate in one of the two co-widows, to the exclusion of the other, who had the authority to adopt in her, which remained in abeyance, during the lifetime of the son adopted by the elder widow.

The Judge in the trial Court, it would appear, paid little attention to the terms and the provisions of the will bearing directly upon the question in controversy between the parties to the suit. He has proceeded on a discussion of the law on the subject of vesting of the estate in the widow, on the death of the son adopted by her, and has on the authority of decisions referred to in his judgment, come to the conclusion that the power to adopt became incapable of execution of the vesting of the husband's estate on some one other than herself. The pro-

2. Mutsaddi Lal v. Kundan Lal, (1906) 28 All 377=33 I A 55=3 A L J 216 (PC).

3. Rai Jatindra Nath v. Amrit Lal, (1901) 5 C W N 20.

position as laid down by the trial Court cannot be accepted on the provisions of the will of Sasi Bhusan Chowdhury, to which detailed reference has been made above, and for reasons stated hereinbefore. In so far as the authority of decisions in this country and of their Lordships of the Judicial Committee of the Privy Council are concerned, referred to in the judgment of the Court below, no useful purpose can be served by entering into a discussion on them. Most of the decisions mentioned by the Judge in the Court below were considered by their Lordships of the Judicial Committee in 60 I A 242 (4), in which the point was raised that a widow's power of adoption was extinguished on the death of the son first adopted, inasmuch as he had then attained full age and full legal capacity to continue his line, and that the subsequent adoption of a son could not divest the estate which had vested in the nearest collateral heir of the last male holder. On that decision, what must now be taken to be the settled law, appear to be this : A widow's authority to adopt is not extinguished by the mere fact that her first adopted son attained ceremonial competence before death; the power of adoption under the husband's authority is not exhausted at the death of the son first adopted by the widow. It is useful to refer to the main reasons assigned for the decision arrived at by their Lordships which were summarised in the following manner, after an exhaustive review of the case law on the subject :

> The vesting of the property on the death of the last holder in some or other than the adopting widow, be it either another coparcener of the joint family, or an outsider claiming by reverter, or by inheritance, cannot be in itself the test of the continuance or extinction of the power of adoption. The true principle must be found upon the religious side of the Hindu doctrine and to the efficacy of sonship.

As to this doctrine taken to be well-established, what was stated was this :

> Their Lordships feel that great caution should be observed in shutting the door upon any authorised adoption by the widow of a son-less man..... The Hindu law itself sets no limit to the exercise of the power during the life-time of the donee, and the validity of successive adoptions in continuance of the line is now well recognised. But there must be some limit to its exercise, or at all events some conditions in which it would be either contrary to the spirit of the Hindu doctrine to admit its continuance, or inequitable in the face of the other rights, to allow it to take effect, has long been recognised both by the Courts in India and by this Board.

This pronouncement recently made by the Judicial Committee, on a review of the previous case law on the subject under consideration, is in consonance with what was stated to be the law prevalent in Bengal by Gooroo Das Banerji, J., in 5 C W N 20 (3) referred to in a previous part of the judgment. The law as now authoritatively laid down in 60 I A 242 (1) has, it may be noticed, been followed by their Lordships of the Judicial Committee in 39 C W N 682 (5). On the provision of the will of Sasi Bhusan Chowdhury bearing on the question arising for consideration in this appeal, and on the authority of decisions of their Lordships of the Judicial Committee, the judgment of the trial Court, in favour of the plaintiffs in the suit, cannot be upheld. It remains to be mentioned that a question relating to the application of the rule of res judicata against the defendant in the suit, was raised before us on behalf of the plaintiffs-respondents in this Court, in support of the decree passed by the trial Court in their favour. It was urged that the defendant-appellant could not be allowed to agitate the question of validity of his adoption, in view of an order passed by this Court on 10th August 1925, rejecting an application made by him for the substitution of his name in the place of Indu Bhusan Chowdhury, after the said Indu Bhusan Chowdhury died on 20th February 1925. It need only be stated in this connexion that the validity of the adoption of the defendant was not considered and decided by this Court, in the order for substitution to which reference has been made above. The plea of res judicata as raised in this appeal for the first time during the course of argument, on which no issue in the suit was directed, appears to be wholly unsupportable. In the result, the appeal is allowed; the decision of the trial Court, and the decree passed by it, in favour of the plaintiffs respondents, are set aside. The suit instituted by the plaintiffs-respondents, out of which this appeal has arisen, is dismissed with costs throughout.

S.R. *Appeal allowed.*

4. Amarendra v. Sanatan, 1933 P C 155=143 I C 441=60 I A 242=12 Pat 642 (PC).

5. Vijaysingji Chhatrasingji v. Shivsangji Bhumsangji, 1935 PC 95=155 I C 493=62 I A 161=59 Bom 360=39 C W N 682 (PC).

* A. I. R. 1935 Calcutta 721

PANCKRIDGE, J.

Sagoremal Gopalka—Plaintiff.

v.

A. C. Banerjee & Co —Defendants.

Suit No. 2175 of 1933, Decided on 2nd August 1935.

(a) Acknowledgment—Pro-note — Admission of execution is admission of liability at date of note.

The admission of the execution of a promissory note prima facie is no more than an admission of liability as at the date of the note : 33 *Cal* 1047 and 1927 *Mad* 219, *Foll.* [P 722 C 2]

*** (b) Acknowledgment—Suit on pro-notes — Written statement admitting execution but alleging various repayments—Statement held admission of notes being partly undischarged at date of statement.**

A suit was instituted for recovery of money due on various promissory notes executed by the same defendant. The defendant filed a written statement wherein he admitted the execution of the pro-notes but alleged that several repayments had been made in respect of the several pro-notes:

Held : that the statement amounted to an admission that all the pro-notes were at least in part undischarged at the date the written statement was filed. [P 723 C 1]

N. C. Chatterjee and *G. K. Mitter*—for Plaintiff.

Sudhish Roy and *Saroj K. Dutt*—for Defendants.

Judgment.—This is a suit on a promissory note executed by the defendants on 12th November 1927. On that day there was also a deposit of certain shares in the Bihar Firebricks and Potteries, Ltd., the particulars of which are given in a memorandum of deposit also signed by the defendants. The shares are discribed as "security against our handnote for Rs. 20,000 only of date." Prima facie the plaintiff's claim on the note is barred by limitation. The plaintiff submits that limitation is saved, first, by various payments on account, the last of which was made on 11th May 1929. The defendants do not dispute that a fresh period of limitation began to run on that date, but inasmuch as the suit was not filed until 13th November 1933, it would still be barred by limitation unless a fresh starting point can be found before 11th May 1932, and subsequent to 13th November 1930. The plaintiff submits that a fresh period of limitation is to be computed from 12th March 1931 on which date the defendant's, through one of their partners, signed a written statement in a suit in this Court, which in the submission of the plaintiff amounts to an acknowledgment of liability in respect of his right within the meaning of S. 19, Limitation Act.

The circumstances which led to the filing of that written statement must be set out in detail. There were five members, the plaintiff being one of them, of a joint family that may for purposes of convenience be referred to as the Gopalkas. On 26th November 1924, the defendants borrowed four several sums of Rs. 20,000 from four of the five Gopalkas and a sum of Rs. 10,000 from the fifth Gopalka, and executed five several promissory notes in favour of the lenders individually. One of such promissory notes was paid off on 14th May 1925, but the lender advanced a sum equal to that secured by the original promissory note on the 6th of the following month. On 12th November 1927, when outstanding notes of 26th November 1924, were about to become barred, the respective holders of them obtained renewal promissory notes from the defendants, of which the promissory note in suit is one and also obtained the deposit of various share certificates by way of security. On 5th June 1928, the promissory note of 6th June 1925 was in its turn renewed. On 10th November 1930 a suit was filed in this Court by two of the Gopalkas including the present plaintiff. They joined with them as plaintiffs the present plaintiff's minors sons. The defendants in the suit were the present defendants and the other Gopalkas in whose favour the notes had been executed, and also certain infant Gopalkas.

The plaint alleged that the parties to that suit other than the present defendants were a joint Hindu family, and that out of the assets of that family the Gopalkas had advanced various sums to the present defendants. Particulars of the sums advanced are set out in the plaint and amount to Rs. 90,000 which sum is arrived at by adding to the Rs. 70,000 secured by the notes of 12th November 1927 the Rs. 20,000 secured by the note of 5th June 1928. The plaint goes on to allege that the present defendants executed promissory notes in respect of the above sums in favour of various members of the joint family and promised to pay interest thereon at the rate of 5 per cent per annum. The

sum due for principal and interest at the date of suit is stated to be a sum of Rs. 1,23,000 for which a decree is asked together with interest and an order for sale of the shares deposited as security for the promissory notes. There is a statement that the Gopalka defendants have been joined as defendants because they have refused to join as plaintiffs and that no relief is sought against them.

In the written statement filed by the present defendants they admit having monetary transactions with individual Gopalkas including the present plaintiff and also admit having executed promissory notes in their favour individually. They proceed to allege that they made various payments to the various persons previously mentioned in respect of their respective promissory notes. They take specific exception to the claim made in the plaint for interest as from 1st June 1928, and state that they do not admit that interest has been paid only up to 31st May 1928. They admit deposit of the shares, and in particular they admit the deposit of 500 shares in the Bihar Firebricks Co. Ltd., with the present plaintiff. Para. 6 is as follows:

> Without prejudice to the aforesaid contentions the defendant firm state that upon an account being taken a much smaller amount will be found due by the defendant firm and on the securities being realised nothing will be due.

The contentions to which reference is made in the foregoing paragraph are the submission that the plaintiffs are not entitled to maintain the suit in its present form. I take it that the submission is that inasmuch as the notes were in favour of the individual Gopalkas they could not be the subject matter of a single suit by the plaintiffs purporting to represent the joint family. I have been referred to various cases which deal with the effect of an admission of the execution of a promissory note and failure to allege that it has been discharged by payment or otherwise. The case which has been cited in support of the contention that unless discharge is alleged, admission of execution amounts to an admission of liability, purport for the most part to be based upon the decision of the Judicial Committee in 33 I A 165 (1). I am inclined to agree with Mr. Roy that that case does not justify the comprehensive propositions which have been enunciated in some of the reported cases. For example, in 41 Mad L J 217 (2) in comparing the case of an admission of execution of a promissory note with the admission of the existence of an open and current account, Napier, J., observed that in his opinion the inference in the case of an admission of execution of a promissory note is much stronger. That does not appear to me to be a correct view because to admit the existence of an open and current account is to admit the present right of one person to an account as against the other. The admission of the execution of a promissory note prima facie is no more than an admission of liability as at the date of the note. I should certainly hesitate to accept as correct the decision in 5 M L T 71 (3) where it was held that the acknowledgment of liability existing at the past time without the allegation that the liability has since ceased is presumed to be an acknowledgment of liability when the statement is made. I think that a sounder view was taken by Ramesam, J., in 50 Mad 548 (4) which is to the effect that the admission must be one which can be applied from the facts and surrounding circumstances and is not one which is implied as a matter of law. To adopt the words of Ayling, J., in 36 Mad 68 (5). "From the language used and the circumstances in which the acknowledgment is made it must be decided whether it amounts to an implied acknowledgment of subsisting liability." Applying that test, such an acknowledgment is in my opinion applied in the defendants' written statement in the suit of 1930.

It is not now argued that the promissory note which the defendants admit having executed in favour of the present plaintiff in para. 2 of that written statement, can be any document other than the promissory note in suit. When we turn to para. 3, we find that the only allegation is that the defendants have

1. Maniram v. Seth Rupchand, (1906) 33 Cal 1047=33 I A 165=2 N L R 130 (P C).

2. Subbarama Aiyar v. Verrabadra Pillai, 1921 Mad 464=70 I C 593=41 M L J 217.
3. Rangamaya Kalu Aiya v. Subbayan, (1909) 5 M L T 71=2 I C 522.
4. Swaminatha Odayar v. Subramma Aiyar, 1927 Mad 219=100 I C 10=50 Mad 548=51 M L J 856.
5. V. Andiappa Chetty v. Devarajulu Naidu, (1913) 36 Mad 68=12 I C 378=21 M L J 1024.

made various payments to the various persons mentioned in the previous paragraphs in respect of their respective promissory notes. That is in answer to the paragraph in the plaint stating that owing to circumstances which I need not set out, the plaintiffs are unable to give the exact amount of claims made by the defendants but they believe that all the interest up to 31st May 1928 has been paid. In my opinion the words "in respect of their respective promissory notes" mean "on account of their various promissory notes" and are quite impossible to reconcile with any suggestion that any of the promissory notes has been discharged by payment. Having regard to the language of the plaint, this inference is strengthened by the assertion of the defendants that they do not admit that interest has been paid only up to 31st May 1928. I do not attach very much importance to para. 6 that on accounts being taken a similar amount will be found due because it is consistent with the previous discharge of one or more promissory notes and if one or more have been discharged by payment, the particular note executed in the present plaintiffs' favour may have been discharged. Having regard to the written statement as a whole I have come to the conclusion regarding paras. 2 and 3 together, that there is an admission, that all the promissory notes including that executed in the present plaintiffs' favour, were at least in part undischarged at the date the written statement was filed.

In these circumstances the defence of limitation fails; learned counsel for the defendants does not dispute the quantum of the claim and there will therefore be a decree for Rs. 35,833 with interest at the rate provided by the note pending suit. Interest on decree at 6 per cent with costs.

S.R. *Suit decreed.*

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* A. I. R. 1935 Calcutta 723

McNAIR, J.

Nemai Chandra Dey—Plaintiff.

v.

Brojendra Nath Mitter and *others*—Defendants.

Suit No. 710 of 1931, Decided on 9th August 1935.

*** (a) Costs—Taxation—Court always reluctant to interfere with taxing officer's discretion—Specially so in question of mere quantum.**

The Court is always averse from interfering with the discretion exercised by the taxing officer, and particularly the Court will not interfere where the only question raised is a question of quantum. [P 724 C 1]

(b) Costs—Taxation—Application for review—Judge is entitled to consider taxing officer's findings.

The Judge is entitled in cases of applications to consider and review the findings of the Taxing Master for review of taxation of costs: *Ager* v. *Blackloack & Co.* 56 *L T* 890 and *Spalding* v. *Gamage*, (1914) 2 *Ch* 405, *Foll.* [P 725 C 1]

N. N. Bose and *A. B. Guha* — for Plaintiff.

Sudhish Roy and *N. K. Ghose*—for Defendants.

Judgment.—This is an application by an attorney for review of taxation of his bill of costs, under Ch. 36, R. 72, Original Side Rules. The items objected to and which are now before me fall into two categories. In the first are items 41, 42, 43 and 44 in the exceptions. They refer to "drawing observations, making a copy of brief, delivering the same and paying counsel's fees." The suit in which these costs were incurred was for the construction of the will of Hiralal De and for a declaration that on the death of his widow the plaintiff Nemai Charan De as the sole reversionary heir became entitled to his residuary estate. Amongst the defendants were three ladies, Sm. Santimoyee Dassi, Sm. Sudhamoyee Dassi, and Sm. Narayan Dasi and at a subsequent date Bivash Chandra Mazumdar, a minor who was represented by his father and guardian ad litem. The suit was eventually settled by a consent decree. Items 41 to 44 have been disallowed by the learned Taxing Officer on the ground that this was a chamber application that no order was drawn up, and that there is no certificate of counsel appearing in the entry of the bill. On behalf of the applicant it is contended that although the order was not drawn up, it is clear, both from the endorsement on counsel's briefs and also from the Court minutes, that the application was made and that the learned Judge certified for counsel, and that the learned Taxing Officer is labouring under a mistake of fact in not allowing these items. The endorsement of counsel, Mr. Das Gupta, bears out the statement of counsel for the applicant

and from the Court minutes it appears that

the time was extended by the Court, the applicant to pay the costs of the application, and of all parties appearing, and the matter was certified for counsel.

In the circumstances it seems to me that the learned Taxing Officer was labouring under a mistake, and that had the facts been clearly put before him he could have allowed these items. Counsel has addressed me at length with regard to the powers of the Court in reviewing questions which have been decided by the Taxing Officer. These matters have been dealt with in frequent decisions both in this country and in England, and the English practice is followed in this country in the absence of any particular rule. The Court is always averse from interfering with the discretion exercised by the learned Taxing Officer, and particularly the Court has said that it will not interfere where the only question raised is a question of quantum.

It has been suggested that the question here is a question of quantum. With that contention I am unable to agree. As I have already said the learned taxing officer has come to his decision, so it appears to me, because he was misinformed as to the actual order made by the Court. These items must be allowed. Item 56 has been disallowed on the ground that it is a third copy brief for which there is no justification. The defendant ladies to whom I have already referred had put in written statements in which they contended that they were in certain events the nearest heirs of the testator, and they claimed to be preferred to the plaintiff. In para. 5 of their written statement they contend that they are the nearest living relations of the deceased and being young and married capable of conferring spiritual benefit on the deceased by giving birth to male issue and on that ground, amongst others, they put forward the contention that they were the nearest reversionary heirs. Subsequently a boy Bivash was born and a written statement was put in on his behalf in which he claimed that he was the nearest living heir of the deceased. In opposing this application Mr. Roy contends that the ladies were really claiming on behalf of the boy Bivash. That contention cannot be upheld. In the paragraph of the written statement to which I have referred the ladies are claiming not on behalf of any child who might be born here after, but they are claiming for themselves, on their own behalf, on the ground that they might later give birth to male issue and that they are entitled to succeed because they are capable of conferring religious benefit on the deceased.

The infant defendant Bivash was claiming separately from the ladies and it was only right, particularly as he was a minor, that his point of view should be placed before the Court. Moreover, it is pointed out by counsel for the applicant that the decree which was passed and for which counsel was briefed was a consent decree and that it was necessary that the point of view of the infant should be placed before the Court so that the Court might be able to certify that any terms of settlement to which consent was given were for the benefit of the infant. Reference has been made to the case reported in 56 L T 890 (1) which was decided by Kelewich, J. There the Taxing Officer refused to allow more than one set of costs in respect of counsel on the ground that the difference in the defences was not sufficiently material to justify appearance by separate counsel. Kelewich, J., while stating that if it were a matter purely of the Taxing Master's discretion he would not entertain the motion, held that it was not purely a question of his discretion but that the Judge was entitled to look into the pleadings and to see whether in fact there were different cases set up by the parties and if so whether there were such differences as to justify representation by separate counsel. That case was referred to and followed by Sargant, J., as he then was, in (1914) 2 Ch 405 (2). In that case there were two companies, Gamages and Benetfinks, Gamages having a controlling interest in Benetfinks. A similar contention was put forward that the interests of the two companies were identical and that the Master's discretion could not and should not be interfered with. The learned Judge again looked into the defences which had been

1. Ager v. Blackloack & Co., (1887) 56 L T 890.
2. Spalding v. Gamage Ltd., (1914) 2 Ch 405=83 L J Ch 855=58 S J 722=111 L T 829.

put in at the trial and considered that the defendants were entitled to file seperate defences. Those two cases are authorities for the proposition that the Judge is entitled in applications of this nature to consider and review the findings of the learned Taxing Master and having reviewed those findings I am of opinion that the attorney's contention put forward in this application should prevail. A further question arises as to the costs of and incidental to the exception proceedings before the Taxing Officer. It appears that on 1st March 1935 the Court minutes are as follows:

"On the applicant paying Rs. 300 to the attorney, Mr. G. B. Chatterjee, by Friday, 8th March, to be held by the attorney subject to the further orders of this Court, time to file exceptions extended till 4 p. m. Thursday 14th March. Costs of this application reserved.

The Rs. 300 was duly paid and the time was extended. It is now claimed that the Rs. 300 should be refunded and that in view of the fact that the attorney who filed the exception was at any rate partly successful he should be entitled to his costs. Mr. Bose for the present applicant contends that the amounts disallowed were negligible. The ordinary rule is that costs follow the event and, having succeeded, Mr. Roy's client is, in my view, entitled to the return of the Rs. 300 and to those costs for which he asks. The applicant is entitled to his costs of this application.

S.R. *Order accordingly.*

A. I. R. 1935 Calcutta 725

GUHA AND LODGE, JJ.

Annada Prosad Bhadra and *another*—Appellants.

v.

Gopal Chandra Ghose and *others*—Respondents.

Letters Patent Appeal No. 10 of 1934, Decided on 24th July 1935, from appellate decree of Henderson, J., D/- 14th June 1934, in Appeal No. 1964 of 1931.

Res judicata — Suit for enhancement of rent — Decision on question as to whether Transfer of Property Act or Bengal Tenancy Act applied to tenancy held operated as res judicata on such question in subsequent suit for possession.

Where in a previous suit for enhancement of rent, the question as to whether the Transfer of Property Act or the Bengal Tenancy Act applied to the tenancy was decided, the decision operates as res judicata on such question being raised in subsequent suit for possession.

[P 725 C 2]

Hemendra Chandra Sen and *Amiya Lal Chatterji*—for Appellants.

Prokash Chandra Majumdar for *Satindra Nath Roy Choudhury* — for Respondents.

Judgment.—The question raised in this appeal by the plaintiffs in the suit out of which it has arisen, is whether the decision in a previous suit instituted by the plaintiffs, in the year 1925, for enhancement of rent under S. 30 (b), Ben. Ten. Act, operated as a bar to the question whether the provisions of the Transfer of Property Act were applicable to the tenancy in suit, being agitated in the present litigation. In the previous suit of the year 1925, on the objection raised by the defendants, it was decided that the tenancy in question was not for agricultural purposes, and the provision of the Bengal Tenancy Act could not therefore apply. The claim for enhancement of rent made in the suit was defeated on the aforesaid decision given by the Munsif in that suit, on 11th November 1925. But for the reason given by the Munsif that the provision of the Bengal Tenancy Act had no application, the decision dismissing the claim for enhancement of rent was not sustainable; no other ground having been given by the Munsif trying the suit, and no other ground having been raised by the defendants in suit for the purpose of resisting the claim for enhancement of rent, made in the year 1925.

In the above view of the case before us, we are unable to agree with the conclusion arrived at by our learned brother Henderson, J., that the plea of res judicata as raised in the case before us, was not sustainable. The foundation of the decision in the previous litigation between the parties to the suit giving rise to this appeal, was that the provisions of the Bengal Tenancy Act were not applicable to the case before the Court; and, in our judgment, the question whether the Transfer of Property Act or the Bengal Tenancy Act was applicable to the present case, as raised in issue 5 in the suit, could not be allowed to be reagitated. In the above view of the case before us, the decision of our learned brother Henderson, J., in second

appeal, and the decision of the Subordinate Judge in the lower appellate Court, are set aside and the decision and decree passed by the trial Court, on 17th August 1929, declaring the title of the plaintiffs-appellants, to the lands in suit, and entitling them to recover possession by evicting the defendant-respondents and by removing their houses standing on the lands are restored. The defendants-respondents will carry out the terms of the aforesaid decree within three months from this date. The plaintiffs-appellants are to get their costs in the litigation throughout, including the costs in this Court, from the defendants-respondents.

K.S. *Appeal allowed.*

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* A I. R. 1935 Calcutta 726

GUHA AND LODGE, JJ.

Chairman of Commissioners of the Baruipore Municipality — Defendant—Appellant.

v.

Sivadas Roy Chaudhury and *others*—Plaintiffs—Respondents.

Letters Patent Appeal No. 11 of 1934, Decided on 24th July 1935, against appellate decree of Henderson, J., D/-14th June 1934 in Appeal No. 2022 of 1931.

*** (a) Civil P. C. (1908), S. 80—Assessment by Municipality — Subsequent supersession of Municipality and public officer appointed by Government to perform duties of Commissioner — Suit for declaring assessment illegal and ultra vires — Notice under S. 80 is not necessary.**

It is only where the plaintiff complains of some act purporting to have been done by a public officer in his official capacity, that notice is enjoined. Where subsequent to an assessment by the Municipality the Municipality is superseded and a public officer is appointed to perform the duties of the Commissioner, for a suit to declare the assessment illegal and ultra vires, no notice under S. 80 is necessary. The fact that the assessment complained of was made before the supersession of the Municipality, is sufficient for the purpose of holding that S. 80 cannot possibly apply: 1934 *P C* 96, *Appl.*

[P 727 C 2]

(b) Practice—New plea — Plea not taken either in primary or appellate Court cannot be raised in second appeal.

Where a point as to legality of a certain tax by a Municipality is not raised before the primary Court or before the Subordinate Judge on appeal, it cannot be allowed to be raised in second appeal. [P 728 C 1]

(c) Bengal Municipal Act (3 of 1884), S. 85 (a)—Tax under S. 85 (a) should not be imposed jointly on more persons than one.

The tax under S. 85 (a) is a personal tax and the assessment is to be made according to the circumstances and property of each individual assessed, and thus this tax should not be imposed jointly on more persons than one: 1928 *Cal* 591, *Appr.* [P 727 C 1; P 728 C 1]

Sarat Chandra Roy Choudhury and *Radhica Charan Chatterji*—for Appelt.

Atul Chandra Gupta and *Kashi Nath Mitter*— for Respondents.

Judgment in Second Appeal

Henderson, J.—This appeal is by the defendant who is the Chairman of the Baruipore Municipality. The plaintiffs instituted the suit in order to obtain a declaration that a certain assessment was illegal. In order to understand the first argument made on behalf of the appellant it is necessary to note that the commissioners of the Municipality were superseded and the Circle Officer was appointed under the provisions of S. 66 (b), Bengal Municipal Act, to perform the duties of the commissioners. It was contended on behalf of the Chairman that the suit should have been dismissed because no notice was served on the Circle Officer under the provisions of S. 80, Civil P. C. Neither the Munsif nor the Subordinate Judge came to any definite conclusions on this point, but it has been argued before me on both sides, and I am clearly of opinion that no notice was necessary. It is quite clear that if a public officer is appointed Chairman of a Municipality it is not necessary to serve notices on him as such. It was however argued that a notice ought to have been served in this case because the Municipal Commissioners had been superseded. It is a mere accident that the person appointed to perform their duties under the provisions of S. 66 (2) was a public officer. Any person or persons might have been so appointed. There is nothing in the Act to suggest that such person or persons become Officers. The effect of the supersession is that the Commissioners vacate their office and their property vests in Government during the period of supersession. It might perhaps be argued that in a suit concerned with Municipal property it is necessary to serve a notice on the Secretary of State; but the Commissioner was not acting as a public officer.

In the second place, before the suit came on for hearing, the supersession was over. The plaintiffs then amended their

plaint and made the present appellant the defendant in the suit. It is not even pretended that he was entitled to any notice. The effect of the amendment was practically to institute a new suit. I entirely agree with both the Courts below that in these circumstances even if the Circle Officer was entitled to notice the present appellant cannot defeat the suit on the ground that no such notice was given.

On the merits of the case there can be no question that the personal tax imposed on the respondents under S. 85 (a) of the Act was illegal. It was imposed jointly on them and some other persons who were not even named. It is a personal tax and the assessment is to be made according to the circumstances and property of each individual assessed. This alone shows that it was not intended that this tax should be imposed jointly on more persons than one. This was the view taken by Mitter, J. in 32 C W N 1170 (1) and I respectfully agree with his decision. Another objection to the assessment was that the plaintiffs were already personally taxed up to the maximum amount allowed under the Act. This ground alone is sufficient to dispose of the point and Mr. Mitter did not rely on any other alleged illegality with regard to this assessment.

It was also contended that the suit should have been dismissed with regard to the latrine tax. I do not propose to say anything with regard to the merits of that contention because Mr. Mitter has pointed out that in the appeal to the lower appellate Court this was not made a ground of appeal; on the other hand, the decree obtained by the plaintiff was a decree to the effect that "the assessment on the plaintiffs be declared invalid." The latrine tax is not a tax made on the plaintiffs at all; under S. 321, the Commissioners may levy fees on the holding. It is not a personal tax at all and its realisation is provided for by S. 322. It is therefore not at all clear that the plaintiffs were given any relief with regard to the latrine tax. That is probably why no appeal was made with regard to it in the lower appellate Court. The present appeal fails and is dismissed with costs. The appellant asks for leave to appeal. This is granted.

1. Prodip Singh v. Ramani Mohan Sen, 1928 Cal 511=114 I C 94=32 C W N 1170.

Judgment in Letters Patent Appeal

This is an appeal from the judgment of our learned brother Henderson, J., dismissing an appeal from the concurrent decision of the Subordinate Judge and the Munsif in a suit by certain ratepayers, the respondents in this appeal, against the Baruipore Municipality, for a declaration that an assessment of tax made by the Municipality between September to December 1928 was illegal and ultra vires; and for setting aside the said assessment. The questions decided by the learned Judge of this Court were two: that the suit could not be dismissed for want of notice under the provisions of S. 80, Civil P. C., and that the personal tax imposed on the plaintiffs in the suit under S. 85 (a), Bengal Municipal Act, was illegal.

So far as the first question was concerned, it has to be mentioned that after the assessment in question sought to be challenged in the suit, the Baruipore Municipality was superseded under S. 65, Bengal Municipal Act, and a Circle officer was appointed by the Government to perform the duties of the Commissioners of the Municipality, as provided by S. 66 of the Act. In view of the position, about which there can be no question, that the assessment of tax by the Municipality which was sought to be declared ultra vires and illegal, was made before the supersession of the Municipality, and before the appointment of the Circle Officer to perform the duties of the Commissioners, the notice as contemplated by S. 80, Civil P. C., was not required to be served on the Circle Officer performing the duties of the Commissioners of the Baruipore Municipality, under S. 66, Bengal Municipal Act. As has been authoritatively laid down by their Lordships of the Judicial Committee of the Privy Council, in 61 I A 171 (2), it is only where the plaintiff complains of some act purporting to have been done by a public officer in his official capacity, that notice is enjoined. The fact that the assessment complained of was made before the supersession of the Municipality is sufficient for the purpose of holding that S. 80, Civil P. C., could not possibly apply to the present case. The decision

2. Rebati Mohan Das v. Jatindra Mohan Ghose, 1934 P C 96=148 I C 482=61 I A 171=61 Cal 470 (P C).

of the learned Judge that the suit was maintainable without giving notice to the Circle Officer under S. 80, Civil P. C., must therefore be upheld.

The decision of our learned brother on the second question raised before him, must also be affirmed on the ground stated by him, that the personal tax imposed on the plaintiffs in the suit under S. 85 (a), Bengal Municipal Act, was illegal. It appears that a point was raised in the second appeal to this Court, on the question of imposition of latrine tax. The point was not raised before the primary Court or before the Subordinate Judge on appeal, and as such could not be allowed to be raised in second appeal. The learned Advocate for the respondents in this appeal has no objection on behalf of his clients to the observations contained in the judgment of Henderson, J., to the following effect being deleted:

> On the other hand, the decree obtained by the plaintiffs was a decree to the effect that the assessment on the plaintiff be declared invalid. The latrine tax is not a tax made on the plaintiffs at all; under S. 321 the Commissioners may levy fees on the holding. It is not a personal tax at all and its realization is provided for by S. 322. It is therefore not at all clear that the plaintiffs were given any relief with regard to the latrine tax. That is probably why no appeal was made with regard to it in the lower appellate Court.

And we give that direction, as we agree with the learned Advocate for the appellants in thinking that the observations quoted above, are likely to give rise to difficulties in future. In the result, the appeal is dismissed with costs.

K.S. *Appeal dismissed.*

A. I. R. 1935 Calcutta 728

M. C. GHOSE, J.

Lal Behary Saha and *another*—Plaintiffs—Appellants.

v.

Bimalapada Majumdar and *others* — Defendants—Respondents.

Appeal No. 112 of 1933, Decided on 9th August 1935, from appellate decree of Addl. Dist. Judge, Maldah, D/- 18th July 1932.

Co-promissors—Two mortgagors jointly and severally liable — Deposit made under S. 83, T. P. Act, by both — No presumption as to amount paid by each or that one paid whole or part of it.

Where two mortgagors are both jointly and severally liable to pay the mortgage debt and a deposit is made by them under S. 83 to save their property, there is no presumption either that both the mortgagors paid equally or that one paid the whole amount or a portion of it; and it is for the claimant to prove what share of money he is entitled to receive. [P 729 C 1, 2]

Sudhansu Sekhar Mukerji—for Appellants.

Jatindra Mohan Choudhury—for Respondents.

Judgment.—This is an appeal by the plaintiffs in a suit on a mortgage bond. Two persons Radharaman Majumdar and Mohini Mohan Majumdar executed the mortgage bond. Afterwards the two mortgagors deposited a certain sum of money in Court under S. 83, T. P. Act, stating that that was the sum which was due from them to the plaintiff who appeared and stated, after notice was issued upon him, that the amount was not sufficient and he refused to accept the tender and thereafter the plaintiff instituted the present suit on his mortgage bond. When the suit was pending defendant 2, Mohini Mohan, died and the plaintiff did not bring in his heirs, in good time, upon the record and the suit as against him abated. After the suit had abated against Mohini Mohan the plaintiff brought on the record Bimalapada Majumdar, a son of the said Mohini Mohan on the ground that he was in possession of part of the mortgage property.

The Court refused to consider him as a representative of the deceased defendant 2 for the purpose of this suit as he was not brought on the record within the time allowed by law. The suit was decreed against defendant 1 only, on the ground that both the mortgagors were jointly and severally liable for the whole of the mortgage debt, but it was stated that if the amount was paid, only the share of defendant 1 should be sold. It may be stated that though on the deposit by the two mortgagors under S. 83 the plaintiff had refused the tender, the money was allowed by the mortgagors to remain in Court. Neither defendant 1 nor any representative of defendant 2 withdrew any portion of the money. When the Court decreed the suit the Court recorded an order that the decretal sum is to be recovered from the sum deposited by Chalan Ex. 6 in the Court; the remainder of the sum decreed is to be recovered from defendant 1 or from the share of the property of defendant 1

in the plaint. As against Bimala, son of the deceased defendant Mohini Mohan, the suit was dismissed. Against that decree Bimala made an appeal on the ground that he was heir to his deceased father, defendant Mohini Mohan, and he had a right to get back the share of the money which his father had deposited under S. 83, T. P. Act. The Court of appeal below found that there was nothing to show what share of the deposit had been made by the appellant's father, but on a general consideration thought that it would be safe to assume that the two mortgagors had deposited the money in the share of half and half and thereupon made an order that half of the deposit money should be returned to the appellant Bimala. Against that decree the present appeal has been made by the plaintiffs.

In the first place it is urged that as no decree was passed by the first Court against Bimala he had no right of appeal against the same. There is some force in this contention inasmuch as the Court of trial did not reject the prayer which was made before it by Bimala. The Court indeed passed an order that the deposited amount should go to satisfy the decree but as to this in the Court of trial he had made no prayer whatsoever. It was for the first time in the Court of appeal that he made a claim to the share of the money deposited by the deceased father. However on the ground that he was adversely affected an appeal was accepted by the Court of appeal below. On the merits it is urged that Bimala not having made any prayer for withdrawal of any portion of the money in the first Court he was in the position of a plaintiff in the Court of appeal where he for the first time made his claim and he being a claimant the onus of proof was on him to show what share if any of the deposit money belonged to his deceased father and further whether he was the sole representative of his father. On neither of these points he adduced any evidence and the Court proceeded on a general ground as if the two men had deposited money in joint names at a Bank, and on their death the Court would divide the money in equal shares to their heirs. This is not a case of that sort.

Here the two mortgagors were both jointly and severally liable to pay the mortgage debt and apparently, by the deposit under S. 83 they wanted to save their property. There is no presumption either that both the mortgagors paid equally or that one paid the whole amount or a portion of it. It was for the claimant Bimala to establish by evidence what share of the money he was entitled to receive. In the result the appeal is allowed with costs. Leave to appeal under S. 15, Letters Patent, is refused.

K.S. *Appeal allowed.*

A. I. R. 1935 Calcutta 729

NASIM ALI AND HENDERSON, JJ.

Sasi Kanta Acharjee Choudhury—Defendant 1—Appellant.

v.

Rajendra Kumar Chakravarty and *others*—Respondents.

Appeal No. 2048 of 1932, Decided on 19th July 1935, from appellate decree of Addl. Dist. Judge, 4th Court, Mymensingh, D/- 30th June 1932.

(a) Bengal Estates Partition Act (5 of 1897), S. 119—Question as to apportionment of revenue between separate estates or of details of partition—Civil Courts have no jurisdiction—But if question of title or of extent of interest is involved, Civil Courts have jurisdiction.

No doubt, S. 119 excludes the jurisdiction of the Civil Court when the question raised before it relates to question of apportionment of Government revenue between the separate estates formed out of the parent estate or to the details of partition; but it does not oust the jurisdiction of the Civil Court in matters which involve questions of extent of interest or of right or title as the provisions of the Act do not empower the revenue authorities to determine finally the question of extent of interest or of right or title: 1928 *Cal* 41 and 1931 *Cal* 29, *Foll.*

[P 730 C 2; P 731 C 1]

(b) Bengal Estates Partition Act (5 of 1897), Ss. 26 and 27—Decree while partition in progress—Decree after partition—Distinction—In former successful party may ask sub-division in new estate—In latter he is merely in position of co-owner.

The distinction between the case in which a decree is made while partition proceedings are in progress and the case in which the decree is made after the partition proceedings has been completed is that in the former case the successful litigant in the Court, may ask for a sub-division in the new estate into which the lands claimed by him have fallen whereas in the latter case, the successful litigant occupies merely the position of a co-owner with the proprietors of the new estate within which the disputed lands have been included : 2 *C L J* 351, *Foll.*

[P 731 C 1, 2]

Jogesh Chandra Roy and *Nagendra Nath Bose*—for Appellant.

Bijoy Kumar Bhattacharji and *Kali Kinkar Chakravarty*—for Respondents.

Surajit Chandra Lahiri—for Deputy Registrar.

Nasim Ali, J.—Estate No. 2 of the Mymensingh Collectorate was partitioned by the partition Deputy Collector into separate estates on 24th February 1926. We are informed that the partition proceedings are still pending in appeal before the Collector. By the order of the partition Deputy Collector under S. 57, Estates Partition Act, the plaintiffs in the suit out of which this appeal arises, in their share got Rupees 38-1-0 as assets out of a Mouza called Daribhabakhali. The Deputy Collector partitioned the estate on the footing that the estate was not divided by private arrangement formally agreed to by all the proprietors and that the proprietors were not in possession of separate lands representing their interest in the estate. On 7th September 1928, plaintiffs commenced the present suit in the Court of the Subordinate Judge at Mymensingh for a declaration that the interest in the parent estate is the proprietary right over certain specific lands only in one Mouza, viz., Mouza Daribhabakhali in pursuance of a private arrangement formally made and agreed to by all the proprietors of the Estate and also a decree made by the civil Court in Partition Suit No. 91 of 1890. They accordingly prayed for a declaration that they were entitled to have their names registered under the provisions of the Land Registration Act to the extent of their interest and to have the specific lands in their possession assigned to them as a separate estate.

Only defendant 1 contested the suit. His main defences are: (1) that Estate No. 2 was never amicably partitioned between the proprietors thereof, but that for convenience of possession some cosharers hold some mouzas exclusively and similarly other cosharers hold some other mouzas exclusively and the remaining mouzas are held by all the cosharers jointly, and (2) that the civil Court has no jurisdiction to interfere with the allotments made by the partition Deputy Collector.

The trial Court found that there had been an amicable partition as alleged by the plaintiffs and decreed the suit. On appeal by defendant 1 to the lower appellate Court, the learned Additional District Judge has affirmed the finding of the trial Court that there was a private partition. He however rejected the plaintiffs' prayer for a declaration that they were entitled to have their names registered in respect of the specific lands belonging to them in only one mouza under the provisions of the Land Registration Act. Subject to the above modification he has affirmed the decree of the trial Court. Hence the present second appeal by defendant 1.

Mr. Roy on behalf of the appellant, has raised two contentions: (1) that the present suit is not maintainable in law, and (2) that the decree passed by the lower appellate Court is not warranted by law. As regards the first contention, Mr. Roy has put his argument thus: Plaintiffs' prayer for a declaration about the extent of their interest in the estate is based on the story of private partition. The partition Deputy Collector rejected the said story, consequently the same matter cannot be re-agitated in the civil Court. Plaintiffs cannot get a declaration about the extent of their interest from the civil Court. Now under S. 9, Civil P. C., the civil Courts have jurisdiction to try all suits of a civil nature, excepting suits of which their cognizance is either expressly or impliedly barred. It cannot be disputed that the present suit is a suit of civil nature. The question then is whether the present suit is barred expressly or impliedly by any other law. Mr. Roy's contention is that it is barred by S. 119, Estates Partition Act. That section lays down that certain orders made by the partition authorities under the Estates Partition Act cannot be set aside by the civil Court. An examination of the provisions of that section shows that the order mentioned therein relates to the mode of division of Government revenue or to the details of partition. S. 119 therefore excludes the jurisdiction of the civil Court when the question raised before it relates to question of apportionment of Government revenue between the separate estates formed out of the parent estate or to the details of partition, but it does not oust the jurisdiction of the civil Court in matters which involve question of

title: see 55 Cal 392 (1) and 52 C L J 247 (2). Now in the present suit the question raised is a question about the extent of plaintiffs' interest in the estate.

Although in popular language the extent of interest of a person in an estate would ordinarily denote his share in the estate and a question of extent of interest would be equivalent to a question of the extent of such share, according to the phraseology adopted in the Act, the extent of interest of a person in the estate may be represented by specific lands, and consequently a dispute as to the extent of such interest may necessarily involve a question as to the extent or quantity of land which represents such interest: see 2 C L J 351 (3) at p. 356.

If such a question is raised before the Collector, he determines it under S. 23. But S. 25 contemplates a suit in the civil Court raising the same questions as are referred to in S. 23. Therefore when the Collector has determined under S. 23, Cl. (a) to proceed with the partition after the inquiry held by him into the question of possession, all the proceedings thereafter are necessarily subject to and controlled by the decree in the title suit contemplated by S. 25: see 2 C L J 351 (3) cited above. Ss. 23 to 27 of the Act show that a civil Court has jurisdiction to decide questions of title or extent of interest not only between a proprietor and a stranger but also between proprietors themselves. The provisions of the Act therefore do not empower the revenue authorities to determine finally the question of extent of interest or of right or title. The suit is therefore not barred, either expressly or impliedly by the provisions of the Estates Partition Act. This contention therefore fails. The second contention of Mr. Roy relates to the form of the decree passed by the lower appellate Court. I have already pointed out that S. 25 provides for a suit for determination of the question of right or title. Ss. 26 and 27 define respectively the effect of the decree in the title suit made while partition proceedings are in progress and made after partition proceedings have been completed.

Elaborate provisions are made which lay down that the decree shall be made in recognition of the partition proceedings and shall be framed in such a manner that the partition proceedings may not be nullified. The distinction between the case in which a decree is made while partition proceedings are in progress and the case in which the decree is made after the partition proceedings have been completed appear to be broadly this, namely, in the former case the successful litigant in the Court, may ask for a subdivision in the new estate into which the lands claimed by him have fallen whereas, in the latter case, the successful litigant occupies merely the position of a co-owner with the proprietors of the new estate within which the disputed lands have been included: 2 C L J 351 (3).

As the partition proceedings are now pending in appeal before the Collector, there will be no difficulty in giving effect to the decree made in the civil suit by the sub-division of the new estate into which the disputed lands have been included. If however the partition proceedings are taken to have been completed within the meaning of S. 27, in view of the fact that the plaintiffs' interest is the proprietary right over the specified lands in the disputed mouza and held by them in severalty and they are therefore entitled to have assigned to them as their separate estate the specific lands under S. 5, Cl. (2) of the Act the decision of the Courts below is to be taken in effect as a direction to the Collector to divide off the lands from the new estate and to assign them to the plaintiff as separate estate in accordance with the provisions of S. 28 of the Act. The second contention therefore also fails. The words "and their right to have their names registered with respect to the same share" in the decree of the lower appellate Court are expunged. Subject to the above modification the decree of the lower appellate Court is affirmed. The appeal is dismissed with costs. Hearing-fee one gold mohur.

Henderson, J.—I agree.

S.R. *Appeal dismissed.*

1. Matangini Ghose v. Manmohini Ghose, 1928 Cal 41=105 I C 149=55 Cal 392.
2. Kedar Nath v. Naresh Chandra, 1931 Cal 29=130 I C 232=52 C L J 247.
3. Raghunath Pershad Narain Singh v. Mohamed Gawahar Ali, (1905) 2 C L J 351.

A. I. R. 1935 Calcutta 731

S. K. GHOSE AND HENDERSON, JJ.

Osman Sheikh—Complainant.

v.

Hari Pada Biswas—Accused.

Criminal Ref. No. 74 of 1934, Decided on 6th December 1934.

Criminal P. C. (1898), S. 159 — Enquiry held not by officer suggested by Magistrate does not by itself make submission of charge sheet illegal or irregular.

The mere fact that the enquiry was not held by a particular officer as suggested by the Magistrate in his order does not make the submission of the charge sheet on the part of the investigating police illegal or irregular. [P 732 C 1]

S. K. Sen and *Nani Gopal Das* — for Reference.

Upendra Kumar Roy and *Amrita Lal Mukherji*—Against Reference.

S. K. Ghose, J.—It seems to us that this Reference was entirely misconceived. It appears that against the petitioner, Hari Pada Biswas, the police have submitted a charge sheet alleging an offence under S. 348, I. P. C. The learned Judge has recommended that the proceeding should be quashed. But at this stage the only point is whether the submission of the charge sheet is either illegal or irregular. The learned Judge has referred to circumstances which may quite properly be urged at the trial. It appears that the Magistrate at one stage of the case directed an enquiry under S. 159, Criminal P. C. His order dated 25th November 1933 is to the effect that it was not possible to depute a Magistrate and therefore he would like the enquiry to be held by the Deputy Superintendent of Police himself. It also appears that, as a matter of fact, the Deputy Superintendent of Police did not hold the enquiry. Whether this was a proper action on the part of the Deputy Superintendent of Police is another matter. But the mere fact that the enquiry was not held by a particular officer as suggested by the Magistrate in his above order does not make the submission of the charge sheet on the part of the investigating police, contrary to the provisions of the Code of Criminal Procedure. We must therefore decline to interfere at this stage. The Reference is therefore rejected.

Henderson, J.—I agree. It is clear that the learned Judge has entirely misconceived the meaning and effect of S. 159, Criminal P. C.

K.S. *Reference rejected.*

A. I. R. 1935 Calcutta 732

GUHA AND LODGE, JJ.

Kameswar Singh — Plaintiff—Appellant.

v.

Kulada Prosad Sahu and *others*—Defendants—Respondents.

Letters Patent Appeal No. 6 of 1935, Decided on 26th July 1935, from appellate decree of R. C. Mitter, J., D/- 6th August 1934, in Appeal No. 229 of 1932.

(a) Bengal Cess Act (9 of 1880), S. 12—Valuation roll prepared on basis of Record of Rights not ultra vires at time of preparation—Unless it is declared ultra vires by competent Court, it cannot be held to be erroneous merely because entry in Record of Rights is subsequently held to be incorrect.

Where a valuation roll prepared on the basis of the Record of Rights is not ultra vires, in any way whatsoever, at the time when it is prepared, the fact that a part of the entries in the Record of Rights is subsequently held by the civil Court to be erroneous and incorrect, does not necessarily render the valuation roll prepared under the Cess Act ultra vires, and until and unless declared to be ultra vires, by a competent Court, the liability of the tenant remains. [P 733 C 1]

(b) Interpretation of Statutes—Reference to another statute.

It is not always safe to interpret a particular statute with reference to provisions contained in another statute. [P 733 C 1]

Gopendra Nath Das—for Appellant.

Ramaprosad Mukherjee and *Durgadas Roy*—for Respondents.

Judgment.—This appeal has arisen out of a suit for recovery of arrears of rent with cesses; and the question for consideration at the present stage of the litigation is confined to the amount of cesses payable by the tenants defendants to the plaintiff landlord. The Courts below came to the decision that the plaintiff was not entitled to realize cesses according to the valuation roll prepared by the revenue authorities, on the basis of the Record of Rights, in as much as the entries in the record, showing six different tenancies were erroneous; it having been held by those Courts that there was one tenancy bearing a rental of Rs. 19-15-17½ gandas as stated by the plaintiff landlord and not six different tenancies, as shown in the Record of Rights and as asserted by the tenants defendants in the suit. The decision arrived at by the Courts below was accepted by our learned brother Rupendra Coomar Mitter, J., on second appeal to this Court.

As has been pointed out by Mitter, J., the cess valuation has to be prepared on the basis of the Record of Rights. The Record of Rights, about the correctness of which there was no question, at the time when the valuation roll was prepared under the Cess Act, was acted upon by the authorities concerned. It was not open either to the landlord or to the tenants to question the valuation roll, unless it was prepared without

jurisdiction ; that is the position under the law, and that is what has been indicated in the judgment of Mitter, J. The tenants defendants in the suit who now claim exoneration from liability to pay cesses fixed by the revenue authorities, did not and could not be allowed to challenge the valuation roll, collaterally in the civil Court. The valuation roll that was prepared on the basis of the Record of Rights was not ultra vires, in any way whatsoever, at the time when it was prepared ; and the fact that a part of the entries in the Record of Rights has now been held by the civil Court to be erroneous and incorrect did not necessarily render the valuation roll prepared under the Cess Act, ultra vires. In our judgment, until and unless the valuation roll was declared to be ultra vires, by a competent Court, the liability of the tenant defendants in the suit remained. We are unable to agree with Mitter, J., in holding that it was the Collector who split up the holding in question into six separate entities; the Record of Rights on which the Collector had to proceed, showed such a state of things; and it is only now that it has been decided in this litigation that the entries in the Record of Rights showing six separate different tenancies are incorrect. In the above view of the case before us, we are unable to accept the decision of our learned brother Mitter, J., affirming those of the Courts below as correct.

It was pointed out to us on the side of the respondent in the appeal that under the Bengal Municipal Act, if the Municipal authorities assess rates either by consolidating or splitting up a holding, such assessment would be ultra vires under the law. Apart from the position that it is not always safe to interpret a particular statute with reference to provisions contained in another statute ; in the case before us, there was no question of splitting up of any holding in the matter of assessment of cesses by the revenue authorities concerned ; the question was whether the valuation roll prepared under the Cess Act on the basis of the Record of Rights which showed six different holdings, and the correctness or validity of which was not in question at the time when the record was acted upon, could be collaterally impeached as ultra vires, now that the Record of Rights has been found to be incorrect so far as it showed six different tenancies in the place of one. As has been indicated already, the liability of the tenants defendants to pay cesses for the lands in question in accordance with the valuation roll prepared under the Cess Act, remained, until and unless the valuation roll has been declared to be ultra vires by a competent Court, at the instance of one or other of the parties concerned, directly raising the question that the assessment of cesses was ultra vires of the revenue authorities. In the result, the appeal is allowed ; the decision of Mitter, J., dated 6th August 1934, affirming those of the District Judge and the Munsif, is set aside, so far as the amount of cesses payable by the tenants defendants is concerned. The plaintiff-appellant before us is held entitled to recover cesses at the rate claimed by him in the suit out of which this appeal has arisen. The parties are to bear their own costs throughout.

K.S. *Appeal allowed.*

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* A. I. R. 1935 Calcutta 733

R. C. MITTER, J.

Abdul Rahman Mullick and *others*—Plaintiffs—Appellants.

v.

Azahar Ali Khan — Defendant —Respondent.

Appeal No. 2089 of 1933, Decided on 22nd July 1935, from appellate decree of Sub-Judge, Second Court, Hooghly, D/- 25th July 1933.

*** Res judicata—Suit for khas possession alleging lease granted to defendant as invalid —Finding as to invalidity of lease but suit dismissed, defendant being found to be occupancy ryot — Subsequent suit for enhancement of rent on footing that defendant is occupancy ryot—Defendant can fall back on lease and finding in prior suit on validity of lease does not operate as res judicata.**

In a suit instituted against the defendant for khas possession, the plaintiffs alleged that the lease granted to the defendant was not valid. The defendant resisted the claim for khas possession on two grounds : (1) that the said lease was a valid lease and (2) that in any event he having acquired occupancy right could not be evicted from the lands. The Court held that the lease was invalid but found that the defendant was an occupancy ryot and so could not be evicted from the lands. Subsequently the plaintiffs sued for enhancement of rent on the footing that the defendant was an occupancy ryot. The defendant contended that he had a valid lease in his favour :

Held: that the tenant defendant won the prior suit on the finding that he was an occupancy ryot. The suit would have failed if he had at least an occupancy right. The finding, against which he could not appeal, that the aforesaid lease was invalid, did not sustain the decree made in that suit, for inspite of that finding the plaintiff's suit was dismissed. Hence the decision on the issue of validity of lease was not a final decision, and did not operate as res judicata: *Case law referred.* [P 734 C 2; P 735 C 1]

S. M. Mullick and *Rabindra Nath Bhattacharjee* for *Kusi Prasanna Chatterjee*—for Appellants.

Abdul Hossain and *Narendra Nath Choudhury*—for Respondent.

Judgment.—The plaintiffs who are mutawallis of a wakf created by one Kader Bux in Aswin 1316, have sued the defendant for arrears of rent and also for enhancement of rent under the provisions of S. 30 (b), Ben. Ten. Act. The claim for arrears of rent has not been resisted, the defendants only contesting their right to enhance rent. Shortly after creating the wakf by which Kader Bux appointed himself mutawalli, he granted in favour of the defendant a mukarari mourasi lease by a registered document in the month of Magh 1316. It is this lease that has been put up by the defendant against the plaintiff's claim for enhancement. It is not disputed that the plaintiffs have become mutawallis on the death of Kader Bux. The question is whether the lease is binding on the plaintiffs, a question which is complicated by the proceedings of an earlier suit inter partes.

That suit was a suit instituted by the plaintiffs against the defendant for khas possession. It was instituted in 1929 and was numbered Title Suit No. 171 of 1929. The plaintiffs alleged therein that the lease granted by Kader Bux to the defendant was not binding on the wakf, being in excess of the powers of a mutawalli and that the defendant was a trespasser on the land after the death of Kader Bux. The defendant resisted the claim for khas possession on two grounds. He maintained : (1) that the said lease was a valid lease and (2) that in any event he having acquired occupancy rights could not be evicted from the lands. The appellate Court held that the lease was invalid, being in excess of the powers of Kader Bux, as mutawalli, but that the defendant was an occupancy ryot and so could not be evicted from the lands. In this view of the matter that suit was dismissed. There was no further appeal to this Court.

The plaintiffs have now sued for enhancement of rent under S. 30 (b), Ben. Ten. Act, on the footing that the defendant is an occupancy ryot. They contend that by reason of the final judgment passed in Title Suit No. 171 of 1929, the defendant cannot be heard to say that he is other than an occupancy ryot. The Court of first instance accepted the said contention and granted enhancement. The lower appellate Court has held that it is still open to the defendant to fall back upon the lease granted to him by Kader Bux, and set it up in defence. On the merits it has held that the said lease is binding on the wakf and accordingly has refused the plaintiffs' prayer for enhancement. The whole controversy between the parties is whether the findings in the judgment passed in Title Suit No. 171 of 1929 that the said lease is not binding on the wakf and the defendant is an occupancy ryot only are conclusive between the parties.

Before examining the cases which have a bearing on the question it is necessary to have in view the principle of res judicata as embodied in S. 11, Civil P. C. For the present case that section is enough and the fact that S. 11 is not exhaustive is not material. An examination of the section shows that in order that a finding on an issue in an earlier suit inter partes may be res judicata in the later suit between them; that issue must be (i) a direct and substantial issue and (ii) it must be finally decided. I am not noting the other elements which are all admittedly present here. Having regard to the frame of Suit No. 171 of 1929 and the pleadings therein there cannot be any doubt that the issue as to whether the aforesaid lease granted by Kader Bux was binding on the wakf, and so on the succeeding matwalis, was a direct and substantial issue in the case; but the question is whether it was finally decided therein. In my judgment it was not. The tenant defendant won the suit on the finding that he was an occupancy ryot. The suit would have failed if he had at least an occupancy right. The finding, against which he could not appeal, that the aforesaid lease was invalid, did not sustain the decree made in that suit, for inspite of that finding the plaintiffs' suit

was dismissed. For this reason I hold that the decision on that issue was not a final decision, and does not operate as res judicata. The cases on the point when examined, in my judgment, arrange themselves on the two sides of the dividing line on the basis of the principal which I have indicated above. In 6 C L J 621 (1), Sir Ashutosh Mookerjee stated the principle in the following terms :

> We may further point out that an estoppel is not confined to the judgments but extends to all facts involved in it as necessary steps or ground work, and as explained by the learned Judges of the Madras High Court in 28 Mad 338 (2), a judgment operates by way of estoppel as regards all the findings which are essential to sustain the judgment.

In 24 Cal 900 (3), where the earlier suit for damages for non-removal of certain offensive matter from the defendants' lands had been dismissed on two grounds, namely (1) for non-service of notice under S. 363, Bengal Municipal Act, and (2) on the finding that defendant was under no liability to remove the offensive matter, and the second finding was urged as res judicata in a later suit for damages between the same parties, Maclean, C. J., and Banerjee, J., held that it was so. In deciding the question Banerjee, J., analysed the cases where more questions than one arise in a suit and are decided. Referring to cases where all the points in the suit are decided by the Court, but where the result of its decision upon every such question is not embodied in the decree in the form of declarations Banerjee, J., makes the following observation :

> Cases of this last mentioned description again subdivide into two classes, in one of which the decree is supported by the decision upon each of the questions determined (and the case we have to consider is one of that description), and in the other it is inspite of the decision upon some of those questions, as for instance, where a suit fails upon the question of limitation, or some preliminary issue, but the question of title is found for the plaintiff.
>
> The case we are dealing with, not being of this latter description, it is not necessary to consider whether the Full Bench decision in 6 Cal 319 (4) is good law, or whether it has been in effect overruled by the Privy Council in 12 I A 23 (5), a question which may be taken as settled by the case of 13 Cal 17 (6) and 18 Cal 647 (7).

The point so reserved by Banerjee, J., has now been settled by the Judicial Committee of the Privy Council in 48 I A 49 (8). A case of the last mentioned type noticed by Banerjee, J., in 24 Cal 900 (3) was 40 Cal 29 (9). There a suit was first brought to enhance rent under S. 30 (a), Ben. Ten. Act, of an occupancy tenancy containing undivided shares in parcels of land. In that suit it was held (1) that the plaintiff had the right to enhance rent of such a tenancy, (2) that the rent paid by the defendant was not lower than rent paid by the tenants of adjoining land. On the last finding the suit was dismissed. A second suit was brought to enhance rent under S. 30, Ben. Ten. Act, also and the question was whether the first of the aforesaid finding in the earlier suit operated as res judicata. It was held that it did not. In support of the contention that the said finding operated as res judicata 24 Cal 900 (3) was cited. Sir Ashutosh Mookherjee in dealing with the case made the following observations:

> That case however is clearly distinguishable. There it was ruled that when a decision has been based on two grounds, either of which is sufficient to support the decree, the decision upon each of the grounds is conclusive between the parties. Here however the decision upon the question of the right of the plaintiff to enhance the rent is not the basis of the decree ultimately made. Consequently it cannot be maintained under S. 13, Civil P. C. of 1882, that the question was directed and substantially in issue between the parties or was finally decided.

Whether an issue is a direct and substantial issue, in my judgment, would generally have to be determined from the nature of the suit and the form of the pleadings, but certainly, where a case is disposed of in the way as was done in 40 Cal 29 (9), it can at least be said that the finding on the issue on which the decree is not based (the decree being in spite of and against the natural consequence of the said finding) is a mere expression of opinion by the Court and not a final adjudication between the parties.

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1. Lilabati Misrain v. Bishun Chobey, (1907) 6 C L J 621.
2. Narayanan v. Kannammai, (1905) 28 Mad 338.
3. Peary Mohan Mukerjee v. Ambica Charan, (1897) 24 Cal 900.
4. Niamat Khan v. Bhadu Buldia, (1881) 6 Cal 319=7 C L R 227 (FB).
5. Run Bahadur Singh v. Lucho Koer, (1885) 11 Cal 301=12 I A 23=4 Sar 602 (PC).
6. Nandalal Bhattacharjya v. Bidhu Mookhy Debee, (1886) 13 Cal 17.
7. Mugandeo v. Mahadeo Singh, (1891) 18 Cal 647.
8. Midnapur Zemindary Co., v. Naresh Narayan Roy, 1922 P C 241=64 I C 231=48 I A 49=48 Cal 460 (PC).
9. Parbati Debi v. Mathura Nath, (1913) 40 Cal 29=15 I C 453.

The case in 48 I A 49 (8), is of the type of 40 Cal 29 (9), and of the second type mentioned by Banerjee, J., in 24 Cal 900 (3). There in the earlier suit instituted in 1864 for khas possession by the landlord the defendants had taken two pleas namely: (1) that the suit was premature, and (2) that they were occupancy ryots. The suit was dismissed on the ground that it was premature, but the Court found that the defendants were not occupancy ryots. In the later suit for khas possession the question was whether the finding in the suit of 1864 that the defendants were not occupancy ryots operated as res judicata. Lord Dunedin held that it did not. Applying the principles deducible from the decisions I have noted above, my view is that the finding in Title Suit No. 171 of 1929, that the lease granted to the defendant by Kadar Bux was not binding on the wakf estate and on the mutwalis succeeding him is not res judicata. By the decree passed therein the said suit for khas possession was dismissed. The decree therefore was not based on the said finding, but in spite of the contrary to its natural consequence. For these reasons I uphold the decree made by the lower appellate Court and dismiss the appeal with costs.

The prayer for leave to appeal under S. 15, Letters Patent, is refused.

K.S. *Appeal dismissed.*

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* A. I. R. 1935 Calcutta 736

NASIM ALI, J.

Abdul Aziz—Petitioner.

v.

(Moulana) Syed Mohammad Arab Saheb—Opposite Party.

Criminal Revn. No. 804 of 1934, Decided on 17th January 1935.

(a) Penal Code (1860), S. 499--Mere delivery of letter containing defamatory matter to complainant is not publication.

The delivery of the letter containing defamatory matter by the accused to the complainant is obviously not a publication such as would render the accused liable to punishment for defamation as the letter cannot have injured the complainant in the estimation of others to whom they were not made known. [P 737 C 2]

*** (b) Penal Code (1860), S. 504—Offence depends on intention or knowledge of offender and not on sensitive feeling of offended.**

The offence under S. 504 does not depend upon the mere sensitive feeling of the offended but upon the intention or knowledge of the offender. Such an intention may be inferred from the circumstances attending the insult. [P 738 C 1]

Suhrawardy and *A. S. M. Akram*—for Petitioner.

A. K. Fazlul Huq and *Jogesh Ch. Singha*—for Opposite Party.

Order.—This is an application in revision against the conviction and sentence of the petitioner under Ss. 500 and 504, I. P. C. The case for the prosecution as stated in the petition of complaint is as follows:

On 15th November 1933 the complainant Moulana Syed Mohammad Arab received a letter from the accused petitioner in which the petitioner made serious allegations against the complainant. The petitioner knew them to be false. He made those allegations with intent to insult him and to cause him to break the peace. The petitioner communicated to Mr. Noor Mohammad, Kazi Abul Karim, and others that he had already written a letter to the complainant and told them that the complainant had been implicated in a case with Moti, prostitute, in Maharaj Road Estate. The complainant was thereby defamed and the character and credit of the complainant were lowered in the estimation of others. The accused also threatened the complainant that he would publish the false allegation to the discredit of the complainant. The defence of the accused petitioner was that the letter was not intended to insult or defame the complainant but to protect his interest, and therefore he did not commit any offence under the Indian Penal Code. The petitioner also denied the publication as alleged by the prosecution. The learned Magistrate who tried the case has not accepted the prosecution case that the statements in the letter conveyed the sense of association of the complainant with a prostitute or dancing girl of the name of Moti. He however held that there were other passages in the letter which defamed the complainant and that the accused failed to prove that he had any justification for making those imputations in the letter. As regards publication the learned Magistrate relying on the evidence of Noor Mohammad, the father-in-law of the complainant, has found that the contents of the letter were communicated to the said Noor Mohammad and a copy of the letter was shown to him. The learned

Magistrate has also held that the accused gave the complainant provocation likely to lead him to commit a breach of the peace and which the accused knew to be likely to arise.

Now it appears that the case for the prosecution as stated in the petition of complaint is that the accused communicated to Noor Mohammad, the father-in-law of the complainant, Hazi Abdul Karim and others, that he had already written to the complainant the letter in question and told them that the complainant had been implicated in a case with Moti, prostitute in Maharaj Road Estate, and thereby defamed the complainant. The petition of complaint does not show that all the contents of the letter were communicated to Noor Mohammad and others. It is also not alleged therein that a copy of the letter was shown to them. The finding of the learned Magistrate about publication is based solely on the evidence of the father-in-law of the complainant, i. e. Noor Mohammad. The other persons to whom the communication was alleged to have been made were not called. Noor Mohammad in his evidence stated that the accused showed him a copy of the letter and that he read the contents of that letter and that on reading the contents he became aware about certain secrets and about the alleged connexion of the complainant with Moti, prostitute. He does not say that the petitioner told him that the complainant had been implicated in a case with Moti, prostitute. The allegation in the petition of complaint that the petitioner told Noor Mohammad that the complainant was implicated in a case with Moti, prostitute, was not substantiated by the evidence of Noor Mohammad. Again the story of Noor Mohammad that a copy of the letter was shown to him does not find a place in the petition of complaint. The learned Magistrate himself has not accepted the prosecution case that the statements in the letter conveyed the sense of the association of the complainant with Moti, prostitute. Noor Mohammad's statement that he came to know of the connexion of complainant with Moti prostitute on perusal of the copy of the letter cannot therefore be accepted. His evidence about his coming to know about other defamatory matters in the letter on perusal of the copy of the same alleged to have been supplied by the accused cannot also be accepted inasmuch as the complainant in his petition of complaint did not say so. The learned Magistrate was of opinion that Noor Mohammad's evidence on certain points is at variance with that of Mr. Avari's and that Mr. Avari's evidence was more reliable. The learned Magistrate himself has observed :

> The witness's (Noor Mohammad's) memory might have failed him or he might have suppressed the fact out of anxiety to remove any supposition of bias against him.

It further appears that Noor Mohammad got the notice Ex. A issued by Mr. Sen on the accused under instructions of the complainant. This notice does not mention that the letter and the contents thereof were published by the accused. In view of all these facts and circumstances it would not be safe to hold on the evidence of Noor Mohammad alone who appears to be interested in the success of the prosecution that there had been any publication of the alleged defamatory matter by the accused. So even if it be held that the letter contained defamatory matter it has not been satisfactorily proved in this case that the accused published the same. In this view of the matter the petitioner cannot be convicted under S. 500 as the delivery of the letter to the complainant was obviously and not a publication such as would render the petitioner liable to punishment for defamation as the letter could not have injured the complainant in the estimation of others to whom they were not made known.

As regards the question whether the letter really contains any defamatory matter, suffice it to say that the Magistrate himself was unable to accept the suggestion of the prosecution that the words in the letter conveyed the sense of the association of the complainant with a dancing girl. As regards the passages in the letter relating to the petitioner's knowledge of certain secrets concerning the complainant, the learned Magistrate thought that the defence evidence about the publication of the pamphlet in which an attack was made against the Wahabias by the complainant might be true. The learned Magistrate however has held that there were other passages in the letter which were defamatory and the petitioner

had no justification for making these allegations against the complainant. The learned counsel appearing on behalf of the petitioner however contended that his client made these imputations in good faith to protect his own interest and consequently he was protected by the ninth exception contained in S. 499, I. P. C. But in view of my conclusion that there had been no publication of these imputations by the petitioner it is not necessary to pursue this matter any further.

As regards the offence under S. 504, it is very difficult to make out on what materials the learned Magistrate came to the conclusion that the petitioner gave the alleged provocation to the complainant intending or knowing it to be likely that it would cause a breach of the peace. It is true that such an intention may be inferred from the circumstances attending the insult. The offence under S. 504 does not depend upon the mere sensitive feeling of the offended but upon the intention or knowledge of the offender. In this case the prosecution has failed to prove such intention or knowledge on the part of the petitioner. The result therefore is that the Rule is made absolute. The conviction and sentence of the petitioner under Ss. 500 and 504, I. P. C., are set aside and he is acquitted. The fine, if paid by him, must be refunded to him.

K.S. *Rule made absolute.*

A. I. R. 1935 Calcutta 738

NASIM ALI AND HENDERSON, JJ.

Sm. Hemlata Dasi—Petitioner.

v.

Bengal Coal Co. Ltd.—Opposite Party.

Civil Revn. No. 578 of 1935, Decided on 14th August 1935, from order of Sub-Judge, Bankura, D/- 19th February 1935.

(a) Rateable Distribution — One decree against *R* — Another decree against his sons —Decrees are not against same judgment-debtor.

A decree was obtained by one against party *R* whilst the decree obtained by the other party was against the sons of *R* :

Held : that the two decrees were not passed against the same judgment-debtor : 25 *Bom* 494 ; 33 *Mad* 465 ; 1915 *Cal* 658 and 1930 *Cal* 454, *Foll.* [P 739 C 1]

(b) Civil P. C. (1908), S. 146—S. 146 cannot enlarge S. 73 of the Code.

Section 146 cannot enlarge the scope of S. 73 as it is expressly made subject to the other provisions of the Code. [P 739 C 1]

(c) Rateable Distribution — Decree against *R* — Executing Court cannot go behind it — S. 146, Civil P. C., cannot help Court to change decree to one against *R's* representatives—Court must take decree as it is.

An executing Court cannot go behind the decree and by invoking S. 146, Civil P. C., it cannot change a decree passed against *R* into a decree against his legal representatives. For purposes of rateable distribution the executing Court must take the decrees as they are. [P 739 C 1]

Sitaram Banerjee, *Nando Gopal Banerjee* and *Anil Chandra Dutta* — for Petitioner.

A. N. Bose and *Manmatha Nath Das Gupta*—for Opposite Party.

Nasim Ali, J.—The facts which give rise to this rule are as follows : One Rasaraj Biswas and his wife Promodini borrowed a certain amount of money from the petitioner on mortgage of some properties belonging to them on 23rd May 1923. Thereafter Rasaraj died. The petitioner obtained a mortgage-decree against the sons of Rasarai and Promodini Dasi on the basis of the said mortgage in the Court of the Subordinate Judge at Alipur. In execution of the said decree the mortgaged properties were sold. The sale proceeds, however, not being sufficient to cover the decretal amount, the petitioner obtained a money decree under O. 34, R. 6, Civil P. C., for the balance of the decretal amount, viz. Rs. 10,221-15-9 on 11th February 1931 against Promodini and the sons of Rasaraj.

The opposite party obtained a money decree for Rs. 31,405-6-9 against Rasaraj during his life-time and certain other persons in the Court of the Subordinate Judge at Hazaribagh and applied for execution of the said decree after the death of Rasaraj against his sons in the Court of the Subordinate Judge at Bankura by attachment and sale of certain properties belonging to Rasaraj. The attached properties were thereafter sold in execution and purchased by the opposite party. In the meantime the petitioner applied for execution of the decree obtained by him in the same Court and applied for rateable distribution of the sale proceeds under S. 73, Civil P. C. The learned Subordinate Judge rejected the petitioner's prayer on the ground that the decree obtained by him was

against the sons of Rasaraj while the decree obtained by the opposite party was against Rasaraj and consequently the decree of the petitioner was not against the same judgment-debtor. The petitioner thereupon obtained the present rule. Now in order to attract the provision of S. 73 the decree should be against the same judgment-debtor. A judgment-debtor is a person against whom a decree has been passed (S. 2, Cl. 10, Civil P. C.). The decree obtained by the opposite party was against Rasaraj, whilst the decree obtained by the petitioner is against the sons of Rasaraj. The two decrees therefore were not passed against the same person.

The view taken by the learned Subordinate Judge is supported by the decisions in 25 Bom 494 (1), 33 Mad 465 (2), 42 Cal 1 (3) and 1930 Cal 454 (4). S. 146, Civil P. C., is not of any assistance to the petitioner. S. 73, Civil P. C., permits rateable distribution only when the decrees are against the same judgment-debtor. S. 146 cannot enlarge the scope of S. 73 as it is expressly made subject to the other provisions of the Code. By reason of S. 146 the words "passed against the same judgment-debtor" in S. 73 cannot be read as "passed against the same judgment-debtor or the legal representatives of the same judgment-debtor." An executing Court cannot go behind the decree and by invoking S. 146 it cannot change a decree passed against Rasaraj into a decree against his legal representatives. For purposes of rateable distribution the executing Court must take the decrees as they are. The learned Judge was therefore right in rejecting the petitioner's prayer for rateable distribution. The rule is accordingly discharged with costs. Hearing fee one gold mohur.

Henderson, J.—I agree.

S.R. *Rule discharged.*

1. Govind Abaji v. Mohoniraj Vinayak, (1901) 25 Bom 494=5 Bom L R 407.
2. Srinivasa Aiyangar v. Kanthimathi Ammal, (1910) 23 Mad 465=5 I C 917.
3. Balmer Lawrie & Co. v. Jadunath Banerjee, 1915 Cal 658=27 I C 644=42 Cal 1=19 C W N 1202.
4. Jaharlal v. Lalita Sundari, 1930 Cal 454=130 I C 227=34 C W N 294.

A. I. R. 1935 Calcutta 739

GUHA AND BARTLEY, JJ.

Ala Baksa—Defendant—Appellant.

v.

Majibal Huq and *others*—Plaintiffs—Respondents.

Appeals Nos. 73 and 74 of 1932, Decided on 4th January 1935, against appellate decrees of Sub-Judge, First Addl. Court, Noakhali, D/- 15th June 1931.

(a) Mahomedan Law—Gift— Musha—Doctrine of invalidity should be confined within strict rules — Gift of undivided share of watery portion of tank and its bank is valid.

The doctrine relating to the invalidity of gifts of Musha ought to be confined within strict rules. The gift of an undivided share in anything which is of such a nature that it can be used to the better advantage in an undivided condition, is valid under the Mahomedan law. The watery portion of a tank does not admit of partition, and an undivided share of the same may be the subject-matter of a valid gift; the undivided share of the banks of the tank also, which by its very nature can be used to better advantage in an undivided condition must be held to be valid. [P 740 C 1, 2]

(b) Mahomedan Law — Gift—Musha—Donee admitted to possession with donor and recognised as person in possession—Gift is valid.

A gift of a share in property, the donee being omitted to possession with the donor and recognised as a person in possession, is valid under the Mahomedan law: 38 *Cal* 518, *Appr.* [P 740 C 1]

(c) Practice—Withdrawal of suit — Court giving permission to withdraw suit and file fresh suit—Court in subsequent suit cannot inquire as to whether order granting permission has been properly made.

Where a previous suit is allowed to be withdrawn by the plaintiff, with liberty to bring a fresh suit and he files a fresh suit, the Court trying the subsequent suit is incompetent to inquire if the order granting permission to withdraw has been properly made. [P 740 C 2]

Jitendra Kumar Sen Gupta—for Applt.

Radhabinod Pal and *Amritalal Mukerji*—for Respondents.

Judgment

S. A. No. 73 *of* 1932.—The subject-matter of the litigation which has given rise to this appeal is a tank with its banks. The plaintiff derived his title by virtue of a deed of gift dated 9th Jaistha 1332 B. S. by which one Hamid Ali, gave him two annas share of the tank and its banks. The plaintiff's claim for possession of the tank and its banks was resisted by defendant 1 in the suit, on the ground that the gift was invalid under the Mahomedan law. It was contended that the deed of gift in favour of

the plaintiff was void inasmuch as under the Mahomedan law, an undivided share of a property that is capable of partition cannot be the subject of a valid gift. There is no question, and it was conceded that the doctrine of Musha has no application to the tank proper, which is incapable of partition. The question of validity of the gift in plaintiff's favour so far as the undivided share of the banks of the tank were concerned was raised before the Courts below, and was urged in support of the appeal to this Court. It was held by the Courts below that in view of the fact that the plaintiff was put in actual possession of the property covered by the deed of gift, the gift in favour of the plaintiff was valid.

In our judgment the decision arrived at by the Courts below, in favour of the plaintiff in this suit, negativing the contention of the contesting defendant the appellant in this Court, is right and must be upheld on two grounds.

I. The gift of an undivided share in anything which is of such a nature that it can be used to better advantage in an undivided condition, is valid, under the Mahomedan law. The watery portion of the tank does not admit of partition, and an undivided share of the same may be the subject-matter of a valid gift; the undivided share of the banks of the tank also, which by its very nature can be used to better advantage in an undivided condition must be held to be valid. In laying down exceptions to the rule of Musha the Hedya (483) states:

> It is otherwise with respect to articles of an indivisible nature, because in those a complete seisin is altogether impracticable, and hence an incomplete seisin must necessarily suffice, since this is all that the article admits of; and also because in this instance the donor does not incur the inconvenience of a division.

The undivided share of the banks of a tank in our judgment falls within the category of things contemplated by the exception mentioned above.

II. A gift of a share in property, the donee being admitted to possession with the donor and recognised as a person in possession, is valid under the Mahomedan law. This possession has been recognised by a large number of decisions of the High Courts in this country, of which the decision of this Court in 38 Cal 518 (1) is typical. It may be mentioned that in affirming the decisions of the Courts below we fully recognize and give effect to the principle enunciated by the Judicial Committee of the Privy Council that the doctrine relating to the invalidity of gifts of Musha ought to be confined within the strict rules. As indicated above, the case before us is one which clearly falls within the exceptions to the rules of Mahomedan law relating to the invalidity of gifts of undivided property. The appeal by the defendants questioning the validity of the gift which is the basis of the title on which the claim of the plaintiff-respondent in this appeal was founded, has rightly been disallowed by the Courts below. The appeal fails and it is dismissed with costs.

S. A. No. 74 *of* 1932.—This is an appeal by defendant 1 in a suit in which the plaintiff wanted to have it declared that a kabuliyat dated 22nd Falgun 1332 B. S. was fraudulent and collusive; and inoperative as such. The claim of the plaintiff in the suit was resisted on the ground that the suit was not maintainable in view of what happened in a previous litigation. It appears that a previous Suit No. 683 of 1926, was allowed to be withdrawn by the plaintiff, with liberty to bring a fresh suit, "if not otherwise barred." That suit was also for a declaration that the kabuliyat now in suit was fraudulent, and for its cancellation. According to the contesting defendants the whole suit had abated owing to the non-substitution of heirs of one of the necessary parties, before leave was granted to the plaintiff to withdraw the suit, and it was open to the defendants therefore to raise the question of the maintainability of the present suit. In our judgment, the position taken up by the defendants cannot be held to be sound, for the reason that it was not open to the defendants to go behind the order of the Court, giving leave to the plaintiff to withdraw Suit No. 683 of 1926 mentioned above.

The Court below has rightly held that the Court trying the present suit was incompetent to inquire if the order granting permission to withdraw had been properly made. The suit as instituted by the plaintiff was maintainable; and on the conclusion, on evidence, arrived at by the Court of appeal below, the kabuliyat in suit has been rightly

1. Abdul Aziz v. Fateh Mahomed, (1911) 38 Cal 518=9 I C 635.

declared void and inoperative against the plaintiff. The decision of the Court below is affirmed. There is no order as to costs in this appeal.

K.S. *Appeals dismissed.*

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* A. I. R. 1935 Calcutta 741

LORT-WILLIAMS AND JACK, JJ.

Baidya Nath Biswas—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeals No. 891 and 894 of 1935, Decided on 7th June 1935.

*** Companies Act (1913), S. 282 — Wilful false statement in balance sheet — Current expenses after company started earning revenue, not shown in revenue accounts — Statement should not necessarily be made with intent to deceive — Technical offence is committed.**

Where, after the company has begun to earn revenue, current expenditure has been debited to organization expenses when it ought to have been debited in revenue accounts in the balance sheet, the balance sheet contains a wilful false statement and a technical offence under S. 282, is committed. It is not necessary that the statement should be such as to deceive any one or that it should even be dishonestly made. [P 742 C 1]

Sures Chandra Taluqdar and *Ajit Kumar Dutt*—for Appellant.

D. N. Bhattacharjee, Offg. Dy. Legal Remembrancer—for the Crown.

Jack, J.—*Appeal No.* 891. In this case, the appellant Baidyanath Biswas, Managing Director of the Federal Insurance Co. Ltd., was charged under S. 282, Indian Companies Act, with having prepared a false balance-sheet. The section reads as follows:

> Whoever in any return, report, certificate, balance-sheet or other document, required by or for the purposes of any of the provisions of this Act, wilfully makes a statement false in any material particular, knowing it to be false, shall be punishable under this section.

The prosecution case is that certain items on the expenditure side of the balance-sheet were false. The establishment charge actually shown in the balance-sheet was Rs. 120, whereas the actual establishment charge during the year was Rs. 1,020, the balance of Rs 900 being credited to organisation expenses which amounted to Rs. 2,257. Certain other correct items of expenditure were also credited to organisation expenses. The result of this was that the company were able to show in the revenue account a balance to their credit of Rs. 227-10-5 which was shown as "life fund" at the end of the period ending 31st December 1932. Had these ordinary current charges been shown in the revenue accounts as expenditure in fact the revenue accounts would have shown a loss of over Rs. 1,400.

For the appellant it has been maintained that these being initial heavy expenditure charges, the appellant was entitled to show them in his accounts in the way in which he has done. But the prosecution evidence is to the effect (and this is supported by authority) that the initial expenditure which can be shown as organisation expenses is limited to the expenditure incurred before the Company began to earn revenue. Unless the expenditure is shown in the profit and loss account, the purpose, for which under the Indian Companies Act a balance-sheet has to be returned, would be defeated inasmuch as the public might be deceived, because there would be no check on the amount of expenditure which might be shown as organisation expenses. For instance, in this case, a great deal more current expenditure might have been shown as organisation charges, thus increasing the favourable balance of the revenue account. The fact that the auditor has given a certificate to the effect that this account is drawn up in conformity with the provisions of the Provident Insurance Societies Act, is not of much value when the auditor himself admits that the account is not correct. He excuses himself in these terms:

> Had the liabilities of the company been all properly disclosed to me, this life fund would have been washed out. There would have been a debit balance on the other side. I was shown entries in the books and on the basis thereof I certified the balance-sheets. All the facts had not been disclosed to me. If they had been I would not have certified them.

It appears that the first premium was received on 4th November 1931, and the prosecution case is that the current wages which were incurred after that date should not have been debited to the organisation expenses. At all events it appears to me that if current expenditure on wages was debited to organisation expenses, this ought to have appeared in the revenue account. It is not alleged that the appellant misappropriated any funds, that all the items of his expenditure were not shown in some form in his account, but there is no

doubt that the balance-sheet of the revenue account has not been correctly shown and there was therefore a technical offence under the Act inasmuch as in the balance-sheet there is a wilful false statement as regards expenditure. It is not necessary that the statement should be such as to deceive any one or that it should even be dishonestly made.

Considering all the circumstances of the present case and the fact that the accused has already been for a period of some months in jail, we think that the remainder of the sentence should be set aside, as also the sentence of fine; and we order accordingly that the sentence be reduced to the period already served and the order for payment of fine be set aside and the appellant be released forthwith.

Sentence reduced.

Judgment. — (*Appeal No.* 894 *of* 1934). There was another case against the same appellant in which he has also been charged under S. 282, Indian Companies Act, in respect of a return as regards the date of allotment of certain shares. The first item is as regards 40 shares which are said to have been allotted on 1st April 1933, but the return showed that the allotment was made on the 5th April. On referring to the papers of the company, it appears that in fact this allotment was only confirmed by the directors on 19th April 1933, and therefore the return on the 4th May was within time. It cannot be said that the accused committed an offence, because by mistake he stated the allotment to have been made on the 5th April instead of on the 19th April.

The other item of the charge concerns the allotment of 200 shares; admittedly there was some dispute as to the payment of the initial instalment due on this allotment and on this account there had to be a subsequent allotment of these shares. Accordingly the charge as regards this item is not pressed. This appeal is, accordingly, allowed. The convictions and sentences are set aside and the appellant will be released forthwith. The fine, if paid, will be refunded. The accused, who is on bail, will be discharged from his bail bond.

B.D. *Appeal allowed.*

A. I. R. 1935 Calcutta 742

GUHA AND LODGE, JJ.

In the matter of N., a Pleader, Sylhet.

Civil Rule No. 856 of 1935, Decided on 19th August 1935.

(a) Legal Practitioners Act (1879), S. 12 —Pleader convicted under S. 17 (1), Criminal Law Amendment Act, and under Ss. 124-A, 153-A and 178, Penal Code— Convictions held implied defect of character and entailed severe action.

A pleader was not only convicted under Section 17 (1) and (2), Criminal Law Amendment Act, but was also convicted for having committed offences under Ss. 124-A and 153-A, Penal Code, and was once found guilty of an offence under S. 178, Penal Code :

Held : these convictions entailed severe action as they undoubtedly implied defect of character in a legal practitioner. [P 743 C 1]

(b) Legal Practitioner—Attitude of pleader highly reprehensible showing lack of faith in Courts of justice — Case must be dealt with severely.

Where the attitude of the pleader in connexion with proceedings before Court was highly reprehensible and his conduct showed that he had no faith in justice administered by the Courts in this country :

Held : that the case must be dealt with severely : 1923 *Cal* 329, *Foll.* [P 743 C 1]

Sarat Chandra Basak—for Petitioner.

Order.—The rule in this case was issued by the full Court under S. 12, Legal Practitioners Act (18 of 1879), calling upon *N*, a pleader practising at Sylhet, to show cause why he should not be suspended or dismissed on the ground that he had been convicted of offences implying a defect of character which unfits him to be a pleader. The pleader has not thought it fit to appear before us and show cause, in spite of notice served on him.

From the materials before us, it appears that the pleader was convicted thrice in connexion with the last Civil Disobedience Movement. It appears further that in one of the proceedings before the criminal Court, he stated before the Magistrate that had an Englishman sat in judgment over him, he would have made a statement; but that it was not only useless, but it was also painful to make a statement when one of his countrymen sat in judgment over him in connexion with his activities in making his country free from foreign bondage. In another criminal proceeding he refused to take oath or to depose as a witness.

The case of a pleader convicted repeatedly for offences of a political nature has uniformly been dealt with severely by this Court. In the case before us, the pleader was not only convicted under S. 17 (1) and (2), Criminal Law Amendment Act, but was convicted for having committed offences under Ss. 124-A and 153-A, Penal Code, and was once found guilty of an offence under S. 178, Penal Code. These convictions entail severe action as they undoubtedly imply defect of character in a legal practitioner; in addition to that, in the case before us, the conduct of the pleader, as mentioned above, in connexion with proceedings before the Court, must be taken to be highly reprehensible, and must accordingly be dealt with very severely.

In view of the facts and circumstances of the case before us, strong disciplinary action is called for; and we accordingly direct that the certificate issued to *N* to practise as a pleader be cancelled, and he be dismissed. The attitude of the pleader taken up in proceedings before Courts of justice and his conduct show that he has no faith in justice administered by Courts in this country. As was said in 38 C L J 353 (1), if the faith of the pleader in British justice should even be restored, and if he would then apply for renewal of his certificate, the Court will deal with the matter on such materials as may be made available. The rule is made absolute.

S.R. *Rule made absolute.*

1. Emperor v. Bimalananda Das, 1924 Cal 329=77 I C 986=25 Cr L J 522=38 C L J 353.

A. I. R. 1935 Calcutta 743

NASIM ALI AND HENDERSON, JJ.

Kusum Kamini Roy and *others*—Plaintiffs—Appellants.

v.

Apurba Kumar Hazra—Defendant—Respondent.

Appeal No. 1214 of 1933, Decided on 13th August 1935, from appellate decree of Addl. Dist. Judge, Dacca, D/- 20th February 1933.

(a) Bengal Land Revenue Sales Act (1859), S. 5—S. 5 contemplates arrears except of current and year preceding — Arrears of these years included in notice—Notice is not invalidated.

Section 5 only contemplates arrears other than those of the current year and of the year immediately preceding it. But if the arrears of the current year or of the preceding year are included along with the arrears which come within the purview of S. 5 that cannot invalidate the notice. [P 743 C 2; P 744 C 1]

(b) Bengal Land Revenue Sales Act (1859), S. 33—For annulment of sale by civil Court, sale must be contrary to provisions of Act and substantial injury to owner must be caused by irregularity.

Two conditions are necessary for annulment of sale by civil Court. Firstly the sales must have been held contrary to the provisions of the Act, and secondly it must be proved by the owner that he has sustained substantial injury by reason of the irregularity which evidently includes illegalities as well. [P 744 C 1]

Atul Chandra Gupta and *Apurba Charan Mukherjee*—for Appellants.

Dr. Basak and *Nagendra Nath Bose*—for Respondent.

Nasim Ali, J.—This appeal arises out of a suit for setting aside the sale of Touzi No. 4977 of the Dacca Collectorate under the provisions of Act 11 of 1859. It appears that the arrears for which the estate was sold were for three years, 1928, 1929 and 1930. In the notice under S. 5 of the Act the arrears not only of the year 1928 but also of the year 1929 were included. Plaintiffs' case is that this notice being contrary to the provisions of the Revenue Sale Law the sale was without jurisdiction and void. The trial Court did not give effect to this ground. Other grounds were also taken by the plaintiffs for setting aside the sale. The trial Court however found against the plaintiffs on the other grounds as well. The suit was accordingly dismissed by the trial Judge. On appeal by the plaintiffs to the lower appellate Court the learned Judge affirmed the decision of the trial Court. Hence this second appeal by the plaintiffs.

It is contended by Mr. Gupta appearing on behalf of the plaintiffs that in the notice which was issued in this case under S. 5, Revenue Sale Law, the Collector had no right to include the arrears of 1929 and consequently the notice is not a valid notice at all. Mr. Gupta also contends that under S. 5 the service of a valid notice is a condition precedent to the sale of the estate and as the notice in this case was bad in law the sale itself was without jurisdiction. I am unable to accept this contention. It is true that in the notice under S. 5 the arrears of 1929 should not have been

included because that section only contemplates arrears other than those of the current year or of the year immediately preceding it. But if the arrears of the current year or of the preceding year are included along with the arrears which come within the purview of S. 5 that cannot invalidate the notice. It may be that if the Collector erroneously includes the arrears of the current year or of the year immediately preceding and fixes a certain time for payment of those amounts he may be precluded from selling the estate for arrears of the current year or of the year immediately preceding before the time fixed in the notice expires. But that does not necessarily mean that the notice is invalid. Further S. 33 lays down that no sale for arrears of revenue can be annulled by a civil Court except upon the ground of its having been made contrary to the provisions of this Act and then on proof that the plaintiff has sustained substantial injury by reason of the irregularity complained of. Two conditions are, therefore, necessary; the sales must have been held contrary to the provisions of the Act and it must be proved by the plaintiff that he has sustained substantial injury by reason of the irregularity which evidently includes illegalities as well. In the present case Mr. Gupta with his usual fairness conceded that there was no evidence to show that the plaintiff has sustained any substantial injury by reason of the inclusion of the arrears of 1929 in the notice under S. 5. This is the only point urged by Mr. Gupta in this appeal and as this point fails the appeal is dismissed with costs.

Henderson, J.—I agree.

S.R. *Appeal dismissed.*

A. I. R. 1935 Calcutta 744

GUHA AND LODGE, JJ.

Dinanath Kar and *others*—Plaintiffs—Appellants.

v.

Choudhuri Jitendra Nandan Das Mohapatra and *others*—Respondents.

Appeal No. 2223 of 1932, Decided on 6th August 1935, from appellate decree of Dist. Judge, Midnapore, D/- 28th May 1932.

(a) Practice—Relief—Suit for declaration of existence of custom — Real relief sought being declaration of right based on custom—Relief really sought should be allowed.

The pleadings in the Moffusil in this country have never been so strictly construed by the Courts in India or by their Lordships of the Judicial Committee of the Privy Council, as to deny a relief to a party to which he may be held to be entitled for the reason that there was some defect or other in the wording of the prayer made in a plaint. In a suit the relief claimed was a declaration as to the existence of a custom but what really was meant by the plaintiff was a declaration that the villagers had the right based upon custom.

Held : that the plaintiff ought to be granted the relief meant though not exactly claimed by him. [P 745 C 1, 2]

(b) Landlord and Tenant — Remission of rent—Suit for declaration of custom—Landlord denying custom in cases of some tenants — Right of all under custom is not barred by limitation, refusal being in some cases only—Suit under O. 1, R. 8, Civil P. C., by some tenants for declaration of custom is not barred.

The fact that the landlord, denies the existence of a custom of remission once, in respect of some tenants and not all cannot destroy the custom; the right if any of the tenants generally cannot be held to be barred by limitation, because there might have been refusal to grant remission under custom in the case of some. Hence suit brought by the tenants under O. 1, R. 8, Civil P. C., for a declaration of the custom is not barred by limitation in any way nor is there any bar to their being granted relief by way of declaration in case the custom set up by them be established on evidence. [P 746 C 1]

(c) Civil P. C. (1908), O. 23, R. 1—Failure to prove that previous suit was withdrawn without permission to bring fresh suit—Suit held not barred under O. 23, R. 1.

Where the defendants have failed to prove that the withdrawal of previous suit, with reference to which the bar under O. 23, R. 1 has been pleaded, was without permission to bring a fresh suit, the suit is not barred by reason of O. 23, R. 1. [P 746 C 2]

Dr. Basak and *Saroj K. Maiti*—for Appellants.

G. C. Sen, Gopendra N. Das, Amarnath Bose, Nirmal K. Sen for *Ramendra Ch. Roy* (for Deputy Registrar)— for Respondents.

Judgment.—The suit in which this appeal has arisen was instituted by the plaintiffs-appellants in this Court for a declaration that there is a custom of remission of rent of Jal (paddy) land of occupancy raiyats on account of entire or proportionate destruction of crops by drought or inundation. The suit was one contemplated by O. 1, R. 8, Civil P. C., brought by certain occupancy raiyats of estates Nos. 10, 14 and 60 of the Midnapore Collectorate in Mouza Baruipur. The Court of first instance passed a decree in favour of the plain-

tiffs granting the relief prayed for in the suit in this form: that the plaintiffs are entitled to and will get a declaration that the occupancy raiyats who hold the holdings in estates Nos. 10, 14 and 60 within Mouza Baruipur directly under the defendants and pay them rent in cash are entitled to get proportionate deduction of rent for their paddy lands within such holdings in years of Haja and Sukha, that is, in proportion to the quantity of paddy destroyed in those lands by such Haja or Sukha.

The Court of appeal below reversed the decision of the trial Court on the ground that the relief granted to the plaintiffs in the suit could not be granted to them under S. 42, Specific Relief Act, and on the further ground that the claim in suit was barred by limitation. The learned District Judge in the Court of appeal below did not decide the question as to the existence of custom set up by the plaintiffs in the suit. It is to be noticed that at the stage when the appeal before the lower appellate Court was pending, the defendants landlords of estates Nos. 10 and 60 settled their dispute so far as the present litigation was concerned, with the tenants, and the decision of the appeal was in favour of the landlords of estate No. 14 only, who are in the position of cosharer landlords; the lands of the estates Nos. 14 and 60 being Ijmali between the proprietors in equal shares.

The District Judge in the lower appellate Court entered into an elaborate discussion of the question as to whether there was any distinction between "custom" and "rights based on custom" and came to the conclusion that there was a substantial difference between the two. The result of the conclusion so arrived at by the Judge was that the plaintiffs who prayed for a declaration as to the existence of a custom, were held not entitled to get a declaration that the villagers had the right based on custom. The Judge has in one part of his judgment observed that what the plaintiffs really meant was to ask for a declaration that the villagers had the right based on custom. It has only to be mentioned on this part of the case, that pleadings in the Moffussil in this country have never been so strictly construed by the Courts in India or by their Lordships of the Judicial Committee of the Privy Council, as to deny a relief to a party to which he may be held to be entitled for the reason that there was some defect or other in the wording of the prayer made in a plaint. The learned advocate appearing for the defendants-respondents in this appeal has not attached any importance to this part of the case and to the District Judge's discussion on the distinction to be drawn between custom and rights based on custom, in the case before us; and we do not consider it necessary to give any serious consideration to the same. In our judgment the plaintiffs were entitled to get the declaration granted to them by the Court of first instance, if the existence of the custom were established, and if there was no effective bar of limitation to the declaration being granted to them.

It appears that the question of limitation and the other question as to whether the plaintiffs were entitled to a declaration under S. 42, Specific Relief Act, were considered by the Court of appeal below, together. The suit was brought by the plaintiffs in their representative capacity; in regard to some of the plaintiffs it was asserted by the defendants that in their case, there was refusal by the landlord to grant remission in the year 1915, and if the right to relief was barred in the case of these tenants, there could not be any declaration as prayed for in the suit, in favour of the tenants of estate No. 14 as claimed in the suit. The decision arrived at by the Court of appeal below was that as a suit for declaration of the existence of a custom was clearly not maintainable under S. 42, Specific Relief Act, even if the suit can be regarded as suit for declaration of the rights of the villagers under the custom, the defendant had shown that in certain cases not clearly defined, but probably quite numerous, some tenants have no longer the right to remission, and that therefore a declaration that all villagers have the right cannot be passed, and no intelligible declaration can be passed, or at any rate none that would show a proper exercise of the discretion required by S. 42, Specific Relief Act.

In our judgment there was no such demand based on custom as set up in the present litigation by the tenants of estate No. 14, and no such refusal based

on denial of the existence of such custom on the part of the landlords, which could destroy the right of the villagers in the estate, based on custom. Furthermore an instance of denial of custom by the landlords concerned, would not destroy the customary right, if it had been established. The documents bearing upon this part of the case do not make out a case of demand and refusal as contemplated by Art. 131, Sch. 1, Lim. Act, which is the only provision of the law that could be held to be applicable to the case before us, so far as the plea of limitation raised in the case was concerned. The position that a certain cosharer landlord, denied the existence of custom once, could not and did not destroy the custom. The denial was not also in the case of all tenants, but in the case of some only; and the right if any of the tenants generally could not be held to be barred by limitation, because there might have been refusal to grant remission in the case of some. The conclusion we have arrived at is that the suit brought by the plaintiffs under O. 1, R. 8, Civil P. C., was not barred by limitation in any way; nor was there any bar to the plaintiffs being granted relief by way of declaration as granted to them by the trial Court, in case the custom set up by the plaintiffs was established on evidence.

It is very much to be regretted that the learned District Judge in the Court of appeal below considered it unnecessary to decide the question as to the existence of the custom on which definite findings were arrived at by the trial Court, on what appears to us to be a very careful consideration of the materials placed before the Court. The Court of first instance has given its decision on all the points arising for consideration on this part of the case; it has held that the custom set up by the plaintiffs in the suit was not unreasonable; that the custom has been in existence from before 1293 A. S.: it was in existence in 1911 A. S. On the evidence before the Court; the conclusion was definite that the custom has existed without interruption since the time of its origin.

As it stands, in the absence of any decision by the lower appellate Court, the case has to be sent back to that Court for a decision on issue 8 raised in the suit in which this appeal has arisen. A point was raised in support of the decree of the Court of appeal below that the suit was barred by the provision of O. 23, R. 1, Civil P. C. On this part of the case, on consideration of the materials on the record, the Courts below concurrently arrived at the decision that the defendants failed to prove that the withdrawal of previous Suit No. 81 of 1919 (No. 276 of 1920), with reference to which the bar under O. 23, R. 1 was attempted to be pleaded, was without permission to bring a fresh suit. We are unable to hold that the decision of the Courts below on this point is in any way erroneous.

In the result the appeal is allowed. The decision of the Court of appeal below is set aside, and the case is remanded to that Court for decision of the question raised in issue 8 in the suit in which this appeal has arisen, the other question arising for consideration in the case being decided in favour of the plaintiffs-appellants. The appellants are entitled to get their costs in this Court and in the Courts below from the defendants-respondents, the proprietors of estate No. 14. Costs after remand will be at the discretion of the Court below.

S.R. *Appeal allowed ; Case remanded.*

A. I. R. 1935 Calcutta 746

GUHA AND LODGE, JJ.

Secy. of State—Defendant—Appellant.

v.

Lal Mohan Choudhury and *others*—Plaintiffs—Respondents.

Appeal No. 2412 of 1932, Decided on 12th August 1935, from appellate decree of Addl. Dist. Judge, Chittagong, D/- 11th August 1932.

Crown Grants Act (1895), S. 2 — Lease granted by Government in khas mahal is not Crown grant — Government is merely landlord—Transfer by lessee of leasehold held in khas mahal pendente lite—S. 52, T. P. Act, applied.

A lease granted by a Government officer in charge of khas mahal cannot fall within the category of grants from Crown referred to in the Crown Grants Act. The position of the Government in regard to khas mahal lands is that of an ordinary landlord, the Government occupying no higher position than that of a zamindar, where the settlement granted to the lessee was by an officer of the Government in charge of a khas mahal; in case of a transfer by the lessee of

such settlement "pendente lite"; S. 52, T. P. Act, was applicable. [P 747 C 2]

Bijon Kumar Mukherjee—for Appellant.

Brojolal Chakravarti and *Bhagirath Chandra Das*—for Respondents.

Judgment.—This is an appeal by the Secretary of State, the defendant in a suit brought by the plaintiffs-respondents in this Court for establishment of their jote right to the lands described in Sch. 1 to the plaint, and for recovery of possession of the lands described in Sch. 2, or in the alternative for recovery of possession of the said lands. The allegation of the plaintiffs on which their claim for relief in suit was based, was that the lands in question appertained to a lease granted to them by the Government on 8th November 1920. It was asserted by the plaintiffs that by subsequent unauthorized action on the part of the Government officers, they were deprived of 2.07 kanis of land out of 10 kanis odd, settled with them. The case of the Secretary of State was that from the settlement granted to the plaintiffs 2.07 kanis of land had to be excluded subsequently in view of a decree passed by the civil Court in Title Suit No. 214 of 1919; the aforesaid quantity of land had to be excluded from the plaintiffs' lease, and corresponding reduction from the rent payable by them was made. The Courts below arrived at the decision that regard being had to the provisions contained in the Crown Grants Act of 1895, the plaintiffs were not bound by any decree passed in Suit No. 214 of 1919; that S. 52, T. P. Act, could not apply to the lease granted to the plaintiffs, and that the lands described in Sch. 2 to the plaint were improperly excluded by the Government from the plaintiffs' lease. According to the learned Additional District Judge in the Court of appeal below it was quite clear that the lease which was granted by the Government could not be taken away in this way before the expiry of the terms of the lease; that in khas mahal transactions also the Crown Grants Act applied, and that S. 52, T. P. Act, on which the defendants relied, was not applicable to the case at all. The transaction evidenced by the lease in favour of the plaintiffs granted on 8th November 1920 was governed by the Crown Grants Act, and the plaintiffs were therefore entitled to recover the lands in suit as forming part of their lease.

The question for consideration in this appeal, that being the only question argued in support of the appeal, is whether the Crown Grants Act applied to khas mahal lands; if it did not, S. 52, T. P. Act, would apply, and the Government could not grant the settlement claimed by the plaintiffs in respect of the lands described in Sch. 2 to the plaint, and the lands were therefore rightly excluded from the plaintiffs' lease.

In our judgment the contentions urged on the side of the appellant must be allowed to prevail, for the reasons mentioned below: (1) The position of the Government in regard to khas mahal lands, is that of an ordinary landlord, the Government occupying no higher position than that of a zamindar; the settlement granted to the plaintiffs in the case before us, was by the khas Tahsildar, an officer of the Government in charge of a khas mahal, the Government being in possession of that mahal merely as a private proprietor. (2) The Crown Grants Act, 1895, was an enactment relating to the grants from the Crown, authorizing certain limitations and restrictions upon such grants made under its authority. A lease granted by a Government officer in charge of a khas mahal cannot fall within the category of grants from Crown as referred to in the Crown Grants Act. (3) If the Crown Grants Act had no application to the lease granted to the plaintiffs, as it could not have, S. 52, T. P. Act, was clearly applicable to the case before us, and the Government was justified, in view of the result of Title Suit No. 214 of 1919, in excluding the lands described in Sch. 2 of the plaint from the lease granted to the plaintiffs on 8th November 1920.

For the reasons stated above, the action of the Government in excluding 2.07 kanis of land from the lease granted to them, to which exception was taken by the plaintiff in the suit, appears to us to have been justifiable and in accordance with law. In the above view of the case before us, the decision arrived at by the Courts below in favour of the plaintiffs-respondents, must be set aside, and the plaintiffs' suit

dismissed. The appeal is allowed, the decision of the Courts below and the decrees passed by them are set aside, and the suit in which this appeal has arisen is dismissed with costs throughout.

B.D. *Appeal allowed.*

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* A. I. R. 1935 Calcutta 748

R. C. MITTER, J.

Kali Kumari Baisnabi — Plaintiff—Appellant.

v.

Mono Mohini Baisnabi—Defendant—Respondent.

Appeal No. 2486 of 1932, Decided on 17th July 1935, from appellate decree of Sub-J., 4th Court, Mymensingh, D/- 20th August 1932.

*** Contract—Illegal — Agreement hit by S. 23, Contract Act—Money due under, cannot be recovered by altering form of action based on another agreement connected with first agreement.**

Where an agreement is illegal or immoral or one which is hit by S. 23, Contract Act, the money due under the agreement cannot be recovered by a change in the form of action based on another agreement which is naturally connected with or has for its support the original illegal agreement. Whether the plaintiff has to rely upon the illegal agreement, or whether it is brought out by the defence is immaterial; all that is material is the intimate connexion between the two : *Case law discussed.*

[P 750 C 2]

Birendra Kumar De—for Appellant.

Amarendra Mohan Mitra for *Parimal Chandra Guha*—for Respondent.

Judgment.—The plaintiff who was fortunate in winning in the trial Court has preferred this appeal against the decree of the learned Subordinate Judge, Fourth Court, Mymensingh, passed on appeal, by which her suit has been dismissed. The suit is on a promissory note executed by the defendant in her favour on the 4th Assar 1338=19th June 1931, for the re-payment of Rs. 500 with interest at the rate of Rs. 37½ per cent. per annum. The plaintiff recites the following facts in her plaint : (1) that she took a lease of a house belonging to the defendant on 14th Assar 1336=28th June 1929, at a monthly rent of Rs. 50 ; (2) that she deposited Rs. 600 with the defendant ; (3) that the contract was that on her vacating the house the said money was to be returned to her ; (4) that she left the house in Jaistha 1338=June 1931, and the defendant took possession. There was then an adjustment of accounts betewen her and the defendant ; the rent due for Bysack and Jaistha 1338 was deducted and the sum of Rs. 500 was found due from the defendant to the plaintiff ; (5) that the defendant could not pay the said sum then and there and for it executed the promissory note sued upon.

The recitals in the promissory note filed with the plaint are to the same effect. The plaintiff is a prostitute, and leased the defendant's house for sub-letting it to prostitutes for carrying on their trade. The finding of the Courts below is that the defendant knew that the plaintiff was a prostitute and took the house for sub-letting it to prostitutes. The defence is that the money due on the promissory note cannot be recovered by suit, the claim being based on *turpi causa*. This defence was negatived by the Munsif but has prevailed with the learned Subordinate Judge. An agreement, the consideration or object of which is illegal, immoral or against public policy, is not a contract under the Indian Law. Moneys due or paid under such an agreement cannot be recovered by suit. This is clear on the statute itself, but what is urged by the appellant's advocate is that in order that the principle *ex turpi causa non oritor actio* may be invoked by a defendant, it is necessary that the plaintiff should require aid from the illegal transaction to establish his case. To support the said contention he relies upon the observations of Mellor, J., in (1869) 4 Q B 309 (1), which is as follows :

> It was therefore impossible for him to recover except through the medium and by the aid of an illegal transaction to which he was himself a party. Under such circumstances the maxim *in pari delicto potior est conditio possidentis* clearly applies and is decisive of the case.

The learned advocate for the appellant says that the plaintiff has not to rely in this case before me on the agreement for lease and that she is entitled to succeed on the promissory note as soon as its execution is proved. In my judgment the true principle deducible from the cases, is that where the consideration or object of an agreement is illegal, immoral or against public policy, the agreement cannot be enforced ; the moneys due on the basis of the said

1. Taylor v. Chester, (1869) 4 Q B 309=10 B & S 237=38 L J Q B 225=21 L T 359.

agreement cannot be recovered, and securities, covenants, bonds and documents of a like nature given in respect of the moneys due under the agreement would be equally unenforcable in a Court of law. If the spring is tainted the flow is equally so In 3 E and B 642 (2) the defendant covenanted by a deed with plaintiff that he, the defendant, would pay the plaintiff £630 on a certain date. The suit was brought on this covenant. The defence was that the plaintiff agreed to sell to the defendant some lands knowing that the said lands were to be exposed for sale by the defendant by lottery contrary to statute ; that in pursuance of the agreement the lands were sold by the plaintiff to the defendant, and as part of the consideration could not be paid then and there in cash, the aforesaid covenant was made to secure payment thereof. The facts alleged in the defence were established. It was not denied that the original agreement, e. g. for sale, was tainted with illegality, lotteries being prohibited by statutes passed, in the reigns of William III and George II (10 & 11 W. III, C. 17 and 12 G. II, C. 28) and could not be enforced. No action could be brought for recovery of the purchase money left outstanding. It was argued however the covenant could be enforced, the covenant being an instrument under seal which required no consideration to support it. Jervis, C. J., in overruling this contention, observed thus :

> The authorities cited in the argument show that where the bond or other instrument is connected with the illegal agreement, it cannot be enforced ; 1 B & P 551 (3), 9 East 408 (4), 5 Bing (N C) 666 (5), and therefore if this plea alleges that the covenant was given in pursuance of the illegal agreement, it would upon these authorities be an answer to the action. . . . It is clear that the covenant was given for payment of the purchase-money. It springs from, and is a creature of, the illegal agreement ; and the law would not enforce the original illegal contract, so neither will it allow the parties to enforce a security for the purchase-money, which by the original bargain was tainted with illegality.

A case of the same type is 2 H & C 339 (6). The defendant was indebted to the plaintiff and other creditors. He proposed a composition with his creditors to pay five shillings in the pound, and for the purpose of inducing the plaintiff and Thomas Geere to the proposal, promised to pay them a further composition of another five shillings to the pound. This was a fraudulent preference and an act of fraud on other creditors, and this further agreement was undoubtedly illegal. In furtherance of the illegal agreement, the defendant's brother accepted a bill of exchange. The said bill being dishonoured on presentation and legal proceedings being threatened the defendant assigned a policy on his life to the plaintiff as a security for the payment of the said bill. The suit being brought to enforce the said security, the defence was that it could not be enforced as the source was tainted. The defence was given effect to, Pollock, C. B., observing that

> It is impossible not to see that the case falls within the principles of the decision in Fisher v. Bridges (2). I entertain a strong opinion, that apart from authority, I should have decided in the same way, but I consider that we are bound by that decision.

Bramwell, B., in the same case, observed thus:

> It is sufficient to say that he executed the indenture to secure the payment of an illegal debt, and as that debt could not be enforced neither can the security be enforced.

Baron Wilde also concurred. The case of 17 C B (N S) 188 (7) is an extreme case which illustrates the same principle. The son of the defendant being about to compound with his creditors, gave two promissory notes to the plaintiff, one of the creditors, without the knowledge of the others; each promissory note was for £ 25 beyond the amount of the composition.The defendant,thefather, also joined in executing the promissory notes. This was done to induce the plaintiff to sign the composition deed. On the first promissory note an action was brought, judgment obtained and execution levied. As consideration of the plaintiff forbearing from enforcing the judgment, the defendant gave him a guarantee for the amount of the judgment and for the amount of the other outstanding promissory note, and thereupon the two promissory notes were given up. The suit was upon the guar-

2. Fisher v. Bridges, 3 E & B 642=2 C L R 929 =23 L J Q B 276=1 Jur 157=2 W R 706.
3. Lightfoot v. Tenant, 1 B & P 551.
4. Panton v. Popham, 9 East 408.
5. The Gas Light and Coke Co. v. Turner, 5 Bing (N C) 666=7 Scott 779=9 L J C P 75.
6. Geere v. Mare, 2 H & C 339=33 L J Ex 50.
7. Clay v. Ray, 17 C B (N S) 188.

antee. It was held the guarantee could not be enforced being tainted with the original fraud. It is unnecessary to notice all the decisions which have followed the principle of *Fisher's* case (2) except the decision of the Court of Appeal in (1908) 2 K B 696 (8). The plaintiff and the defendant were bookmakers who had betting transactions together, which resulted in indebtedness of the defendant to the plaintiff. The defendant gave a cheque to the plaintiff for the amount of bets to him. At the request of the defendant the cheque was held over for a time, and part of the amount of the cheque was later on paid by the defendant to the plaintiff in cash. Later on a verbal agreement was entered into by the parties, by which, in consideration of the plaintiff holding over the cheque for a further time and refraining from declaring the defendant a defaulter, which act would have injured the defendant's business with his customers, the defendant promised to pay the balance of the amount of the cheque in a few days. The suit was on the verbal promise. The consideration for this promise was that the plaintiff would not place the defendant on the defaulters' list. The consideration was, as Romilly, M. R., put it in 9 Eq 471 (9) "a perfectly good consideration quite ulterior to and independent of any racing debt."

The question before the appeal Court was whether the verbal promise could be enforced. Sir Gorell Barnes' Farwell, L. J., concurring, but Moulton, L. J., dissenting, pointed that there was nothing illegal in making bets under the common law; they were void under 8 & 9 Vict. C. 109, and there would have been no illegality in paying them or in giving a cheque for them. The statute prevented recovery by an action, but they were debts of honour, which could be recovered by the conventional and effective methods followed in betting circles, e. g. posting the man as a defaulter. The learned President then made the following observations :

> I am unable to see how a new contract such as that suggested, if made for good consideration, can be said to be illegal. I think it would probably have been different if the bets were illegal and the giving of the cheque an illegal act, for the principle then to be applied would be those succintly stated in (1857) 2 H & N 416 (10) at 423 by Baron Watson as follows : 'The rule laid down in 7 Taunt 246 (11) is that when a demand connected with an illegal transaction can be sued on without the necessity of having recourse to the illegal transaction, the plaintiff can maintain an action; but where it is necessary to resort to the illegal transaction to make the case upon the new security the new security cannot be enforced.' But these principles do not strictly apply to a case where nothing prohibited has been done by the parties and the cheque and the bets are merely unenforceable by the plaintiff. But thirdly, it may be said, that these considerations do not completely dispose of the case, and that a contract, though not positively prohibited, may be unlawful either because it is immoral, that is to say, contrary to positive morality recognised as such by law or because it is against public policy, and that in such cases there is not a lawful contract founded on good consideration. It is upon this that I have felt some difficulty, for it may be said that the Courts ought not to permit of a claim being made founded on the forbearance aforesaid, because by so doing a means may be afforded of evading the strict provisions of the Acts against gaming and wagering, and of allowing pressure to be brought to bear upon persons failing to pay that which they are under absolutely no legal obligation to pay and that to support such an action as this will prove generally mischievous; but if there be no illegality nor unlawfulness in the contract and there be good consideration, I cannot see on what grounds it can be suggested that the Courts could refuse to give effect to it.

These cases in my judgment establish the principle that where an agreement is illegal or immoral or one which is hit by S. 23, Contract Act, the money due under the agreement cannot be recovered by a change in the form of action based on another agreement which is naturally connected with or has for its support the original illegal agreement. Whether the plaintiff has to rely upon the illegal agreement, or whether it is brought out by the defence is immaterial: all that is material is the intimate connexion. In (1869) 4 Q B 309 (1), the plaintiff had to rely upon the illegal agreement to repel the defence, but in 3 E & B 642 (2), 2 H & C 339 (6) and 17 C B (NS) 188 (7), the defendant raised it by way of defence, and succeeded as soon as he showed an intimate connexion of the agreement sought to be enforced with the earlier illegal agreement, and established that the illegal agreement was the foundation upon which the latter

8. Hyams v. Stuart King, (1908) 2 K B 696=77 L J K B 794=52 S J 551=24 T L R 675=99 L T 424.
9. Bubb v. Yelverton, 9 Eq 471=39 L J Ch 428 =18 W R 512=22 L T 258.
10. Attorney General v. Holling Worth, (1857) 2 H & N 416=27 L J Ex 102=5 W R 684.
11. Simpson v. Bloss, (1816) 7 Taunt 246=2 Marsh 542.

agreement sued upon rested. In (1869) 4 Q B 309 (1) the illegality was pleaded but in 10 Q B 491 (12) the fraud which made the agreement illegal was not pleaded, but it being apparent the Court did not interfere. In the case before me the plaint recites the consideration for the promissory note sued upon and the promissory note itself shows for what consideration it was. It was the security deposit for the rent of the house let out by the defendant to plaintiff to be used as a brothel. The observations of A.L. Smith, L. J., in (1892) 2 QB 724 (13) at p734 are relevant and put the plaintiff out of Court. They are as follows :

If a plaintiff cannot maintain his cause of action without showing as part of such cause of action that he has been guilty of illegality, then the Courts will not assist him in his cause of action. This was decided in (1869) 4 Q B 309 (1) when the illegality was pleaded, and also in 10 Q B 491 (12), where it was not pleaded, but the fraud being apparent the Court would not assist. When the plaintiff's statement of claim is looked at it will be seen that he there states the purpose for which he handed the money to the defendant namely 'to keep up the price of stores,' which upon the evidence was shown to be 'to create a fictitious premium' In my judgment, the plaintiff when suing the defendant for breach of contract, as he does, has to prove the whole contract, and it is not competent to him to put in evidence only half of the contract, and he did not do so, for the letters above were opened by his learned counsel as part of his case. Immediately the whole contract, upon which the plaintiff sues, is put in, the illegality of the conduct of the plaintiff the McNab at once becomes apparent. In my opinion, the maxim "*in pari delicto potior est conditio possidentis*" applies, and this Court ought not to assist the plaintiff when he seeks to recover £632-3s-4d. back from the defendants.

The whole contract as evidenced by the promissory note in this suit is the repayment of the balance of the security deposit for the lease of the house taken for immoral purposes. For these reasons I maintain the decree passed by the lower appellate Court and dismiss the appeal but without costs.

S.R. *Appeal dismissed.*

12. Begbie v. Phosphate Sewage Co., (1873) 10 Q B 491=44 L J Q B 233=24 W R 115=33 L T 470.
13. Scott v. Brown, (1892) 2 Q B 724=41 W R 116=57 J P 213=67 L T 782.

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* A. I. R. 1935 Calcutta 751

GUHA AND LODGE, JJ.

Mono Mohan — Judgment-debtor — Appellant.

v.

Kali Kinkar Chakravarty — Decree-holder—Respondent.

Appeal No. 485 of 1933, Decided on 26th August 1935, from original order of Sub-Judge, First Court, Chittagong D/- 7th August and 2nd November 1933.

*** Civil P. C. (1908), S. 60 — Preliminary decree for accounts is saleable property and is liable to attachment.**

A preliminary decree for accounts, is a saleable property over which the decree-holder has a disposing power which he may exercise for his benefit. Such decree is liable to be attached under S. 60 : 14 *M I A* 40, *Dist.*; 1914 *Cal* 60, *Applied* ; 1924 *Cal* 1047, *Rel on.* . [P 752 C 1,2]

Benoyendra Nath Palit — for Appellant.

Abub Qasem Khan—for Respondent.

Judgment.—This is an appeal by the judgment-debtor arising out of an application for execution of a decree passed on 21st September 1932. The decree-holder prayed for attachment of a decree obtained by the judgment-debtor on 15th June 1932, against one Naba Chandra Choudhury in Account Suit No. 189 of 1928, in the second Court of the Subordinate Judge, Chittagong. Objection was raised under S. 47, Civil P. C., stating that a preliminary decree for accounts could not be attached, as such a decree was not assignable under the law, according to the judgment-debtor, as mentioned in his petition of objection filed in Court, it was a mere right to sue. The objection as raised by the judgment-debtor was overruled by the Court of execution ; and hence this appeal.

The question for decision in the case before us is whether a preliminary decree in a suit for accounts is liable to attachment, regard being had to the provisions contained in S. 60, Civil P. C., regarding the liability of property to attachment and sale in execution of decree. If it was a mere right to sue, as was contended for the judgment-debtor, there could be no question that the preliminary decree for accounts could not be attached under the law. As it was observed by their Lordships of the Judicial Committee of the Privy

Council in 14 M I A 40 (1), a mere right of suit is not property, but a title to recover future property; and the observations were made in the case before the Judicial Committee in which there was a claim under a future award, as to which it was wholly uncertain until the award was made what the debtor will be entitled. The uncertainty at the time of attachment was not limited to a mere question of quantum, it was wholly uncertain what the arbitration might terminate. In the case before us, there was a preliminary decree for accounts in favour of the judgment-debtor, now confirmed by this Court on appeal; and we have it on the judgment-debtor's own statement of his case before the Court of execution, that it was expected that the amount due to him would be over Rs. 80,000 There was no question about the judgment-debtor succeeding in right to get an ascertained sum on accounts being taken under the decree obtained by him. In the case of a decree directing an inquiry as to mesne profits, it has been held by this Court, that a sale of the decree was valid under the law, as the right sold was not a mere right to sue within the meaning of S. 6 (e), T. P. Act : see 18 C W N 450 (2).

A right to sue is not saleable property, and cannot be transferred; but in the case before us, the claim for money on rendition of accounts has been established in favour of the judgment-debtor, and the claim has now been merged in a decree by a competent Court. The right under the decree is assignable although the cause of action so far as the judgment-debtor's right to get money on accounts being taken was concerned, was not. A right to take accounts, and to recover such sums, as may be found due, is not assignable, being a right to sue within the meaning of S. 6 (e), T. P. Act: see 51 Cal 972 (3). The decree sought to be attached being saleable property belonging to the judgment-debtor over which or the profits he has a disposing power which he may exercise for his own benefit, was liable to be attached under S. 60, Civil P. C.

In the above view of the case before us, the decision of the Court below, and the orders passed by it on 7th August and 2nd November 1933, must be affirmed ; and we direct accordingly. The appeal is dismissed with costs; the hearing fee in this Court be assessed at three gold mohurs.

B.D. *Appeal dismissed.*

1. Syed Tuffuzzal Hossain Khan v. Rughoonath Pershad, (1870-72) 14 M I A 40=2 Suther 434 =7 Beng L R 186=2 Sar 656 (P C).
2. Prasanna Kumar v. Asutosh Roy, 1914 Cal 60=20 I C 685=18 C W N 450.
3. Khetra Mohan Das v. Biswanath Bera, 1924 Cal 1047=82 I C 411=51 Cal 972=40 C L J 79=28 C W N 894.

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* A. I. R. 1935 Calcutta 752

MUKERJI AND S. K. GHOSE, JJ.

Secy. of State—Defendant—Appellant.

v.

Hiru Mondal and *others* — Plaintiff—Respondents.

Appeal No. 78 of 1932, Decided on 13th August 1935, from original decree of Sub-Judge, Krishnagar, D/- 31st July 1931.

*** Tort—Liability—Joint tort-feasors—Persons conspiring and combinedly dispossessing *P* — All are liable to *P* for mesne profits— Kanungo trespassing on *P's* land and taking possession of land in combination with others—Giving these others settlement and dispossessing *P*—Government not repudiating kanungo's action —Government held jointly liable with others to *P* for mesne profits.**

Where a number of persons actuated by design or as a result of conspiracy combine together and dispossess *P*, *P* is entitled to look to all of them jointly for recovery of mesne profits. The kanungo at first committed istray acts of trespass on *P's* land and thereafter entering into combination with others went upon the land, gave settlement of the land to these others and got *P* dispossessed. The action of the Kanungo was never repudiated by the Government at any stage. *P* subsequently instituted a suit for possession and mesne profits :

Held : that Government was jointly liable with orders to *P* on account of mesne profits : 37 *Cal* 559, *Foll.* ; 1929 *P C* 300, *Dist.*

[P 754 C 1, 2; P 755 C 1]

S. C. Basak—for Appellant.

Bejoy Kumar Bhattacharjee and *Amarendra Narain Bagchi* — for Respondents.

Judgment. — This is an appeal preferred by the Secretary of State for India in Council from a final decree for mesne profits passed in accordance with O. 20, R. 12 (2), Civil P. C. In order to appreciate the contention that has been urged on behalf of the appellant in this appeal it is necessary to set out a few facts. The plaintiff Hiru Mandal instituted a suit in 1920 for recovery of possession of 138 bighas of land together

with mesne profits against the Secretary of State for India in Council as the first defendant and four other persons as defendants 2 to 5. The allegations in the plaint were that the plaintiff was the owner of a holding bearing No. 17 in the rent roll prepared according to the rules and orders of the Board of Revenue ; that the said holding consisted of about 200 bighas of land and the rental thereof had been fixed at Rs. 237-8-0 exclusive of cesses which were fixed at Rupees 7-6-9 pies ; that he was in possession of the lands but that a Kanungo of the Government had forcibly taken away straw from the lands in the month of Pous 1324 B. S. and thereafter had dispossessed the plaintiff on the 1st Magh 1324 B. S. and had put the other defendants in possession.

Two written statements were filed in the suit, one on behalf of the Secretary of State for India in Council and the other by defendants 2 to 5. The defences taken were practically on the same lines in both the written statements. It should be stated here that it was not suggested in the written statement that was filed on behalf of the Secretary of State for India in Council that the action of the Kanungo which was complained of in the plaint was something beyond or in excess of his authority. Defences on the merits were taken and these defences being considered, the Munsiff made a decree in plaintiff's favour in respect of a quantity of 113 odd bighas of land. An appeal was taken from the said decree by the Secretary of State for India in Council to the Court of the District Judge but the appeal was dismissed. From the decision last mentioned, a second appeal was taken to this Court, that appeal being No. 1312 of 1925. The contention that was urged in this second appeal turned upon the question of limitation. But this Court, on considering the findings of fact at which the learned District Judge on appeal had arrived, came to the conclusion that the suit was not barred. It was held by this Court that the allegations as regards the cutting and taking away of straw in Pous 1334 that had been made in the plaint related only to stray acts committed by the Kanungo but that in point of fact the real cause of action arose in the month of Magh 1324, when the dispossession actually took place. On this point, it was observed thus :

> He (that is, the District Judge) found that the real dispossession took place when the settlement was made by Government with defendants 2 to 4 and when in pursuance of that settlement they entered into possession of the disputed land.

Now, having held that the suit was not barred by limitation and taking into consideration the other findings of fact at which the Court of appeal below had arrived, this Court dismissed the second appeal and the result was that the decree the trial Court had made was confirmed. It is necessary here to set out the terms of that decree. The decree was in these terms :

> It is hereby ordered and decreed that this suit be decreed on contest against defendants 1 to 4 and be dismissed against defendant 5. Plaintiff's raiyati right in the disputed land be declared and the plaintiff do get khas possession of the same. Plaintiff do also get mesne profits (to be hereafter determined) from the date of dispossession to the date of recovery of possession with annual interest up to the date of realization. Plaintiff do get costs with interest at the rate of 6 per cent per annum from defendants 1 to 4. Defendant 5 do bear his own costs.

In pursuance of this decree, an inquiry was held under the provisions of O. 20, R. 12, sub-R. 1 of the Code. The Commissioner who held this investigation made a report on 18th November 1930. This report was considered by the learned Judge and he eventually made his decision on 31st July 1931 reducing the amount of mesne profits which the Commissioner had assessed at Rs. 11,859-10-9 to Rs. 8,215. The period for which the mesne profits was awarded was from 1325 to the end of 1334. The contention that has been urged on behalf of the appellant in this appeal is that the Secretary of State for India in Council was not jointly liable with the other defendants for the entire amount of mesne profits that was awarded by the learned Judge but that his liability should be confined to such rents as he may have realised from the other defendant. At the outset it may be observed that the liability was determined by the preliminary decree, and so it cannot be challenged in this appeal from the final decree. But on the merits it may be pointed out that in the decisions of the several Courts in the original suit itself, it had been found that there was a combination amongst the several defendants, the result of which, according to the said

Courts, was that the plaintiff was dispossessed. These findings have been referred to by the learned Judge in his judgment. The learned Judge has observed that under issue 6 it had been found by his predecessor that the Kanungo had entered into an unholy combination with defendant 3 to wrench away the land from the plaintiff and that the District Judge had also accepted the same view. The learned Judge held inasmuch as such a combination existed amongst the several defendants, the test of joint liability in a matter of this description had been satisfied and that, therefore, defendants 1 to 4 were all jointly liable for the claim for mesne profits. It cannot be disputed that, so far as this Court is concerned, the view, which the learned Judge has taken of the question of joint or several liability with regard to mesne profits, has been adopted and applied in a number of cases. Amongst these cases the one to which it would be sufficient to refer is the judgment of Mookerji, J., in 37 Cal 559 (1). The learned Judge observed in that case as follows:

> It cannot be laid down as an inflexible rule, that in every case of tort, the Court is bound to pass a joint decree against the wrong doers, making each jointly and severally liable for the whole amount decreed. In case, therefore, in which the controlling general principle, namely that where acts of several persons, by design or by conduct tantamount to conspiracy, contribute to the commission of a wrong, they are jointly liable, is not applicable, the rule of joint liability also ceases to be applicable.

These observations clearly indicated that where a number of persons actuated by design or as a result of conspiracy combine together and dispossess the plaintiff, the plaintiff is entitled to look to all of them jointly for recovery of mesne profits. If this principle be correct, then there can be no question that upon the facts found in the present case, the learned Judge's decision is right because the case, as far as we have been able to understand it was this: that the Kanungo at first committed stray acts of trespass upon the plaintiff's land and that thereafter entering into a combination with the other defendants went upon the land, gave them a settlement and got the plaintiff dispossessed. We also understand that it was the case for the Government at the time that the lands did not appertain to the plaintiff's holding No. 17 but were khas lands of which the Kanungo was entitled to take possession on behalf of the Government. It is clear that the action of the Kanungo was never repudiated by the Government at any stage. It has to be stated here that although the observations quoted above from the judgment of Mookerji, J., in 37 Cal 559 (1) were not specifically dissented from in any later decision of this Court, there was a decision of Page, J., in 53 Cal 992 (2) in which another part of that decision was dissented from, namely that part of the decision wherein Mookerji, J., had laid down certain principles which according to him were to be followed in apportioning the liability of the different grades of tenants or under-tenants. The decision in 37 Cal 559 (1) above cited, however, has since been reversed by the Judicial Committee in 56 I A 290 (3). Dr. Basak appearing on behalf of the appellant has contended that the principle above referred to should no longer be treated as correct and that the pronouncement of the Judicial Committee in 56 I A 290 (3) has shaken the authority of 37 Cal 559 (1) and of other cases on which it was founded. He has drawn our attention first of all to the definition of mesne profits as given in the Code in S. 2, Cl. 12. Mesne profits is there defined as meaning

> those profits which the person in wrongful possession of the property actually received or might with ordinary diligence have received therefrom, together with interest on such profits.

It is not necessary to refer to the rest of the definition. This definition has been emphasised by the Judicial Committee in 57 I A 105 (4) in which their Lordships have said :

> Under the definition of mesne profits under S. 2, sub-S 12, Civil P. C., 1908, the sum to be awarded is not what the plaintiff has lost by his exclusion from the land but what the defendant has made, or might with reasonable diligence have made, by his wrongful possession.

There can be no dispute whatsoever that that is the meaning of the expression "mesne profits" such as has been used in the Code and with regard to

1. Ramratan Kapali v. Aswini Kumar Dutt, (1910) 37 Cal 559=6 I C 69.
2. Pramada Nath Roy v. Secy. of State, 1927 Cal 182=99 I C 428=53 Cal 992=31 C W N 112.
3. Gurudas Kundu Choudhury v. Hemendra Kumar Roy, 1929 P C 300=121 I C 525=56 I A 290=57 Cal 1 (P C).
4. Gray v. Bhagu Mian, 1930 P C 82=121 I C 540=57 I A 105=9 Pat 621 (PC).

which the plaintiff is entitled to a decree in the present case. If that definition is applied to the mesne profits with regard to which the plaintiff is entitled to a decree in the present case and if the finding be, as it is that all the defendants acted jointly and in pursuance of a combination, then it is difficult to see how this definition is not satisfied if calculation is made of such profits as the defendants who acting together and in combination with each other purported to dispossess the plaintiff and were in wrongful possession of the property might with ordinary diligence have received therefrom. When a combination of this character exists, the plaintiff is justly entitled to say that it is not for him to find out what exactly is the amount which each of the trespassers has received from the property, but that he would make them all jointly liable for the entire amount of profits which they had received or which they might with ordinary diligence have realised from the property. The decision of the Judicial Committee in 56 I A 290 (3), as has already been stated, has been relied upon by Dr. Basak.

Now the facts of the above case were that a quantity of land to which three families of zamindars were entitled in certain shares became diluviated. On re-formation the Government took possession of the lands and let them out on a putni lease. One of the three families recovered the land from the Government and allowed the putnidar to continue in possession. Subsequently, members of the other two families sued the family which had recovered the land the Government and the putnidar claiming to recover possession of the lands and the mesne profits. A decree was passed in certain terms to which we need not refer here. One of the questions which arose upon that decree was on what basis the mesne profits should be computed. On that question, it was held that mesne profits recoverable from the principal defendants who had recovered the land would be on the basis of the rents they had received from the putnidar and not upon the produce value of the land. The distinguishable element of that case was that the land was in occupation of a putnidar and that the putnidar was not a trespasser and in those circumstances their Lordships held that it was not obligatory on the part of the trespasser to remove the putnidar from the land. On the construction of the decree it was held that it was not a joint and several decree against all, and indeed such a decree could not be made because the different defendants came into possession at different times.

The facts of the present case are entirely different. Here, if the findings be correct, and we have got to go upon the findings such as have been recorded in the concurrent judgments of the several Courts which disposed of the original suit, there were no tenants on the land excepting the plaintiff who claimed to be in occupation of it as a tenant. The lands were claimed on behalf of the Government as khas lands and the Kanungo presumably acting on behalf of the Government, put the other defendants into possession and if the findings be correct he did so mala fide. We are of opinion that the decree that has been passed in this case is a decree which is amply supported on principle and by authority. Another decision of the Judicial Committee has been referred to by Dr. Basak, namely the case of 56 I A 93 (5). But we do not think that anything that has been said in that case can be of any assistance to the appellant in the present case. That case was an action of trover and the distinction was pointed out by their Lordships of the Judicial Committee in their judgment. As has been observed in 59 Cal 859 (6),

> In the case of claim of mesne profits two courses are left open to the Court. A decree for mesne profits may be passed jointly and severally against all the trespassers who may have jointly kept the plaintiffs out of possession of any particular property leaving them to have their respective rights adjusted in a separate suit for contribution or the respective liabilities of such trespassers may be ascertained in the plaintiff's suit against them, and a decree on the basis of such several liabilities may be passed as against the respective trespassers in plaintiff s favour.

In the present case, as has been pointed out by the learned Judge in his judgment, there was no claim and no averment made in the statement filed on behalf of the different defendants, alleging that they were separately liable for mesne profits as amongst themselves.

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5. L. P. E. Pugh v. Asutosh Sen, 1929 P C 69=114 I C 604=56 I A 93=8 Pat 516 (PC).
6. Basanta Kumar v. Ram Shankar, 1932 Cal 600=138 I C 882=59 Cal 859=55 C L J 205.

The different defendants all pleaded that they were not liable for mesne profits at all. We are of opinion that the decree which the Court below has made is right. We accordingly dismiss this appeal with costs to the plaintiff-respondent.

S.R. *Appeal dismissed.*

A. I. R. 1935 Calcutta 756

NASIM ALI AND HENDERSON, JJ.

Bhupati Mohan Das—Appellant.

v.

Phanindra Chandra Chakravarty and *another*—Respondents.

Appeal No. 2438 of 1932, Decided on 19th August 1935, from appellate decree of Addl. Dist. Judge, Second Court, Dacca, D/- 23rd June 1932.

(a) Actionable claim — Provident fund — Right of subscriber is actionable claim.

The right of the subscriber or depositor to the provident fund money is a right to get a definite sum out of the provident fund arising out of an obligation created by the rules of the provident fund and is hence an actionable claim as defined in S. 3, T. P. Act: 36 *Cal* 936, (*F B*) and 1935 *Cal* 271, *Rel. on.* [P 758 C 1,2]

(b) Suit—Maintainability—*A* obtaining decree against *B*—Attachment of *B's* provident fund in execution—Fund assigned to *C* for loan prior to *A's* suit — *C's* suit against *A* for money realised from fund — *C* legal practitioner — *B's* right to fund held actionable claim, hence suit barred by T. P. Act, S. 136.

A obtained a simple money decree against *B* and in execution of that decree attached the money standing to the credit of *B* in his provident fund. Previously to the suit of *A* the provident fund had been assigned by *B* to *C*, a legal practitioner, on account of a certain sum of money borrowed from him by *B*. *C* therefore instituted a suit against *A* for the recovery of money realised by him by attachment of the fund:

Held: that the suit was not maintainable as the assignment to *C* by *B* of his provident fund was an assignment of an actionable claim and hence S. 136, T. P. Act, was bar to *C's* suit. [P 759 C 1]

S. C. Basak, *Gopal Ch. Das* and *Bhuban Mohan Saha*—for Appellant.

Atul Chandra Gupta and *Hemendra Narain Bhattacharjee*—for Respondents.

Judgment.—This appeal arises out of a suit for a declaration that the plaintiff is the assignee from defendant 2 of a sum of money specified in the schedule attached to the plaint and as such is entitled to get the said sum from defendant 1 who realised the same in execution of a decree obtained by him against defendant 2. The plaintiff's case briefly stated is as follows:

Defendant 2, formerly a reader of English literature of the Dacca University, borrowed Rs. 4,200 on a hand note from the plaintiff on 11th April 1926. On the same day by way of collateral security he assigned to the plaintiff his right, title and interest in his 20 years endowment policy No. 533114 for Rupees 5,000 with the Sun Life Assurance of Canada and in the provident fund money under the University of Dacca accrued and to be accrued thereafter until the debt on the hand-note would be fully liquidated. Under Cl. 2, S. 2, Dacca University Act, the Governor-General in Council extended the provisions of the Provident Fund Act in 1925 by Notification No. 844 of 19th April 1927 to the provident fund constituted by the Dacca University. Defendant 1 obtained a simple money decree against defendant 2 on 16th February 1929 for Rs. 2,759-10-0 and in execution of the said decree attached the money standing to the credit of defendant 2 in the provident fund. The plaintiff preferred a claim under O. 21, R. 58, Civil P. C., on 5th March 1929. The claim was disallowed on 22nd March 1929. Out of the provident fund money standing to the credit of defendant 2 the Dacca University deposited Rs. 2,773-11-3 in the executing Court on 11th March 1929. Defendant 1 withdrew the said sum of money on 23rd March 1929. The plaintiff thereafter obtained a decree on the hand-note executed by defendant 2 in his favour for Rs. 8,383-10-1 on 25th April 1929 and in execution of the said decree realised Rs. 6,902-2-0 by attaching the balance left in the Provident Fund deposit. On 22nd March 1930 the plaintiff instituted the suit out of which this appeal arises with the following prayers: (1) that the plaintiff may be declared to be entitled to the sum of money which defendant 1 withdrew from the executing Court on 23rd March 1929 by virtue of the assignment by way of collateral security on 11th April 1926; (2) that the order dated 22nd March 1929 disallowing the plaintiff's objection be set aside; (3) that the plaintiff may be declared to be entitled to get the sum of money by way of restitution and that defendant 1 may be asked to refund the said money to Court.

Defendant 1 alone contested the suit. His defences so far as they are material for the purposes of the present appeal are: (1) that the Provident Fund money being an actionable claim, the plaintiff is not entitled to get any relief in this suit as he is a legal practitioner; (2) that the present suit is not maintainable. The Courts below have overruled the defences of defendant 1 and have decreed the plaintiff's suit. Hence this second appeal by defendant 1. The first point for determination in this appeal is whether the Provident Fund money is an actionable claim. By S. 3, T. P. Act, actionable claim has been defined as a claim to any debt other than a debt secured by a mortgage of the immovable property or by the hypothecation or pledge of movable property or to any beneficial interest in movable property not in the possession either actually or constructive of the claimant which the civil Courts recognise as affording grounds for relief whether such debt or beneficial interest be existent, accruing, conditional or contingent. The word " debt " has not been defined in the Transfer of Property Act. In 36 Cal 936 (1) it has been laid down that a debt is a sum of money which is now payable or will become payable in future by reason of a present obligation. Debt is nothing more than the benefit of an obligation to pay money. It is

> in law as in fact a very different thing from a sum of money in a man's own possession: . . . see Williams on Personal Property, 18th Edn., p. 184.

If a man owns a pound in his pocket the pound in the pocket is a thing (res, chose) in possession. If the pound is not in his pocket but is due from the debtor it is a chose or a thing in action or an actionable claim. In Roman Law the person entitled to the benefit of an obligation was called a creditor while the man who was bound by it called debitor. So long as a coin is in a man's possession he is the owner of the coin. This ownership is however subject to a limitation. This limitation is based

> on the inconvenience which would ensue if a valid title could not be obtained by the transfer of current coin in the ordinary course of circulation: . . . see Williams on Personal Property, p. 25.

Section 76, Contract Act, lays down that the word "goods" means and includes every kind of movable property. By S. 2, Cl. 7, Sale of Goods Act, "Goods" means every kind of movable property other than actionable claims and money.

> Money is necessarily excluded from the definition not only because it constitutes the price in exchange for which the goods are sold, but because it is governed by wholly different principles of law owing to its being currency. It is therefore not regarded as a chattel but as something sui generis. . . . It does however partake in a limited manner of the nature of a chattel when a definite sum is entrusted to another to use or lay out in a particular manner on behalf of the person who so entrusted it. In such a case the latter may treat the equivalent of the sum so entrusted as his property and not merely as a debt due to him from the person to whom he entrusted it. He may therefore follow it if it is lent or given away to another or otherwise dealt with contrary to his instructions. For instance he may claim as his own or obtain a charge upon any property purchased with it but when once it has passed in currency it cannot be followed: . . . see Pollock and Mulla's Commentary on the Indian Sale of Goods Act, p. 16.
>
> Money or cash paid into a Bank to a customer's account is a simple contract debt. The property in the particular coins paid in the Bank passes to the Banker who merely becomes bound to repay an equal amount. The relation of a Banker to a customer is therefore, so long as the customer's account is in fund, that of a debtor to his creditor, with a super added obligation on the Banker to honour his customer's cheques so long as the balance to the holder's credit is sufficient to meet them; . . . see Williams on Personal Property, 18th Edn., p. 255.

If an employee receives his pay and keeps the money in his own possession, the ownership of the money is with that man. If however he leaves a portion of his salary with his employer, or if the employer makes any contribution to make provision in his interest under a scheme of compulsory and to a large extent voluntary thrift, he cannot be said to be the owner of the money standing to his credit in the same sense as he is the owner of the money in his pocket. "Provident Fund" means a fund in which subscriptions or deposits of any class or classes of employees are received and held on their individual accounts. It also includes any contributions, that is, any amount credited in the Provident Fund by any authority administering the fund by way of addition to, a subscription to, or deposit or balance at the credit of an individual account in the fund: see S. 2, Cls. (e) and (b), Provident Funds Act, 1925. The moneys standing to the credit of a subscriber or depositor are not certain specific coins or promis-

1. Bancharam Majumdar v. Adyanath Bhattacharjee, (1909) 36 Cal 936=3 I C 492 (F B).

sory documents representing them earmarked and kept separately from the other moneys in the fund. The sum is only payable out of the Provident Fund. It is not entrusted to be used or laid out in a particular manner on behalf of the subscriber or depositor. It is a sum standing to the credit of any subscriber or depositor payable to him by reason of an obligation arising out of the rules of the fund in accordance with the conditions prescribed. Again under certain circumstances a succession certificate is necessary for collecting Provident Fund money after the death of the subscriber or depositor. In 39 C W N 117 (2) it was not disputed that the Provident Fund money was a debt within the meaning of Succession Certificate Act. It is very difficult to distinguish in principle any particular sum of money standing to the credit of a subscriber in a Provident Fund from a balance standing to the credit of the depositor in a Bank. The depositor to the fund cannot claim ownership to the particular coins which he deposits. The moneys which are deducted out of the pay of an employee or which are contributed by the employer are not certain specific coins which are in deposit with the employer. It is true that owner of a movable property may continue to be the owner though he may be deprived of its possession against his consent or may voluntarily part with its possession. Coins are no doubt movable properties. But the law puts a limitation on the ownership of money or coins in view of the inconvenience which would ensue if a valid title could not be obtained by its transfer. As soon as a man parts with the possession of the coins or the money and the money passes in currency it cannot be followed. If a man lends certain coins to another he cannot get back the identical coins which he lent, but he is entitled to claim equivalent of the coins so lent. In other words the money becomes a debt due to him from the person to whom he lent it.

I am therefore of opinion that the right of defendant 2 to the Provident Fund money was simply a right to get a definite sum out of the Provident Fund from the Dacca University arising out of an obligation created by the rules of the Provident Fund. His right to receive that money out of the fund is not the same as the right which he has in his cattle, clothes, coins, furniture, carriages and other tangible movable things in his possession. It is therefore a debt or actionable claim as defined in the Transfer of Property Act. The second question for determination is what is the nature of right which the plaintiff acquired by virtue of the assignment of the Provident Fund money by way of collateral security on 11th April 1926. S. 6, T. P. Act, lays down that

> Property of any kind may be transferred except as otherwise provided by this Act or by any other law for the time being in force.

An actionable claim is property within the meaning of the Transfer of Property Act: . . . see 14 Cal 241 (3) at p. 244. The transfer of an actionable claim is effected by the execution of an instrument in writing signed by the transferor and it is completed upon an execution of such instrument. Upon such transfer all the rights and remedies of a transferor vest in the transferee whether such notice of the transfer has been given or not : see S. 130, T. P. Act. This transfer includes not only an absolute assignment but also conditional assignment. An actionable claim may be transferred for securing the payment of an existing or future debt . . . See Illus. (ii), S. 130, T. P. Act. It is therefore clear that even if the transfer be not an absolute assignment but only a conditional one, the transferee stands in the shoes of the transferor and is entitled to sue the debtor for recovery of the debt in his own name without obtaining the transferor's consent to such a suit and without making him a party thereto (see Cl. 2, S. 130, T. P. Act). In 37 Bom. 198 (4) at p. 210, their Lordships of the Judicial Committee have observed that:

> The section covers transfers by way of security as well as absolute transfers. When a creditor 'purports to create a lien or a charge' on the debt due to him in favour of another person, the words 'lien or charge' had no meaning except as giving to the latter a right to recover the debt from the debtor. The transaction in reality is one whereby the owner of what

2. Atul Chandra Sen v. Sm. Kaunammal, 1935 Cal 271=155 I C 749=39 C W N 117=62 Cal 272.

3. Rudra Perkash Misser v. Krishna Mohan, (1887) 14 Cal 241.

4. Mulraj Khatau v. Viswanath Prabhuram Vaidya, (1913) 37 Bom 198=17 I C 627=40 I A 24 (P C).

in English law is called a chose in action transfers it to another.

Also 33 Bom 610 (5) at p. 628 and 34 Mad 53 (6). S. 134, T. P. Act, also contemplates a transfer of an actionable claim for the purpose of securing an existing or future debt. When an actionable claim is mortgaged or charged for the purpose of securing a debt, the assignee stands in the shoes of the assignor and is entitled either to realise the debt from the debtor or to sue him for recovery of the debt if the debtor does not pay it when it becomes due. The plaintiff therefore by virtue of the assignment in question acquired all the rights which defendant 2 had in the Provident Fund money. But the difficulty of the plaintiff does not end here. He is a legal practitioner and consequently by S. 136, T. P. Act, he is precluded from enforcing his right in Court. The third point for determination is whether the present suit is maintainable. By O. 2, R. 2, Civil P. C., an obligation and a collateral security for its performance must be taken to constitute but one cause of action.

A personal claim for the mortgage money under a mortgage and the enforcement of the security for the debt are to be regarded as one and the same cause of action. That provision (Explanation to O. 2, R. 2) is in marked distinction to the law of this country where a mortgagee had liberty to appoint a receiver under his deed to sue for the debt and to take proceedings for sale or foreclosure independently and at the same time. It is important therefore in considering the effect of the Code to bear in mind that its obvious intention is to establish a rule of law different from that accepted here . . . See 50 I A 115 (7) at p. 117.

It is conceded by the learned advocate for the respondent that the assignment was not a pledge. If the Provident Fund money was a movable property other than actionable claim, the assignment was the hypothecation of a movable property. The Contract Act is wholly silent on the hypothecation of movables. This Act made provision for absolute sale of goods and for pledges of goods. The Transfer of Property Act has not also made any provision for hypothecation of movables. From the mere silence of the legislature on the hypothecation of movables it is not to be inferred that such transactions are invalid in this country: See Ghose on Mortgage, Edn. 4, p. 108. In the case of hypothecation or mortgage of movables the remedy of the creditor or mortgagee is to foreclose the mortgage: see the case of 42 Cal 455 (8). In the case of 1933 Mad 241 (9), Madhavan Nair, J observed:

If a mortgagee of chattels is entitled for foreclosure quite as much as mortgagee of immovable property, I do not see any reason why a mortgagee of movable property is not entitled to a right of sale quite as much as the mortgagee of immovable property.

If therefore the Provident Fund money is not an actionable claim but a tangible movable property, the proper remedy of the plaintiff was to enforce that charge in the suit which he brought for recovery of the debt for payment of which the Provident Fund money was hypothecated. If however the assignment was only an assignment of an actionable claim by way of security he cannot claim any right on the basis of the said assignment as he is a legal practitioner. If he would not have been hit by S. 136, T. P. Act, he could recover the debt from the Dacca University and he could sue the Dacca University as well as the defendant who realised a portion of the Provident Fund money with notice of the assignment for recovery of the money due to him. He however did not do so. He elected to sue defendant 2 only on the basis of a hand-note obviously to avoid the bar under S. 136 and obtained a decree for the whole amount due on the promissory note against defendant 2 only. He attached the Provident Fund money in the hands of the University as a debt under the provisions of the Civil Procedure Code and realised under O 21, R 46 of the Code the balance standing to the credit of defendant 2 by execution. There cannot be any doubt that the plaintiff abandoned his rights under the deed of assignment in view of the legal difficulties when he instituted the suit on the hand-note against defendant 2 and got a decree for the whole amount due on that hand-note against defendant 2 personally. For the above reasons I am of opinion that the present suit is not maintainable The result therefore is that this appeal is allowed, the judg-

5. Ardesir Bejonji Surti v. Sirdar Ali Khan, (1909) 33 Bom 610=4 I C 804.
6. Ramaswami Pillai v. Muthu Chetti, (1911) 34 Mad 53=5 I C 834.
7. Kishan Narain v. Palamal, 1922 P C 412=72 I C 187=50 I A 115=4 Lah 32 (P C).
8. Mahamaya Debi v. Haridas Haldar, 1915 Cal 161=27 I C 400=42 Cal 455=20 C L J 183=19 C W N 208.
9. Basivireddi v. Kamaraju, 1933 Mad 241=142 I C 96=56 Mad 560=64 M L J 86.

ments and decrees of the Courts below are set aside and the suit is dismissed with costs throughout.

Henderson, J.—I agree.

S R. *Appeal allowed.*

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* A. I. R. 1935 Calcutta 760

NASIM ALI AND HENDERSON, JJ.

Bhalani Prosanna Lahiri and *another* —Plaintiffs—Appellants.

v.

Manindra Chandra Roy Choudhury and *others*—Defendants—Respondents.

Appeal No. 266 of 1933, Decided on 23rd August 1935, from appellate decree of Addl. Dist. Judge, 2nd Court, Rangpur, D/- 19th September 1932.

(a) Adverse Possession—Question is of legal conclusion on facts fo ..d.

The question whether possession is adverse is a question of legal conclusion to be drawn from the findings on simple facts: 19 *Cal* 253 (*PC*), *Foll.* [P 760 C 2]

*** (b) Adverse Possession—Trespasser not in possession for some years within statutory period—Mere intention to possession is not sufficient.**

Only the intention of the trespasser to possession without actual possession would not be sufficient in law to prove continuous possession of a trespasser when in fact he was not in possession for some years within the statutory period required for a claim of adverse possession: *Case law discussed.* [P 762 C 1]

*** (c) Adverse Possession—Trespasser discontinuing possession—His intention to return or not is immaterial.**

If in fact the trespassers discontinued their possession it is immaterial whether they intended to return or not. The question of intention is relevant only for the purpose of determining whether in fact the possession was discontinued. [P 762 C 1, 2]

Atul Chandra Gupta and *Jitendra Kumar Sen Gupta*—for Appellants.

Hiralal Chakravarti and *Shyama Das Bhattacharji*—for Respondents.

Nasim Ali, J.—This appeal arises out of a suit for possession of a plot of land marked A in the Commissioner's map on declaration of plaintiffs' zamindary right thereto. Plaintiffs' case is that the disputed land is a part of the mal lands of the village Kamal Kachhna of which they are the proprietors, that they were all along in possession of the same till they were dispossessed therefrom by an order of the criminal Court, under S. 145, Criminal P. C. The defence of defendants 1 and 2 is that the disputed land is rent free and that it was never in the possession of the plaintiffs or their predecessors. They also claim title by adverse possession for more than 12 years. The trial Judge held that though the disputed land was mal land of Kamal Kachhna, the defendants had a title of legal origin the exact nature of which was lost in antiquity. In this view the learned Judge did not consider it necessary to come to any finding on the question of adverse possession set up by the defendants. He accordingly dismissed the suit. On appeal by the plaintiffs to the lower appellate Court the learned additional District Judge had confirmed the decree of the trial Court on the ground that the plaintiffs' title to the disputed land as zamindars had been extinguished by adverse possession of the defendants for more than 12 years. Hence this second appeal by the plaintiffs:

The question whether possession is adverse or not is often one of simple fact, but it may be a conclusion of law or a mixed question.

It is a question of legal conclusion to be drawn from the findings on simple facts: 19 I A 48 (1).

The facts found are: (1) The disputed land is a vacant plot of land which was never under cultivation but was capable of possession; (2) the plaintiffs never exercised any acts of possession down to 1327 when possession was taken by them forcibly dispossessing the defendants; (3) no actual acts of possession were exercised on the land before 1313 B. S.; (4) the defendants stacked bricks on the disputed land in 1313 B. S. with a view to construct a building thereon; (5) the defendants fenced round the disputed land in 1315 B. S. and the fence was in existence for a year or so; (6) two corrugated huts were erected by the defendants on the disputed land in 1315 B. S. but they were removed in Chaitra 1316 B S.; (7) a pathshala ghur was erected on the south-west corner of the disputed land in 1316 B. S. with the permission of defendant 2; (8) the defendants successfully opposed in Agrahayan 1316 B. S. the selection of the disputed land as a site for a proposed boarding house for Batra Khettrya students of Government H. E. School at Rangpur; (9) the defendants cleared jungles on the disputed land in 1319 B. S. in pursuance of a notice issued by the Municipality;

1. Luchmeswar Singh v. Monwar Hossain, (1892) 19 Cal 253=19 I A 48 (PC).

(10) defendants realised rent from a circus party for 15 days in Bhadra 1321; (11) temporary college hostel was erected on the disputed land with the permission of defendant 1 in 1324 and was removed in 1325; (12) by an amicable partition the disputed land was allotted to the share of the defendants and masonry boundary pillars were erected along the northern and eastern limits of the disputed land in 1325; (13) defendant realised rent from a circus party for occupation of the disputed land in Chaitra and Baisakh 1326 B. S.; (14) Mukunda's jatra was held on the disputed land in Falgoon or Chaitra 1326 with the permission of defendant 1; (15) A circus company attempted in Sravan 1327 B. S. to hold performance on the disputed land by taking settlement from defendants at the rent of Rs. 5 per day, but the performance could not be held on account of an injunction from the Collector and (16) the defendants are paying Municipal taxes since 1323 B. S. The question is whether these facts establish adverse possession of the defendants for the statutory period. The following principles are well established:

(a) In order to establish adverse possession it must be shown that possession was adequate in publicity, in continuity and in extent: 27 I A 136 (2).

(b) It is sufficient that the possession should be overt and without any attempt at concealment so that the person against whom time is running ought if he exercises due vigilance to be aware what is happening: 61 I A 78 (3).

(c) It is not necessary in order to establish adverse possession that proof of acts of possession should cover every moment of the requisite period . . . The facts of possession may be continuous though actual acts of possession are at considerable intervals. How many acts will infer the fact is a question of proof and presumption independent of prescription. The nature of the requisite possession must necessarily vary with the nature of the subject possessed. The possession must be the kind of possession of which the particular subject is susceptible : 61 I A 78 (3).

A series of isolated acts of trespass with no continuity of possession would fall short of the requisite and if in fact there has been interruption, possession during such interruption must be deemed to be with the person having the lawful right. It must also be actual as opposed to ideal possession: 85 I C 594 (4).

If a person enters upon the land of another and holds possession for a time, and then without having acquired title under the statute abandons possession the rightful owner on the abandonment is in the same position in all respects as he was before the intrusion took place. There is no one against whom he can bring an action. He cannot make an entry upon himself. There is no positive enactment nor is there any principle of law which requires him to do any act, to issue any notice, or to perform any ceremony in order to rehabilitate himself. No new departure is necessary. The possession with intruder ineffectual for the purpose of transferring title ceases upon its abandonment to be effectual for any purpose. It does not leave behind any cloud on the title of the rightful owner or any secret process at work for the benefit in time to come of some casual interloper or lucky vagrant.'. . . The statute applies not to want of actual possession by the plaintiff but to cases where he has been out of and another in possession for the prescribed time. There must be both absence of possession by the person who has the right and actual possession by another whether adverse or not to be protected to bring the case within the statute: (1881) 13 A C 793 (5).

When possession has been abandoned the civil possession is not only out of the trespasser but is vested again in the owner. This result seems to depend on the failure of the physical element in possession and it is not necessary to refer specially to the intention. The possessor has in fact discontinued his occupation whether he intends to return or not. Lightwood on Possession of Land, para. 61.

'But in determining whether there had been discontinuance of possession intention cannot be altogether be left out of account. For after all the adverse character of possession must be based to a certain extent on the intention to exclude the real owner: 85 I C 594 (4) cited above.

The doctrine of constructive possession cannot be invoked in favour of a wrongdoer so as to enable him to obtain thereby a title by limitation: 29 I A 104 (6).

(d) Title by adverse possession is strictly limited to what has been actually possessed by the trespasser. The maxim *tantum prescriptum quantum possessum* is rigorously applied to him. The application of this general rule however depends on the facts of each particular case. Possession is a question of fact, and extent of possession may be an inference of fact : 58 I A 29 (7).

2. Radhamoni Debi v. The Collector of Khulna, (1900) 27 Cal 943=27 I A 136=4 C W N 597=7 Sar 714 (P C).
3. Secy. of State v. Debendra Lal, 1934 P C 23=147 I C 545=61 I A 78=61 Cal 262 (P C).
4. Abhoy Sankar v. Satyendra Prosanna, 1925 Cal 981=85 I C 594.
5. Trustees, Executors and Agency Co. v. Short, (1881) 13 A C 793=58 L J P C 4=59 L T 677=37 W R 433=53 J P 132.
6. Secy. of State v. Krishnamoni Gupta, (1902) 29 Cal 518=29 I A 104 (P C).
7. Nageshwar Bux Roy v. Bengal Coal Co., 1931 P C 186=58 I A 29=130 I C 315=10 Pat 407 (P C).

Act of possession over a part of any immovable property may no doubt in many cases be evidence of de facto possession of the whole. But possession by a wrongdoer over a part (except where there is a clear connexion and interdependence between the part actually possessed and the whole of which it is a part) must be confined to the part of which he is actually in possession: 24 Cal 256 (8).

The contention of Mr. Gupta on behalf of the appellants is that the findings of the learned Additional District Judge about the continuity and extent of defendants' possession for the statutory period is based mainly upon the presumption of constructive possession in favour of the defendants during the years in which they were not in actual possession. This contention is supported by the following passage in the judgment of the learned Judge:

Once possession is acquired it is possessed without actual possession. Possession is the intention to hold together with power to hold; in other words the physical possibility of possessing the property according to will.

These observations of the learned Judge indicate that he was of opinion that only the intention to possession without actual possession would be sufficient in law to prove continuous possession of a trespasser though in fact he was not in possession for some years within the statutory period. This view is clearly opposed to the principles which have been indicated above. Again the findings of the learned Judge show that a pathsala was in existence on a small portion of the disputed land. It is not clear from the judgment of the learned Judge whether the defendants exercised any acts of possession over the remaining portion of the disputed land from 1317 to 1320 and 1322 to 1323. It has not been found whether there is any close connexion and inter-dependence between the portion on which the pathsala stands and the whole of the disputed land of which it is part. The finding of the learned Judge, that the defendants were in continuous possession of the whole of the disputed lands from 1314 to 1327, appears to me to have been influenced to a large extent by his view that a trespasser can rely, for acquiring title by adverse possession on ideal or constructive possession in the land trespassed upon, though he has not in fact possessed it for some years during the statutory period. If in fact the defendants discontinued their possession it is immaterial whether they intended to return or not. The question of intention is relevant only for the purpose of determining whether in fact the possession was discontinued. I am not satisfied in the present case that the learned Judge approached the question of adverse possession from the proper point of view. Again the trial Court found that the defendants had a title of legal origin, the exact nature of which was lost in antiquity. The learned Judge has not come to any clear finding on this point. I am therefore of opinion that the case should be reheard by the lower appellate Court. The result therefore is that this appeal is allowed. The judgment and decree of the lower appellate Court are set aside and the case is sent back to that Court for re-hearing of the appeal according to law. Costs will abide the result.

Henderson, J.—I have nothing to add with regard to adverse possession, but desire to say something on the other point at issue in this appeal whether the defendants adduced evidence which would entitle a Court of fact to infer that their possession must have had a lawful origin and to pronounce in favour of a lost grant. As must almost be inevitable, in view of the pleadings, the evidence was chiefly directed to show assertions of title and acts of possession. It is clear that evidence which might be quite valueless for the purpose of establishing adverse possession, may throw considerable light on the other question at issue. The learned Subordinate Judge delivered a most careful judgment and came to the conclusion that the defendants had established a lost grant. In dealing with adverse possession the learned Additional District Judge—in my opinion quite rightly did not rely upon anything previous to the year 1313.

But it is obvious that in dealing with the other point great importance attaches to the evidence that the defendants were in possession of the disputed land for many years through Mohesh, who in his turn sublet it to the Tushbandar Estate, and to the evidence with regard to the difficulties which the defendants experienced in inducing the Court of Wards to surrender the plot when they

8. Mohini Mohan Roy v. Promoda Nath Roy, (1897) 24 Cal 256=1 C W N 304.

themselves required it for the construction of their own residence.

In my opinion it cannot be questioned that there was ample evidence on the record to justify the finding of the trial Court with regard to a lost grant. If the Judge sitting in appeal had on a consideration of that evidence, affirmed that judgment I should not have been prepared to interfere with his conclusion in second appeal. The real question for our determination on that part of the case is whether he did so affirm the original judgment. I must confess that on first reading the judgment I reached the conclusion that there was no finding on this point at all. But on re-perusing it, it appears to me that the learned Judge did intend to affirm that finding. The legal advisers of the appellants also apparently took this view (vide ground No. 1 in the petition of appeal). But in view of the halting and at times unfortunate language used by the learned Judge it is impossible to feel any certainty on this point. As my learned brother is strongly of opinion that there is no real finding on the point, I consider that the most satisfactory course is to direct a re-hearing of the appeal on both points. I therefore concur in the order which he proposes to make.

S R. *Appeal allowed ; Case remanded.*

A. I. R. 1935 Calcutta 763

M. C. GHOSE, J.

Ashutosh Choudhury — Plaintiff — Appellant.

v.

Ali Sheikh and *others*—Defendants—Respondents.

Appeal No. 1372 of 1933, Decided on 27th June 1935, from appellate decree of Dist. Judge, Murshidabad, D/- 3rd March 1933.

Bengal Tenancy Act (1885), S. 153—Suit for enhancement of rent — Tenant denying title—Appeal under S. 153 is competent.

Where in a suit the landlord claimed enhancement of rent and the defendant denied the title of the landlord :

Held : an appeal under S. 153 lay.

[P 763 C 2]

Urukramdas Chakravarti, *Prafulla Kumar Sarkar* and *Pramatha Nath Mukherji*--for Appellant.

Byomkesh Basu—for Respondents.

Judgment.—This is an appeal by the plaintiff in a suit for arrears of rent and for enhancement of rent. The 1st Court found that the plaintiff sued as shebait of a certain idol but that Ex. 1-a showed that the defendants held the jama under him personally and that the rent is to be paid to him personally. As he sued as a shebait of an idol the first Court dismissed the suit. As to the question of enhancement the 1st Court held on the evidence that the enhancement should have been by one and half anna per rupee from the year 1340 B. S. The plaintiff appealed against the dismissal of the suit. The Court of appeal below held that the plaintiff having sued as a shebait he being really the dakhalikar his suit could not succeed. Upon hearing the learned Advocates on both sides it appears that the Courts below misread the settlement record Ex. 1-a the record of the defendants, which shows that the defendants are the owners of the land and they are liable to Ashutosh Choudhury. The figure (2) before Ashutosh Choudhury shows that the khatian 2 represents the interest of Ashutosh Choudhury. Khatian 2 is Ex. 1 in the case. (After stating the entry in the Khatian in Bengali, their Lordships proceeded). From this it is urged by the learned Advocate for the respondent that Ashutosh is the dakhalikar but not the shebait. He cannot explain who then is the shebait of the Thakur.

The real meaning of the Bengalee words is clearly that Ashutosh Choudhury dakhalikar is the shebait of the Thakur. If some other person was the shebait his name would have been put down there. The plaintiff is clearly entitled to a decree. It was urged that no appeal lay under S. 153. The argument is not correct, as the defendant denied the title of the plaintiff and also the plaintiff had applied for enhancement. The plaintiff's suit should be decreed as regards the arrears claimed by him. On the question of enhancement the learned District Judge came to no finding at all. Upon hearing the learned Advocate it appears that an enhancement is due according to the Bengal Tenancy Act. Considering the depressed state of the market enhancement is allowed at 1 anna in the rupee from the year 1340 B. S. The appeal is allowed. The plaintiff-appellant will get his costs in all the Courts. In view

of the decision in the appeal no separate order is necessary on the application.

B.D. *Appeal allowed.*

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* A. I. R. 1935 Calcutta 764

R. C. MITTER, J.

Kiran Chandra Pramanik—Plaintiff—Appellant.

v.

Purna Chandra Pramanik and *others*—Defendants—Respondents.

Appeal No. 1512 of 1933, Decided on 29th July 1935, from appellate decree of Addl. Sub-Judge, Khulna, D/- 8th June 1933.

*** (a) Court-fees—Non-payment of — Amendment of plaint allowed—Plaintiff directed to give value of property and put in deficit court-fee — Non-compliance with order — Suit dismissed for default on rejecting permission to withdraw under O. 23, R. 1, Civil P. C. — Proper order is rejection of plaint — Fresh suit is not barred by O. 23, R. 1, O 9, R. 9 or O. 2, R. 2, Civil P. C.**

On an application by the plaintiff an amendment of plaint by addition of a relief for possession of the suit property was allowed and he was directed to give the value of the property to put in the deficit court-fee in view of the relief claimed. On his failure to comply with the order the Court dismissed his suit in default, on rejecting permission to withdraw under O. 23, R. 1, Civil P. C.:

Held : that the proper order in the circumstances would not be a dismissal of the suit, but the rejection of the plaint under O. 7, R. 11, Civil P. C.; [P 765 C 2]

Held also : that the effect of the order of dismissal would be the same if the Court had passed the order in correct form namely an order rejecting a plaint. A fresh suit was therefore not barred either by O. 9, R. 9, O. 23, R. 1 or O. 2, R. 2, Civil P. C. [P 765 C 2, P 766 C 1]

*** (b) Court-fees—Non-payment of—Rejection—Plaint can be rejected even after registration—Remand of suit after hearing by trial Court and appellate Court is of no moment.**

A plaint can be rejected at any stage of the suit even after its registration : 12 *All* 553 ; 27 *Cal* 376 and 1922 *Cal* 506, *Foll.* [P 765 C 2]

The fact that the suit was registered, heard by the trial Court, and by the appellate Court and remanded, would be of no moment, for a plaint not correctly valued and stamped can be rejected under O. 7, R. 11, Civil P. C. at any stage of the suit, the said provisions being mandatory. [P 765 C 2]

Dr. Mukherji and *Rajendra Nath Das*—for Appellant.

Hemendra Chandra Sen and *Mukunda Behari Mullick*—for Respondents.

Judgment.—The property in suit, which is a plot of land in the town of Khulna, twelve and half cottas in area, is a part of a bigger block of 25 cottas, which originally belonged to defendant 1 and one Krishnadhone Pramanik in equal shares. On 8th January 1927 defendant 1 sold his undivided eight annas share in the block of 25 cottas to the plaintiffs, who thereafter instituted a suit for partition against Krishnadhone Pramanik. That suit terminated on 8th January 1929 with a compromise decree. A commissioner of partition was appointed and the block was partitioned by metes and bounds; the northern half with an area of 12½ cottas was alloted to Krishnadhone and the southern half with an area of 12½ cottas was allotted to the plaintiff. While the partition suit was pending defendant 1 sued defendant 2 for arears of rent on the allegation that the latter was a tentant under him of 10 cottas of land out of the said block of 25 cottas at a rental of Rs. 5-8-0. This 10 cottas of land has fallen to the plaintiff's allotment. The said suit was decreed ex parte on 25th July 1928. The plaintiff's case is that this was a false suit, based on a fictitious tenancy, instituted with a view to deprive him of the full benefit of his property, and the decree passed therein is a collusive one. Prima facie it is a suspicious proceeding, but as the merits of the case have not been investigated nothing need be said further about it at this stage.

Then followed certain proceedings between the plaintiffs and the defendants to this suit which have complicated matters, by reason of the misguided advice which the plaintiff received and by the Court omitting to make orders in strict conformity with the rules laid down in the Civil Procedure Code; but, in my judgment, if the substance and not the form of those orders, which I will hereinafter notice, be looked into, there is no difficulty in answering the question as to whether the suit out of which this appeal arises is maintainable or not. The proceedings which I have mentioned above are the proceedings of a title suit instituted by the plaintiff of the present suit against the defendants of this suit on 19th November 1928 while the partition suit was pending. That suit was numbered Title Suit 644 of 1928 and on transfer as Title Suit 558 of 1928. In that suit the plaintiff after reciting his title, and the fact that

the aforesaid partition suit was pending stated that defendant 1 had obtained a collusive rent decree against defendant 2. He however prayed for a declaration of his title and for a declaration that the tenancy of defendant 2 under defendant 1 at a Jama of Rs 5-8-0 was a fictitious one and for injunction for restraining defendant 1 from executing his rent decree against defendant 2. The last mentioned prayer became unnecessary in the course of the trial as it was said that defendant 2 had satisfied the said decree out of Court. He did not value the lands in suit and pay ad valorem court-fee stamp but affixed to his plaint a court-fee stamp of Rs. 20 only. The Munsiff gave him a decree in terms of his prayer on 10th August 1929, that is granted him a declaration that the alleged tenancy of defendant 2 under defendant 1 was a fictitious one. The defendants preferred an appeal from the said decree being Title Appeal No. 393 of 1929. The Subordinate Judge by his judgment dated 30th May 1931 held that the suit as framed was not maintainable; the plaintiff being out of possession was bound to ask for recovery of possession, but as the plaintiff had made an application for amendment of his plaint for including a prayer for possession, while his suit was pending in the trial Court, he remanded the case to the trial Court. The order as made is in the following terms :

It is accordingly ordered that the appeal be allowed and the decision of the lower Court be set aside and that the suit be remanded to the lower Court for fresh trial after amendment of the plaint as prayed for by the plaintiff by his petition of 12th July 1929, and upon payment of the proper amount of Court-fees by him. Costs in this Court and in the lower Court will abide the final result.

Having regard to the fact that the plaint contained a prayer for permanent injunction whether the Subordinate Judge took a correct view of S. 42 of the Specific Relief Act, may be open to question in view of the decision of this Court in 26 C W N 206 (1), but that question need not be considered now. On 15th June 1931 the records were received by the trial Court and on 15th July 1931 the application for amendment of the plaint was allowed, and the plaintiff was directed to give the proper value of the disputed property within a week and to put in the deficit court-fee. On 22nd July 1931 the plaintiff took no steps in those directions, but no order could be passed on that date as the presiding officer was absent and the case was adjourned to 25th July 1931. On the adjourned date the plaintiff put in an application for withdrawing the suit with liberty to bring a fresh suit on the same cause of action, but that application being refused on 3rd August 1931, the plaintiff taking no further steps, the suit was dismissed for default with costs to the defendants including costs of the appellate Court.

There can be no doubt that the default of the plaintiff consisted in not giving the correct valuation and paying the deficit court fee that would be due on the valuation being corrected. There could be at this stage no other default, because till these were done the suit could not be further proceeded with. The proper order in the circumstances would not be a dismissal of the suit, but the rejection of the plaint under O. 7, R. 11 of the Code; and I must hold that the effect of the order dated 3rd August 1931 should be the same if the Court had passed the order in correct form, namely an order rejecting a plaint. There can be no doubt that a plaint can be rejected at any stage of the suit even after its registration: 12 All 553 (2), 27 Cal 376 (3) and 49 Cal 880 (4); and the fact that the suit was registered, heard by the trial Court, and by the appellate Court and remanded, would be of no moment, for a plaint not correctly valued or stamped can be rejected under O. 7, R. 11 of the Code at any stage of the suit, the said provisions being mandatory.

The present suit was filed on 22nd June 1931. The plaint is a replica of the plaint of Title Suit No. $\frac{644 \text{ of } 1928}{558 \text{ of } 1929}$ except that in para 12, it is stated that the partition suit terminated in a decree and the twelve and half cottas of land described in the plaint was allotted

1. Joy Narain Sen v. Srikantha Roy, 1922 Cal 8=65 I C S=33 C L J 592=26 C W N 206.

2. Kishun Singh v. Sabdal Singh, (1890) 12 All 553=1890 A W N 185.
3. Brahmomayi Debi v. Andi Si, (1900) 27 Cal 376.
4. Radha Kanta v. Debendra Narayan, 1922 Cal 606=70 I C 101=49 Cal 880=38 C L J 74=27 C W N 566.

to the plaintiff. Objections were taken to the maintainability of the suit on the ground that it was barred under O. 9, R 9, O. 23 R. 1 (3), O. 2, R. 2 and on the ground of res judicata. In the view that I have taken of the effect of the order dated 3rd August 1931 passed in Title Suit No. $\frac{644 \text{ of } 1928}{558 \text{ of } 1929}$ I do not see how O. 9, R. 9, O 2 or O. 23, R. 1 (3) of the Code can have any possible application. O. 7, R. 13 in express terms gives the plaintiff in such a case a right to sue again on the same cause of action. There is no scope for the application of the doctrine of res judicata also even with regard to the findings arrived at by the appellate Court in Title Appeal No. 393 of 1929 If any authority is needed the judgment of Chandavarkar, J. in 35 Bom 38 (5), furnishes one, but I am of opinion that O. 7, R. 13 of the Code furnishes a complete answer.

I accordingly hold that the present suit is maintainable. The result is that the judgments and decrees passed by the lower Courts are set aside and the case remanded to the Court of first instance to be decided on the other issues in the case save and except issues 2 and 4, on which issues my decision is to be regarded as final and in favour of the plaintiff. The appellant will have all costs of the Courts below incurred up to date, save and except the costs of Court-fees paid on the plaint. Further costs and costs of this Court to abide the result. Application for leave to appeal under the Letters Patent asked for is refused.

S.R. *Appeal allowed.*

5. Irawa v. Satyappa, (1911) 35 Bom 38=7 I C 967.

A. I. R. 1935 Calcutta 766

GUHA AND LODGE, JJ.

Bibhuti Bhusan Dutta and *another* — Defendants—Appellants.

v.

Uday Chand Mahatap — Plaintiff — Respondent.

Letters Patent Appeal No. 8 of 1934, Decided on 24th July 1935, against judgment of M. C. Ghose, J., D/- 11th June 1934.

Res judicata—Suit by patnidar involving decision on rate of rent — Zamindar and Government made parties — Agreement by patnidar with zamindar to pay latter Government revenue plus half that amount as profits—No issue on question agreed upon because of agreement — Court deciding revenue payable by patnidar — Government's appeal — Zamindar not party — Revenue amount enhanced — Subsequent suit by zamindar for rent at enhanced rate—Question of rate of rent raised — Patnidar pleading previous judgment as res judicata—Previous judgment held not res judicata as amount of rent payable to zamindar was not directly and substantially in issue in that suit.

A suit was instituted by a patnidar and the disposal thereof involved a decision on the rate of rent payable by him. The zamindar and the Government were parties to the suit. During the preliminary stage the patnidar and the zamindar entered into an agreement whereby the former agreed to pay the latter the amount of the Government revenue plus half that amount as profits. No issue was framed by the Court on the question agreed upon as it was disposed of by the agreement. A certain amount was fixed by the Court as the amount of revenue payable by the patnidar, but on appeal by the Government, to which the zamindar was not a party the amount of revenue payable by the patnidar was enhanced. Subsequently the zamindar sued the patnidar for rent at the enhanced rate and the rate of rent payable was disputed. The patnidar pleaded that the judgment in previous suit was res judicata :

Held : that the question of rent payable to the zamindar by the patnidar was not directly and substantially in issue in that suit; hence the judgment in that suit did not operate as res judicata to the question in issue. [P 768 C 2]

Rajendra Chandra Guha and *Mahendra Kumar Ghose*—for Appellants.

Sarat Chandra Basak and *Bijon Kumar Mukerji*—for Respondent

JUDGMENT IN SECOND APPEAL

M C. Ghose J.—This is an appeal by the plaintiff zamindar in a suit for rent against the defendant patnidar in respect of certain resumed chowkidari chakran land. The only point at issue is what is the rate of rent payable by the defendant to the plaintiff. The patni was created in 1847. In 1899 the land of which the rent is now in dispute was resumed by Government as chowkidari chakran land and assessed to land revenue. Thereafter in 1905 the then patnidar Anath Bandhu Banerjee took settlement of the resumed land from the plaintiff agreeing to pay the revenue assessed by the Government and also a half of that amount as profit to the zamindar. The revenue assessed by the Government was Rs. 25-7-0. According to the kabuliyat of 1905 the plaintiff claimed that the defendant is liable to pay rent at the rate of Rs. 38-2-6. The defendant who purchased the patni in 1916 at an auction sale under Regn. 8

of 1819 pleaded that the greater part of the land which was resumed as chowkidari chakran land was really mal land of the patnidar and that on a correct view the land liable to resumption by Government would be found to be about 1/3rd of what was actually resumed and the Government revenue would accordingly be reduced. The defence has relied on the decree of a suit which was instituted in 1918 by the defendant patnidar against the Secretary of State, the plaintiff zamindar and certain other persons in which the claim was that of 34 bighas resumed by Government; about 24 bighas odd were mal lands of the patni and that the amount due to the Government for the chowkidari chakran lands would be only about Rs. 8. The trial Court found on a consideration of the evidence that the patnidar was liable to pay only Rs. 9.3.0 per annum as Government revenue on the resumed lands. As to the rent payable to the plaintiff zamindar it was agreed between the parties in the trial Court that the plaintiff would be entitled to get from the patnidar the amount due as Government revenue plus half of that sum as profit of the plaintiff. Against that decision, holding that the Government revenue on the resumed lands was Rs. 9-3-0 only, there was an appeal by the Secretary of State, and the District Judge Mr. Cammiade by his judgment dated 4th December 1922 allowed the appeal of the Secretary of State and held that the land revenue due was Rs. 25-7-0.

In second appeal this Court reversed the decree of the Court of appeal below and remanded the appeal for re-hearing. The appeal was re-heard by Mr. B. K. Basu, District Judge, who by his judgment dated 18th August 1928 allowed the appeal of the Secretary of State and held that the land revenue payable was Rs. 25-7-0. The zamindar did not appear in that appeal. The patnidar made a second appeal to the High Court. The Secretary of State alone defended the appeal. The zamindar did not appear. The High Court by judgment dated 16th December 1930 upheld the decree of the District Judge and dismissed the appeal as against the Secretary of State. The High Court however passed the following order:

> The appeal in the lower appellate Court was made by the Secretary of State alone. The other defendants did not prefer any appeal before the District Judge and therefore they are not bound by the decree of the Subordinate Judge.

The Court of appeal below held that as the trial Court in the suit of 1918 found the amount of revenue payable to the Government was Rs. 9-3-0 the amout of rent payable ty the plaintiff was Rs. 9-3-0 plus half of the amount, that is, Rs. 13-12-6 and that the plaintiff was not entitled to rent at the rate of Rs. 38-2-6 as claimed. It is urged on behalf of the plaintiff that the learned Subordinate Judge was in error in holding that the observation of the High Court in the judgment of 16th December 1930 is res judicata in this matter, that on a proper perusal of the judgment of the trial Court in the suit of 1918 it would be found that the matter is not res judicata, for the question of rent payable by the defendant to the plaintiff was not directly in issue in that suit. There it was agreed between the patnidar and the zamindar that the rent payable by the defendant patnidar to the plaintiff zamindar would be made up of two sums : first, the amount payable as revenue to the Government for the chowkidar chakran lands ; and secondly 50 per cent of that sum as profit to the zamindar. The issue between the patnidar and the Secretary of State was as to the amount of land revenue. The trial Court decided that the land revenue payable to Government was Rs. 9-3-0. Thereupon the trial Court decided that the rent payable to the plaintiff zamindar was Rs.9-3-0 plus half of Rs. 9-3-0=Rs. 13-12-6. The zamindar was content with that decree ; it was the Secretary of State who appealed and on his appeal the land revenue payable was decided to be Rs. 25-7-0. Can the patnidar be allowed to plead that it does not matter that the Secretary of State has got it decreed that the land revenue payable is Rs. 25-7-0, that inasmuch as the zemindar did not join in that appeal, he is liable to pay only Rs. 13-12-6 per annum to the zamindar ? I am clearly of opinion that such a plea of the patnidar cannot be accepted.

The agreement between him and the zamindar in the trial Court was that he would pay the zamindar the amount of land revenue plus half of that sum. According to that agreement as soon as the

Secretary of State got the decree that he was entitled to Rs. 25-7-0 as land revenue, the patnidar became liable to the zamindar for Rs. 25-7-0 plus half of Rs. 25-7-0=Rs. 38-2-6. The observation of the High Court quoted above, cannot, in my opinion, operate to dissolve the agreement made by the patnidar with the zamindar. As between him and the zamindar there was in the suit of 1918 only one issue relevant to the matter now in dispute, viz., issue 9: "Are the plaintiffs bound to pay any extra amount to defendant 7 for chowkidari chakran lands? If so, how much?" and the decision was by agreement of the parties. The issue that was highly contested was issue 8: "If the 'Ga' lands of the plaint are mal lands what would be the assessment on the chowkidari chakran lands?" The amount of rent payable by the patnidar to the zamindar was not a matter directly and substantially in issue in that suit. The plaint in the suit contained amongst others the following prayers (cha):

That it be declared that the lands of Sch. Ga appertain to mal lands of Lot Harigram, and that they are not chakran lands, and that neither the Government nor the zamindar is entitled to receive anything from the plaintiff in respect of the said lands and that on account of the said lands the plaintiff was not liable to pay anything either to the choukidari fund or to the zamindar,

and (cha)

that it should be held that on account of the lands which are really chakran lands after excluding the lands of Sch. Ga the plaintiffs are only liable to pay Rs. 8-6-16 gandas to the choukidari fund and that in place of Rs. 25-7-0 fixed by Government the plaintiff is liable to pay Rs. 8-6-16 gandas only and that anything in excess thereof neither the Government nor the zamindar are entitled to claim or realize from the plaintiff.

The Secretary of State who was interested in the amount of land revenue contested the suit and made an appeal against the decree of the first Court. The zamindar was not directly interested in the amount of land revenue, for it was his business merely to collect it from the patnidar and pass it on to Government, getting a certain profit for doing the work. No doubt his profit varied according to the amount of the land revenue. In my opinion the question of the amount of land revenue was directly and substantially in issue between the patnidar and the Secretary of State; it was not directly and substantially in issue between the patnidar and the zamindar. The zamindar took up the position that he was entitled to get from the tenant the land revenue payable to Government plus 50 per cent of the same and to this position the defendant did not take any objection in the trial Court or the first appellate Court. I find that the suit is not barred by the principle of res judicata. It was also urged by Dr. Basak on behalf of the zamindar appellant, that the High Court judgment of 1930 is not evidence against him, on the ground that the zamindar was not properly made a party in that appeal. The zamindar, Maharaja Adhiraj of Burdwan, was summoned as a respondent by name, but long before the hearing of the second appeal his estate was taken charge of by the Court of Wards, and under S. 51, Court of Wards Act, 1879, the Manager of the Wards' property should have been summoned as next friend or guardian for the suit. The argument appears to be well founded. In the present case the defendant did not adduce any evidence to show how the rent admitted by him was arrived at. According to the kabuliyat of 1905 he is liable to pay to the plaintiff the amount of Government revenue Rs. 25-7-0 and half of it, that is, in all Rs. 38-2-6. The appeal is allowed with costs in all the Courts. Leave to prefer an appeal under the Letters Patent is allowed.

[On appeal under the Letters Patent their Lordships delivered the following]

Judgment.—The facts of the case giving rise to this appeal have been stated in detail in the judgment of our learned brother, M. C. Ghose, against which this appeal is directed. The only question for consideration in the appeal is whether the learned Judge is right in his conclusion that the suit out of which the appeal arose was not barred by the principle of res judicata. It was contended on behalf of the defendants-appellants that the judgment in Title Suit No. 30 of 1918 in the Court of the Subordinate Judge of Burdwan, dated 30th September 1920, operated as a bar to the question of rate of rent payble by the defendants to the Burdwan Raj Estate. This plea of res judicata thus raised wholly ignores the position created by the fact that at the trial of the suit to which reference has been made above, it was agreed by the parties concerned that the plaintiff, the Burd-

wan Raj Estate, would be entitled to get the amount due as Government revenue plus half of that amount as profit of the plaintiff. On the agreement of the parties, there was no issue joined on the question agreed upon; and the suit was tried upon other issues. Reliance was placed on the side of the appellants on an observation contained in the judgment of this Court dated 16th December 1930, in the appeal arising from the suit of 1918; but as has been observed by Ghose, J., that observation could not operate to dissolve the agreement of parties, on which the trial Court proceeded. In the above view of the case before us, we have no hesitation in affirming the judgment of our learned brother Ghose, J. The appeal is dismissed with costs.

S.R. *Appeal dismissed.*

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* A. I. R. 1935 Calcutta 769

R. C. MITTER, J.

Nanu Ram Pokharmal Agarwala — Plaintiff—Appellant.

v.

Hedayet Ali Ahammad and *another*— —Defendants—Respondents.

Appeal No. 2205 of 1932, Decided on 1st August 1935, against decree of Sub-Judge, Jalpaiguri, D/- 2nd June 1932.

*** Contract Act (1872), S. 178 (as before amendment of 1930) — 'Possession,' meaning—Pledgor's possession for limited purpose —Delivery of articles pledged to creditor, as security, is not valid pledge.**

The word 'possession' used in S. 178 means 'unqualified possession.' [P 770 C 1]

When the alleged pledger is put in possession of the goods by the owner and is asked to retain possession for a specified and limited purpose, delivery given by him of the goods to his creditor by way of security does not constitute a valid pledge: *Case law referred*; 12 *Beng L R* 42, *Rel on*; 1934 *P C* 246, *Dist*; 1920 *Cal* 421, *Foll.* [P 770 C 1]

Dr. Basak & Rajendra Bhusan Bakshi —for Appellant.

Rupendra Narayan Roy Chaudhury and *Farhat Ali*—for Respondents.

Judgment.—Defendant 2 is a Deputy Magistrate. He was under orders of transfer from Dinajpur to Barisal. At the time he left for Barisal he left his wife's ornaments with his brother, defendant 1, for safe custody. His brother was then living in joint-mess with him. On 28th Chaitra 1335 B.S. corresponding 11th April 1929, defendant 1 took a loan of Rs. 600 from the plaintiff and delivered to the latter the said ornaments as security. The loan was taken by the defendant for his own needs. Subsequently defendant 2 instituted criminal proceedings against his brother, defendant 1. In the course of the said proceedings the ornaments were taken away from the plaintiff by the police and deposited with the Sadar Sub-divisional Magistrate of Jalpaiguri.

The plaintiff has instituted this suit to recover his dues from defendant 1. He has also prayed for recovery of his dues by sale of the said ornaments. He made defendant 2 a pro forma defendant, in order that the decree may be passed in his presence. Defendant 2 only appeared and contested the suit. He contended that there was no valid pledge and resisted the plaintiff's prayer for sale of the ornaments. Both the Courts below have upheld the contention of defendant 2 and have only given a personal decree against defendant 1. The plaintiff preferred this appeal and contends that he has the rights of a pledgee. The case depends upon the construction of S. 178, Contract Act, as it stood before the amendment of 1930. The findings of the Courts below are that the plaintiff acted bona fide and the proviso to that section does not apply. The only question therefore is whether defendant 1 had "possession" within the meaning of that section. There is marked distinction in law between possession, and detention or bare custody. One element is no doubt common in both these legal concepts, namely physical control over the thing. To constitute possession there must be an additional element, namely the animus or intention. Whether the animus must be what is called animus domini (Savigny) or something less, namely an intention to exclude other, not necessarily the owner also, is a matter of controversy (Holmes on Common Law Lecture VI). But it is quite clear that a servant has no possession in the eye of the law. That may be due to the imprints left by the abolished system of slavery. The cases where a servant delivered goods of his master as security for a loan taken by him therefore stand on a different footing from the cases where goods have been pledged by a person who had obtained them under a hire purchase system. The lat-

ter has in my judgment possession. A gratuitous bailee has also possession. If such person deliver goods to their creditors by way of security, left to myself I cannot see why there would not be a valid pledge, provided the other elements of S. 178 are present. I agree with much of what Lort-Williams, J., has said in his judgment delivered in 56 Cal 367 (1) and I would have had no hesitation in acting upon the principles formulated therein, had the matter been res integra.

But the matter, in my judgment, is settled by a long series of decisions beginning with the judgment of Couch, C. J. and Phear, J., in 12 Beng L R 42 (2). That case was no doubt a case of sale, and depended upon the construction of S. 108, Contract Act, but the principles laid down there have been applied to cases of pledge: 22 C W N 1042 (3), 23 C W N 352 (4), 23 C W N 907 (5), 24 Bom 458 (6) and 27 Mad 424 (7). These cases lay down the principles that when the alleged pledger has only "qualified" possession, that is, he is put in possession of the goods by the owner and is asked to retain possession for a specified and limited purpose, delivery given by him of the goods to his creditor by way of security does not constitute a valid pledge; the word "possession" used in S. 178 according to these decision means "unqualified possession." In 23 C W N 907 (5) the pledge was upheld by a Division Bench on the aforesaid principles also. The case of 61 I A 416 (8), cited before me, does not deal with this question. There the question was whether S. 178 which includes within it an agent, also applied to the case of an owner intending to pledge his goods, not by actual delivery of the goods but by endorsing and delivering railway receipts. A short summing up of the effect of decisions of the High Courts of India on the point before me is only made by Lord Wright at p. 427 of the report. Following the course of decisions by which I am bound I uphold the decree made by the Subordinate Judge and dismiss this appeal with costs. The prayer for leave to appeal under S. 15, Letters Patent, is refused.

S.R. *Appeal dismissed.*

1. Rahim Bux v. Central Bank of India, 1929 Cal 497=119 I C 23=56 Cal 367.
2. Greenwood v. Holquette, (1874) 12 Beng L R 42=20 W R 467.
3. Roopchand Jankidas v. National Bank of India, 1919 Cal 540=48 I C 975=46 Cal 342=22 C W N 1042.
4. Leon Sanbolle v. K. V. Seyne and Bros., 1919 Cal 677=50 I C 476=23 C W N 352.
5. Profulla Kumar v. Nabo Kishore Rai, 1920 Cal 421=54 I C 224=23 C W N 907.
6. Saegar v. Hukma Kessa, (1910) 24 Bom 458=2 Bom L R 403.
7. Naganada Davay v. Bappu Chettiar, (1904) 27 Mad 424.
8. Official Assignee, Madras v. Mercantile Bank of India, 1934 P C 246=152 I C 730=61 I A 416 (P C).

A. I. R. 1935 Calcutta 770

KHUNDKAR, J.

Laxmi Bhander Ltd. — Plaintiffs—Petitioners.

v.

Purna Chandra Dutta Banik—Defendant—Opposite Party.

Civil Rule No 539 of 1935, Decided on 28th August 1935, from order of Munsif, Second Court, Gopalgunj, D/- 28th March 1935.

Civil P. C. (1908), O. 29, R. 1—Suit by registered company — Secretary verifying plaint under authority of articles of company—Averment to that effect in plaint—Affidavit to establish such authority is not necessary.

Where in a suit on behalf of a registered company the secretary verifies a plaint under authority obtained from the Articles of Association of the plaintiff company which empowers the Secretary to do all acts necessary for the conduct of suits and inasmuch as there is averment in the plaint to that effect :

Held : that, no affidavit was necessary to establish such authority for verification : 22 *Cal* 268 and 22 *Cal* 60, *Foll*; 1927 *Cal* 758, *Dist.* [P 771 C 1]

Hemendra Chandra Sen — for Petitioners.

Order.—The petitioners who are a company registered under the Indian Companies Act brought a suit against the opposite party for recovery of a sum of Rs. 42-14-3 alleged to be due on a bond. The plaint in the suit was signed and verified by the Secretary of the Company.

By an order dated 13th March 1935, the learned Munsif directed that the plaintiff to file an affidavit testifying to the fitness of the Secretary to verify the plaint. The direction not being complied with the learned Munsif ordered the plaint to be struck off. It is against this order that the present rule is directed.

On behalf of the petitioners it was submitted that the case of 31 C W N

1004 (1), referred to in the judgment, does not support the proposition that when a pleading is signed or verified by a person other than the plaintiff, the authority of that person to sign or verify must in every case be established by affidavit. That case proceeded really upon R. 12, Chap. 7, Original Side Rules of this Court, and applies only to suits within the Ordinary Civil Jurisdiction of this Court.

The relevant provisions in the Code of Civil Procedure are O. 6, Rr. 14 and 15 and O. 29, R. 1. It was contended that inasmuch as Rr. 121 and 122 of the Articles of Association of the plaintiff company empower the Secretary to do all acts necessary for the conduct of suits and especially mentions verification of pleadings as one of those acts and inasmuch as there is an averment in the plaint to that effect, the case of 22 Cal 268 (2) applies and no affidavit was necessary.

Reliance was placed on the case of 21 Cal 60 (3) in which it was held by the Judicial Committee of the Privy Council that where a Manager of a banking Company under a power of attorney which authorized him to sue for debts due to the company executed a power of attorney appointing the accountant of the bank to be its attorney at a certain place, the latter was competent to sign and verify a plaint even though his power did not contain express words authorizing him to sue for debts due to the bank. The present case falls within the principle enunciated in these two decisions. The plaintiff in this case was a registered company and the Memorandum of Association clearly empowers the Secretary to verify plaints. In my judgment the requirements of O. 29, R. 1 were satisfied. In the result the Rule is made absolute, the order of the learned Munsif is set aside, and it is directed that the suit be restored and heard according to law.

B.D. *Rule made absolute.*

1. International Continental Caoutchous Compagnie v. Mehta & Co., 1927 Cal 758=105 I C 356=54 Cal 1057=31 C W N 1004.
2. Sreenath Banerji v. E. I. Ry. Co., (1895) 22 Cal 268.
3. Delhi and London Bank v. Oldham, (1894) 21 Cal 60.

A. I. R. 1935 Calcutta 771

GUHA AND LODGE, JJ.

Saroj Kumar Bose—Plaintiff—Appellant.

v.

Surjya Kanta Sarkar and *others* —Defendants—Respondents.

Letters Patent Appeal No. 1 of 1935, Decided on 30th July 1935, against judgment of R. C. Mitter, J., D/- 30th November 1934.

Landlord and Tenant—Tenant obtaining encroached land of third party by adverse possession—Landlord obtains title to land—Hence landlord is entitled to rent from tenant in respect of that land.

A tenant encroaching upon an adjoining land belonging to a third party and obtaining it by adverse possession obtains it for the benefit of his landlord who gets a title to the land encroached. Hence the benefit accruing to the tenant during the term of the tenancy must be taken to be a benefit, so far as the tenant is concerned, saddled with the burden of paying additional rent for excess land, once it is found that the land encroached upon is held as part of the tenancy: *English and Indian case law discussed*; 1928 *Cal* 142, *Dist.* [P 772 C 2; P 773 C 1]

Jogesh Chandra Roy, Rajendra Chandra Guha and *Premranjan Roy Choudhury*—for Appellant.

Girija Prasanna Sanyal and *Satindra Nath Roy Choudhury*—for Respondents.

Judgment.—This appeal has arisen out of a suit for realisation of rent and cesses, in which additional rent was claimed for excess area found in the possession of the tenants defendants. The question for consideration in the case is whether the plaintiffs were entitled to get additional rent as claimed by them in the suit. On the facts found in the case, a good portion of the lands in suit was outside the plaintiff's estate bearing Touzi No. 3846, to which the taluk in respect of which rent was claimed in the suit appertained. There is no question that the defendants had encroached on the lands of other adjoining estates; and the Courts below proceeded on the footing that the tenants had acquired title to the same by adverse possession against the rightful owners, the neighbouring proprietors, and further that the tenants held the lands encroached upon as appertaining to the taluk comprised in the estate of which the plaintiff was the proprietor. The question was whether the plaintiff landlord can take advantage of the encroachment by the tenant

defendants on the lands of estates to which he has no title, whether the encroachment by the tenant defendant would enure for the benefit of the lessor, so as to entitle him to claim rent in respect of the lands encroached upon and of which the tenant defendants were in possession, as appertaining to the tenancy held by the tenant defendants. Reference in this connexion was made in the judgment of the trial Court to documents showing that the defendants admitted the title of the plaintiff to the lands in suit as appertaining to the tenancy in question appertaining to the plaintiff's estate.

The Court of first instance, as well as the learned District Judge, on appeal from the decision of the trial Court, decided the question of liability for payment of additional rent as raised before them, on the basis that if a tenant during his tenancy encroached upon the land of a third party, and held the same with his own tenure, until the expiration of his tenancy, the tenant was to be considered to have made the encroachment not for his own benefit, but for the benefit of his landlord, so as to entitle the landlord to claim rent for the land encroached upon and held as a part of the tenancy. In the cases decided by this Court, to which reference was made in the judgment of the trial Court, the question of a claim for additional rent was not before the Courts; but it was held that if the tenant has acquired title in regard to lands encroached upon as part of his tenancy, the tenant must be taken to have acquired that title for his landlord and not for himself. In 22 W. R. 246 (1), it was held by Markby and Romesh Chunder Mitter, JJ., that in case of lands encroached upon by the tenant, it was to be presumed that they were added to the original tenure. The case was one of encroachment upon khas lands of the landlord; but it was observed that it was the clear rule of English law, and it was a rule which was supported by reason and principle; it was observed further that in India where there was a great deal of waste land and where quantities and boundaries were very ill-defined, there were very strong reasons for the application of the rule. 10 Cal 820 (2) was a case in which the case of encroachment by a tenant upon the land of a third person was considered, and it was found in that case, that the tenant was in possession of the land encroached upon for upwards of 12 years. The case was one in which the question what the law of this country was with regard to encroachment made by a tenant directly arose for consideration. Garth, C. J. observed that there was no doubt whatever that by the English law, an encroachment made by a tenant upon land adjoining to, or even in the neighbourhood of his holding, was, in the absence of strong evidence to the contrary, to be presumed to be made for the benefit of the landlord. The learned Chief Justice went on to state that the rule applied to all land encroached upon, whether the landlord had any interest in it or not: if a tenant during his tenancy encroached upon the land of a third person, and held the land until the expiration of his tenancy, he was to be considered to have made the encroachment not for his own benefit but for the landlord; and if he has acquired a title against the third person by adverse possession, he has acquired it for his landlord and not for himself. The rule laid down in the cases referred to above, was adopted in 25 Cal 302 (3), by Maclean, C. J. and Banerjee, J., in regard to encroachment upon waste land or land of third parties.

On the authority of decisions of Courts to which reference has been made above, with which we are in entire agreement, and on general principles, it appears to us to be clear that if the tenant's possession of encroached lands enables the landlord to acquire a title to the same as against a third party, the landlord's right to get rent from the tenant in respect of lands possessed by him as appurtenant to the tenancy, cannot be disputed. The judgment of our learned brother Roopendra Coomar Mitter dealing with the plaintiff's claim for additional rent for excess area, against which this appeal is directed, proceeds on the basis that if the landlord had the right to impose additional rent, it could only be on the principle that the encroach-

1. Gooroo Das Roy v. Issar Chandra Bose, (1874) 22 W R 246.

2. Nuddyar Chand Shaha v. Meajan, (1884) 10 Cal 820.

3. Prolhad Teor v. Kedar Nath Bose, (1898) 25 Cal 302.

ment enured for the benefit of the landlord for the moment of the encroachment; and in support of his conclusion reliance was placed by the learned Judge on a passage in Woodfall's Law of Landlord and Tenant, Edn. 23, p. 933. The passage quoted from the text-book is based on the decision of English Courts in certain cases of which 1 C P 259 (4), 7 C P 1 (5), 11 Ex. 313 (6) and 2 E & B 349 (7) may be said to be typical. All these cases were referred to by Garth, C. J. in his judgment in 10 Cal 820 (2), mentioned above, in which the learned Chief Justice held, as already stated, that encroachment by a tenant on the land of a third person, when the land encroached upon was held as a part of the tenancy, was for the benefit of the landlord and for his own benefit. In our judgment, the benefit accruing to the tenant during the term of the tenancy must be taken to be a benefit so far as the tenant was concerned, saddled with the burden of paying additional rent for excess land as provided by law in this country once it is found that the land encroached upon was held as part of the tenancy. It requires to be noticed that we are not able to apply the decision of this Court in 105 I C 737 (8), mentioned in the judgment of Mitter, J., to the facts of the case before us.

On the conclusions we have arrived at, as mentioned above, we are unable to agree with the conclusion arrived at by Mitter, J. and the decision given by him, disentitling the plaintiff on general principles, from claiming additional rent for excess area, as made in the suit. It is significant, however, that in the judgments of neither of the Courts below, is there any finding as to whether the tenant had been in possession of the lands encroached upon for more than 12 years, so as to confer a title to the same on the plaintiff. There is also no definite finding that the lands encroached upon were treated by the tenant defendants as appurtenant to the tenancy held by them under the plaintiff. If the tenant defendants have been in possession of the lands encroached upon by them, as part of the tenancy held by them under the plaintiff, they are in our judgment liable to pay additional rent for excess area as claimed by the plaintiff in the suit. The case must therefore go back for definite findings on the facts mentioned above, on evidence already on record, and on such further evidence as the parties may adduce in support of their respective cases before the Court. In the result the decision and decree passed by Mitter, J. dismissing the claim of the plaintiff-appellant to additional rent for the lands found to be outside Estate No. 3846 are set aside; and the case is remitted to the Court of appeal below, for a fresh decision in the light of the judgment. The plaintiff-appellant is entitled to get his costs in the litigation up to the present stage, including the costs in this appeal, from the defendants respondents. Costs after remand will abide the result. The records are to be returned as soon as possible.

S.R. *Appeal allowed; case remitted.*

4. Earl of Lisburne v. Davies, 1 C P 259.
5. Whitmore v. Humphries, (1872) 7 C P 1=25 L T 496=20 W R 79=41 L J C P 43.
6. Kingsmill v. Millard, 11 Ex 313=3 C L R 1022.
7. Andrews v. Hailes, (1853) 2 E & B 349=22 L J Q B 409=17 Jur 761=1 W R 366.
8. Jatindranath Choudhuri v. Trailakyanath Das, 1928 Cal 142=105 I C 737.

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* A. I. R. 1935 Calcutta 773

R. C. MITTER, J.

Phani Bhusan Sen—Petitioner.

v.

Sanat Kumar Maitra and *others*—Opposite Parties.

Civil Rule No. 797 of 1935, Decided on 24th July 1935.

*** (a) Election—District Judge can inquire into validity of nomination paper, irrespective of Dist. Magistrate's or Chairman's decision.**

Notwithstanding a decision by the Chairman or the District Magistrate that the nomination paper of a candidate for election is in order, the District Judge in considering an election petition can go into the question again.

[P 774 C 2; P 775 C 1]

(b) Bengal Municipal Act (15 of 1932)—Name published in Calcutta Gazette as elected—Proceedings challenging election are not prevented.

The publication in the Calcutta Gazette of the name of a person as an elected commissioner does not prevent proceedings for setting aside his election being taken or continued before the District Judge. [P 775 C 1]

(c) Election—Judge can review his judgment in view of R. 5 of rules of procedure relating to election petitions.

The power of reviewing his order or judgment has been conferred on the Judge dealing with an election petition by R. 5 of the rules of procedure relating to election petitions framed under S. 44 (b), Bengal Municipal Act.

[P 775 C 2]

(d) Bengal Municipal Act (15 of 1932), S. 37, Cl. (4)—S. 37 (4), does not exclude power of review—"Final" only means non-appealable.

Sub-S. (4) of S. 37 which gives to the order of the Judge a finality does not exclude the power of the Judge to review his own order. The word "final" used there means that the order is a non-appealable one : 30 *Cal* 619 ; 2 *C L J* 306, *Foll* ; *Case law discussed.* [P 775 C 2]

Sisir Kumar Ghose and *Rabindra Nath Bhattacharji*—for Petitioner.

Surajit Chandra Lahiri—for Opposite Parties.

Order.—The petitioner and opposite parties 1 and 2 stood as candidates for election as commissioners from Ward No. 5 of the Rajshahi Municipality. The election was held on 28th March 1934 and the petitioner was declared elected. He filed his nomination paper on 26th February 1934. It was scrutinised by the Chairman on 3rd March 1934 and was found to be in order. At that time an objection was raised to the effect that he was not eligible for election on the ground that he had been convicted about two years ago under S. 420, I. P. C., and sentenced to a fine of Rs. 500, and detention till the rising of the Court. However the certified copy of the judgment of the Magistrate was not produced at the time with the result that the Chairman held that his nomination paper was in order. Against the action of the Chairman a petition was filed before the District Magistrate of Rajshahi, but the latter refused to enter into the merits of the petition, throwing it out on the ground that it was unstamped. On 6th April 1934 opposite party 1 filed an election petition before the District Judge of Rajshahi and the only ground which was persisted in was that the petitioner was not qualified to stand for election by reason of the provisions of S. 22, sub-S. (2), Bengal Municipal Act (Bengal Act 15 of 1932). That sub-section is in these terms :

If any person is or has been convicted by a criminal Court of any such offence as in the opinion of the Local Government involves moral turpitude and which carries with it a sentence for transportation or imprisonment for more than six months, such person shall not, unless the offence of which he was convicted has been pardoned, be eligible for election or appointment for five years from the date of the expiration of the sentence. Provided that on an application made by a person disqualified under this sub-section, the Local Government may remove the disqualification by an order made in this behalf.

An offence under S. 420, I. P. C., carries with it a sentence of imprisonment for more than six months, for the maximum sentence on conviction is seven years. The question therefore is whether the conviction under S. 420, I.P.C., involves moral turpitude, and whether it involves moral turpitude or not is made to depend solely upon the opinion of the Local Government. The election petition remained pending before Mr. S. K. Haldar, District Judge of Rajshahi, for a number of months and during that time the opposite party 1 tried his utmost to obtain from the Local Government an expression of its opinion as to whether the conviction under that section involved moral turpitude. Letters were written and memorials sent but the letter communicating the opinion of the Government did not reach him in time with the result that Mr. Haldar did not give further time and dismissed the election petition on the ground that the opinion of the Local Government that the said conviction involved moral turpitude had not been produced before him.

Thereafter a notification was issued in the Calcutta Gazette publishing the result of the General Election of the Rajshahi Municipality, and the name of the petitioner along with the names of all the other commissioners elected at the General Election was mentioned therein. On 10th January 1935 the Local Government wrote a letter to the Commissioner of the Rajshahi Division wherein it was stated that conviction of the petitioner of the said offence involved moral turpitude. On the contents of the said letter being made known to the opposite party No. 1 he made an application to the District Judge for reconsideration of Mr. Haldar's order. The said application was treated as an application for review made on the ground of discovery of new and important evidence by Mr. Hattiangadi, District Judge of Rajshahi, who succeeded Mr. Halder, and has been granted by him. By order dated 16th May 1935, Mr. Hattiangadi has set aside the petitioner's election. The petitioner moved against this order and obtained the rule. In my judgment notwithstanding a decision by the Chairman or the District Magistrate that the nomination paper of a candidate for election is in order

the District Judge in considering an election petition can go into the question again. S. 38(d) is explicit on the point. I do not therefore see my way to accede to the contention of the petitioner that it was not open to the opposite party No.1 to urge before the District Judge the grounds mentioned in S. 22, sub-S.(2).

A point of greater importance has however been raised on behalf of the petitioner in this rule. It is that the learned District Judge had no power to review an order made under S. 37, be it an order confirming or amending the declared result of an election or setting the election aside. A subsidiary point has been raised, namely, that even if such an order can be reviewed by the District Judge, the District Judge has no power to admit an application for review or set aside an election after the publication of the result of the election in the Calcutta Gazette. In my judgment there is no substance in the last mentioned point. S. 50 is the section which deals with the publication in the Calcutta Gazette. It is the last step of an election. It is only after publication in the Calcutta Gazette of the names of elected and appointed commissioners that the Commissioners are to meet and within 21 days of such publication that the chairman is to be elected by them (S. 45). The Act does not contemplate that the publication in the Calcutta Gazette of the names of the commissioners elected is to be after all disputes about the validity of a particular election has been settled. It, on the other hand, contemplates that the commissioners are to carry on their functions notwithstanding that the election of some or all of them may be under challenge in proceedings taken under S. 36 of the Act (S. 41). The publication in the Calcutta Gazette of the name of a person as an elected commissioner does not in my judgment prevent proceedings for setting aside his election being taken or continued before the District Judge. The principal question raised in the rule must now be considered. The District Judge who has to hear an election petition is not a persona designata. He is the presiding Judge of the principal civil Court of original jurisdiction in the district : 39 C W N 971 (1). By reason of S. 4, Civil P. C., and S. 37, Bengal Municipal Act the Civil Procedure Code does not ex proprio vigore apply. The local Government can however by virtue of the powers conferred on it by S. 44 (f), Bengal Municipal Act, prescribe rules of procedure in relation to election petitions. R. 5 of the rules so prescribed is relevant. It runs thus :

> Every election petition shall be inquired into by the Judge, as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure, 1908, to the trial of suits; provided that it shall only be necessary for the Judge to make a memorandam of the substance of the evidence of any witness examined by him.

Whether a civil Court or a public officer exercising judicial functions has inherent power to review its or his judgment or order is a question on which divergent views have been expressed (see the cases collected in 2 C L J 306 (2) and 6 C L J 84 (3), but so far as this case is concerned it is not necessary to decide the said question, for in my judgment the power of reviewing his order or judgment has been conferred on the Judge dealing with an election petition by the aforesaid statutory rule. R. 5, which I have quoted above, in my judgment, imports S. 114 and O. 47, Civil P. C., and all rules of procedure contained therein relating to suits which are consistent with the provisions of the Bengal Municipal Act. Nor do I think that sub-S. 4, S. 37 which gives to the order of the Judge a finality excludes the power of the Judge to review his own order. The word "final" used there means that the order is a non-appealable one. 30 Cal 619 (4) and 2 C L J 306 (2). In 3 I A 221 (5) the donee, upon the refusal of a Sub-Registrar to register a deed of gift, the execution of which was denied, applied to the Zilla Judge under S. 73, Registration Act of 1871, for an order on the Sub-Registrar to register it. The Zilla Judge, Mr. Taylor, after taking evidence came to the conclusion that execution had not

1. Nara Narayan Mondal v. Aghore Chandra Ganguly, (1935) 39 C W N 971.

2. Hiralal Mukherjee v. Premmoyee Debi, (1905) 2 C L J 306.
3. Baij Nath Ram Goenka v. Nand Kumar Singh, (1907) 34 Cal 677=6 C L J 84=11 C W N 803.
4. Matangini Debi v. Grish Chandra, (1903) 30 Cal 619=7 C W N 433.
5. Reasat Hossein v. Hadjee Abdoollah, (1876) 2 Cal 131=3 I A 221=26 W R 50=3 Sar 221 (P C).

been proved. He accordingly refused the application. An application for review on the ground of discovery of new and important evidence was made to his successor-in-office, Mr. Craster, and was granted. In revision the High Court set aside the order granting review on the ground that the Zilla Judge had no jurisdiction to review an order passed by him and thereupon an appeal was taken to Her Majesty in Council. Sir James Colvile first pointed out that the order of the Zilla Judge either granting or refusing the application in such proceedings was final so far as that Court was concerned, and although passed not in a suit but in a miscellaneous proceeding of a summary nature was to all intents and purposes a decree as defined in the Civil Procedure Code. He then noticed the provisions of S. 38 of Act 23 of 1861 which defined the procedure to be followed by the Zilla Judge in such cases. That section is in the following terms:

> That the procedure described by Act 8 of 1859 (Civil Procedure Code) shall be followed as far as capable in all miscellaneous cases and proceedings which after the passing of the Act shall be instituted in any Court,

Sir James Colvile then remarked as follows:

> This provision, their Lordships conceive, expressly makes applicable to a proceeding to compel registration under the Registration Act the whole procedure of Act 8 of 1859, including a power of admitting a review.

It is urged that the view that I am taking is inconsistent with the judgment of the Bombay High Court in 45 Bom 972 (6). I do not think so. That case is, as I shall indicate later on, a peculiar case, but even if the observations made therein by Macleod, C. J., be held to be laying down general principles of interpretation I should say that, regarded as such, they are inconsistent with the observations of the Judicial Committee in 3 I A 221 (5), a case not cited before the learned Judges of the Bombay High Court, and so should be discarded.

In that case however, a landlord instituted proceedings under Ch. 7 of the Presidency Small Cause Courts Act for recovery of possession of property in the possession of a sub-tenant. The Bombay High Court had held in the past that such proceedings are not suits. The Second Judge of the Small Cause Court, Mr. Tyabjee, ordered the sub-tenant to vacate. The sub-tenant thereafter applied for review on the ground of discovery of new evidence. The application for review was rejected, the Judge holding that he had no such power. The High Court was moved and Macleod, C. J., in the course of his judgment and in construing S. 48, Presidency Small Cause Courts Act, made the following observation:

> I think that that section means that in the proceedings themselves under the chapter the provision of the Code shall apply as far as possible, that is to say, until an order is made granting or dismissing the application, and while any further proceedings which might become necessary in execution of the order are being taken. To go a step further, by stating that any other provisions of the Code with regard to appeals or reviews apply, would not, I think, be warranted by the words of the section.

Section 48, which is in Ch. 7, runs thus:

> In all proceedings under this chapter, the Small Cause Court, shall as far as may be and except as herein otherwise provided, follow the procedure prescribed for a Court of first instance by the Code of Civil Procedure.

It was pointed out in that case that the proceedings under Ch. 7 are summary proceedings and do not finally determine the rights of the parties, for a party aggrieved can file a suit in the High Court, and the words "so far as may be" used in the section have in view the summary nature of the proceedings. The words "except as herein otherwise provided" have in contemplation the rules framed by the High Court under S. 9 (1) of the Act. It was pointed out that the provisions of S. 114 and O. 47, Civil P. C., do not apply to suits instituted in Presidency Small Cause Courts, they being expressly excluded by S. 8 and O. 51, Civil P. C., and the High Court of Bombay had not made provisions for review of judgments in such suits in the rules framed under S. 9 (1), Presidency Small Cause Courts Act. Fawcett, J., who agreed with Macleod, C. J., in discharging the rule, in my judgment, sounded the correct note, when he said that when applications for review are not admissible in suits filed in the Presidency Small Cause Court, it would be unreasonable to hold that such applications are admissible in summary proceedings in the same Court taken under Ch. 7 of the Act. He rightly said that

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6. Framoz Dosabhai v. Dalsukhbhai, 1921 Bom 180=61 I C 567 = 23 Bom L R 383 = 45 Bom 972.

the provisions of S. 8 and O. 51, Civil P. C., furnished the clue to the interpretation of S. 48, Presidency Small Cause Courts Act. and that the Legislature never intended by that section to confer a power of review in cases coming under Ch. 7. Having regard to these special circumstances, I do not think that the decision given in *Framoz Dosabhai's case* (6) on the construction of S. 48, Presidency Small Cause Courts Act, lays down any general principles of interpretation or can be invoked to interpret R. 5 of the rules framed by the Local Government under S. 44, Bengal Municipal Act. For these reasons I hold that the District Judge had power to review his order passed under S. 37, Bengal Municipal Act, and I must discharge the Rule, subject to one variation in the order made on 16th May 1935. The learned District Judge had allowed Rs. 80 as pleader's fee to the opposite party No. 1. Mr. Haldar, when he dismissed the opposite party No. 1's application, allowed against him Rs. 16 only as pleader's fee. None of the parties were responsible for the way the proceedings took. It was all due to the delay in the transmission of the letter of the Local Government, wherein it had expressed its opinion on the nature of the offence of which the petitioner had been convicted. In these circumstances I am of opinion that it would be proper to allow to the opposite party the sum of Rs. 16 only as pleader's fee. Subject to this modification the order of Mr. Hattiangadi, dated 16th May 1935, is affirmed and this Rule is discharged with costs. Hearing-fee one gold mohur.

S.R. *Rule discharged.*

** A. I. R. 1935 Calcutta 777

R. C. MITTER, J.

Serajgunj Loan Office, Ltd. — Appellant.

v.

Nil Kanta Lahiri—Respondent.

Appeal No. 9 of 1935, Decided on 9th August 1935, from appellate order of Sub-Judge, Pabna, D/- 29th September 1934.

**** (a) Companies Act (1913), S. 153— Sanction— Court should see that arrangement is reasonable and practicable—That rights of one class of creditors is not sacrificed for others—Compliance with statutory provisions and interest of minority shouid be looked to.**

In according the sanction to a composition scheme the Court has not only to see that the arrangement proposed and accepted by the majority is reasonable and practicable, but also to see that one class of creditors or depositors does not feast upon the rights of another class. It has also to see that the provisions of the statute have been complied with, that the majority is acting bona fide and the minority has not been overridden : *In re Alabama New Orleans, Texas and Pacific Junction Railway Co.*, (1891) 1 *Ch* 213, *Rel on* ; 1935 *Cal* 398, *Diss from.*

[P 778 C 2]

*** (b) Companies Act (1913), S. 153 — Agreement of majority of creditors sanctioned by Court — Class represented by majority is bound by agreement—Unsecured creditors with decrees and without decrees are in same class—Hence crediter with decree cannot execute it.**

Once Court grants sanction to the agreement of the majority of creditors with company concluded at the meeting held under the preliminary order of the Court under S. 153, it binds all those who fall within the class represented by the said majority. Unsecured creditors of a company who have already obtained decrees against the company are within the same class as unsecured creditors who have not obtained decree against the company. Hence a creditor who has obtained a decree against the company cannot execute it : *Sovereign Life Assurance Co.* v. *Dodd*, (1892) 2 *K B* 573 and 39 *C W N* 875, *Foll.*

[P 778 C 2]

Nirmal Chandra Chakraburty — for Appellant.

Dinesh Chandra Ray — for Respondent.

Judgment.—The Serajgunj Loan Office Limited, a banking corporation registered under the Companies Act, found itself in financial difficulties, but no winding up proceedings were taken. Instead of that a composition with its creditors was proposed, accepted and sanctioned by the Court under S. 153, Companies Act. The relevant dates on which the respective contentions of the parties have been advanced before me are the following :

8*th January* 1933.—A meeting by the share-holders of the Bank for the purpose of devising means for stopping payment of interest and withdrawal of deposits.

21*st February* 1933.—A resolution was passed by the share-holders authorising the filing of an application on behalf of the Bank in the High Court under Section 153, Companies Act, proposing an arrangement between itself and its creditors.

20*th April* 1933.—The said application was moved and the preliminary order

was passed by the High Court directing a meeting of the creditors to be held.

21*st May* 1933.—The said meeting was held and the majority of creditors representing more than three-fourths in value agreed to the arrangement proposed.

19*th June* 1933.—Sanction was given to the said arrangement by the High Court.

The substance of the arrangement sanctioned by this Court is that the creditors of the Bank shall not be able to demand payment of their dues within ten years, interest was reduced, a consultative body of six persons selected by the creditors was constituted and the directors in consultation with the consultative body were directed to distribute pro rata amongst the creditors a certain portion of the collections annually made.

The respondent, who received notice of the meeting which the High Court directed to be held did not attend it. He had before the date of the preliminary order of the High Court, that is, on 20th March 1933, instituted a suit to recover his dues. That suit was decreed on 24th April 1933. It is this decree which he seeks to execute against the Bank. The Bank has taken up the position that the respondent must come and accept payment in pursuance of the arrangement sanctioned by the High Court. The first Court gave effect to the Bank's contention and dismissed the execution case, but the lower appellate Court has held otherwise. In my judgment the view taken by the first Court so far as this case is concerned is the correct view, notwithstanding the fact that the decree was obtained by the respondent before the date when the majority of creditors at a meeting held under the preliminary order of the High Court agreed to the arrangement proposed by the Bank. This view accords with the decision of my learned brothers Guha and Lodge, JJ., in Appeal No. 70 of 1934 (1). It is no doubt in conflict with the decision on my learned brother Henderson, J., in 1935 Cal 398 (2), but I prefer to follow the decision in Appeal No. 70 of 1934 (1) not only because it is the decision of a Division Bench, and so binding on me, but also because its ratio recommends itself to me.

Section 153, Companies Act, no doubt, confers an extraordinary power on the majority to bind the minority. Ordinarily an arrangement or composition is binding on parties who are contracting parties. A contract between *A* and *B* can ordinarily be varied by a subsequent contract between them. But that principle has been sacrificed by the legislature where a person or a company is in insolvent circumstances and either bankruptcy proceedings or winding up proceedings have been taken, as the case may be, for the purpose of equitable distribution of assets. Proceedings under S. 153 is only an alternative proceeding to winding up proceedings, the object being practically the same. The sanction of the Court is the safeguard of the minority who do not agree. In according the sanction the Court has not only to see that arrangement proposed and accepted by the majority is reasonable and practicable, but also to see that one class of creditors or depositors does not feast upon the rights of another class. It is for this purpose that separate meetings must be convened by distinct classes of creditors. It has also to see that the provisions of the statute have been complied with that the mcjority is acting bonafide and the minority has not been overridden. (Per Lindley, L. J. in (1891) 1 Ch 213 (3) at pp. 238-239). But if these conditions are satisfied and the Court grants sanction the agreement of the majority of creditors with company concluded at the meeting held under the preliminary order of the Court under S. 153 binds all those who fall within the class represented by the said majority. Unsecured creditors of a company who have already obtained decrees against the company are in my judgment within the same class as unsecured creditors who have not obtained decrees against the company; they do not form a distinct class. Their rights against the company are not so dissimilar as to make it impossible for them to consult together

1. Barisal Loan Office Ltd., v. Sasthi Charn, Appeal No 70 of 1934, decided on 26th June 1935.
2. Sushila Bala Basu v. Anjuman Trading and Banking Corporation, 1935 Cal 398=156 I C 599.
3. In re Alabana, New Orleans, Texas and Pacific Junction Railway Co., (1891) 1 Ch 213=60 L J Ch 221=2 Meg 377=64 L T 127.

with a view to the common interest in a meeting held under the directions of the Court given under S. 153 of the Act.

This is the view which has been taken by my learned brother Cunliffe, J. in 39 C W N 875 (4) following the test propounded by Bowen, L. J. in (1892) 2 K B 573 (5). With this decision I entirely agree. On these principles I do hold that the respondent is bound by the scheme adopted by the majority of the creditors of the company, which, in my judgment, were of the same class, and sanctioned by this Court. The view that I am taking, in my judgment, does not militate against the decision of Viscount Haldane in 46 I A 135 (6), where the precise question which I have to consider did not arise. On the view that the scheme sanctioned by the Court under S. 153 takes effect not from the date of the final order of the Court but from the date of the resolution of the majority of the creditors passed at the meeting convened under the preliminary order of the Court, Raghubar Dayal was admittedly one of the members of the class of creditors the majority of which agreed to the arrangement proposed. Where there is no winding up proceedings, and a composition or arrangement is proposed under S. 153, any other view would lead to manifest injustice and lead to a race and consequent inequality amongst the creditors of the same class, which it is the object of the legislature to prevent, seeing that there is no provision in the Act in such cases to stay actions and proceedings against the company by individual creditors while the application under S. 153 is being considered by the Court. S. 169 would not cover the case. This has been pointed in cases under the Companies Consolidation Act, 1908, of which the Companies Act in this respect is a mere copy (per judgment of Scrutton, L. J. (1923) 1 K B 160 (7).

For these reasons I allow the appeal. The order of the learned Subordinate Judge is accordingly set aside and the Munsif's order restored with costs to the appellant company to this Court and of the lower appellate Court. Hearing fee is assessed at one gold mohur. The prayer for leave to appeal under S. 15 of the Letters Patent is refused.

S.R. *Appeal allowed.*

4. In re Jalpaiguri Banking and Trading Co., (1935) 39 C W N 875.
5. Sovereign Life Assurance Co. v. Dodd, (1892) 2 K B 573=62 L J Q B 19=41 W R 4=67 L T 396.
6. Raghubar Dayal v. Bank of Upper India, 1919 P C 9=50 I C 429=46 I A 135=41 All 566 (P C).
7. Bowkett v. Fullers United Electric Works Ltd., (1923) 1 K B 160=92 L J K B 412=128 L T 303.

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* A. I. R. 1935 Calcutta 779

R. C. MITTER, J.

Jadu Nath Guha Roy and *others* — Defendants—Appellants.

v.

Kasiswar Guha Roy—Plaintiff and *others*—Respondents.

Appeal No. 41 of 1933, Decided on 30th July 1935, from appellate decree of Dist. Judge, Noakhali, D/- 29th August 1932.

(a) Practice—New point—Second appeal—Points involving investigation of facts are not allowed.

Points involving investigation of facts cannot be allowed to be raised for the first time in a second appeal. [P 781 C 2]

*** (b) Equity — "Person seeking equity should come with clean hands" — Partition of property by registered deed—Clause that "one party shall not purchase holdings allotted to another" — Each party breaking terms in clause—*K* bringing suit to set aside purchase by *G* in contravention of the terms —*K* held entitled to sue under the terms of the deed — *K's* violating terms of partition deed held no bar to enforce his legal claim—Maxims.**

A partition between *G* and *K* of joint property was effected by a registered partition deed. There was a clause in the partition deed to the effect that if one party purchased a raiyati or under raiyati holding allotted to the other, either in his own name or benami, such other person in whose share the holding came could treat the purchase as void. Both the parties had violated this term. *K* brought a suit to declare such purchase by *G* to be void by praying for possession of the holding. *G* contended that as *K* also had violated the term in the partition deed he could not claim any relief as "one who seeks equity must come with clean hands":

Held: that if *K* had purchased raiyati or under-raiyati holding in contravention of the terms of the partition deed *G* could sue him if in time, but that was no defence to the action of *K* claiming under a right derived from the partition deed. [P 782 C 1]

(c) Limitation Act (1908), Art. 143 — Art. 143 applies to suits for possession when plaintiff is entitled to possession by forfeiture or breach of condition—Art. 143 is not necessarily restricted to landlord and tenant.

Article 143 is in general terms. It applies to all suits for possession, when the plaintiff becomes entitled to possession by reason of any

forfeiture or breach of condition. Art. 143 is not applicable only to suit between landlord and tenant. When a particular article is intended to be made applicable to suits between landlord and tenant only it is stated to be so in express terms in the Limitation Act.

[P 782 C 1; P 783 C 1]

(d) Limitation Act (1908), Art. 143—Forfeiture—When it amounts to, explained.

A tenancy can be forfeited on the breach of a covenant in a lease providing in such cases for re-entry, or where the title of the landlord is repudiated, but other interest owned by persons other than tenants can be forfeited by rules of law or by reason of breach of express conditions, and a person may also be entitled to possession on certain conditions being not performed : 1928 *Cal* 714 ; 30 *Mad* 316 ; 1920 *Mad* 812; 4 *All* 493 and 8 *Cal* 224 (*FC*), *Foll* ; 22 *I C* 28 and 1930 *Cal* 165, *Dist.* [P 782 C 2]

(e) Limitation Act (1908), S. 18—Plaintiff establishing fraud of defendant in keeping him away from knowledge of his right — Defendant must prove knowledge of plaintiff beyond period of limitation.

The terms of S. 18, Limitation Act, are materially different from S. 26, Real Property Limitation Act (3 and 4 Will. 4, C. 27), and when a plaintiff has established that by fraud of the defendant he had been kept from the knowledge of his right to sue the burden is shifted on the defendant to show that the plaintiff had knowledge of the transaction impeached beyond the period of limitation : 1922 *Cal* 157, *Foll.* [P 783 C 1, 2]

(f) Transfer of Property Act (1882), S. 14 — Perpetuity — Condition in partition deed that one shall not purchase holding in the share of another—Clause not creating right in favour of any cosharer — Condition does not violate rule against perpetuities.

There was a clause in a partition deed to the effect that one party shall not purchase for himself or benami, a ryoti or under-ryoti holding allotted to the share of another party. In case of a breach of this condition the party was entitled to disregard to purchase and get khas possession of the holding. It was contended that this clause was against the rule against perpetuities :

Held : that the clause did not create any right in property in favour of the cosharers of any of them. The ryots and under-ryots holding under them could transfer their interest to any body ; only rights were reserved to quantum cosharers to disregard purchase of such rights by his other cosharers who got allotments elsewhere : 1927 *Cal* 41, *Foll.* ; 1929 *Cal* 263, *Dist.* [P 783 C 2]

J. C. Roy, *S. C. Taluqdar* and *Jatindra N. Sanyal*—for Appellants.

Dr. Pal and *Gopal Chandra Narain Choudhury*—for Respondents.

Judgment.—The facts on which the controversy in this appeal rests are very simple and may be stated as follows :

Kalinath Guha, the father of defendants 1 to 4 and husband of defendant 5 Dinabandhu Guha, Kasiswar Guha, the plaintiff, Sulata Sundari Chaudhurani, widow of Biseswara Guha and Durga Mohan Guha, were the joint proprietors of certain properties. On 8th September 1912 the said persons partitioned their properties by a registered deed. In Cl. 19 of the said deed it is provided that:

A co-sharer shall not be able to purchase in his own name or in benami any ryoti or under-ryoti holding or any portion thereof situate within the allotment of another. If he does the person in whose allotment it is situate shall be entitled to take khas possession, and the purchaser or his benamidar shall not be entitled to raise any objection; if he does it will be disregarded.

The said clause as also other clauses of the partition deed are expressly made binding not only on the executants of the deed but on their heirs and legal representatives.

A ryoti holding going by the name of Ram Kanai Sil was within the plaintiff's allotment. In contravention of the terms of the said clause defendants 1 to 4, the heirs of Kali Nath Guha, purchased on 5th June 1916, 15½ annas share of the said ryoti holding from Kalidas Sil and Hara Sundary Dassi, the ryots in the benami of one Rajendra Narayan Chowdhury. On the same date Kalidas Sil, defendant 6, took an osat ryoti from the ostensible purchaser Rajendra Narayan Chowdhury and continued in possession as before. This contrivance was adopted by defendants 1 to 4 in order to conceal from the plaintiff that the purchase was really by them and the cloak of secrecy was maintained so successfully for a number of years that even Kalidas Sil could not know that the real purchasers were defendants 1 to 4 and that they were his real landlords. Defendants 1 to 4 subsequently made a gift of the same to their mother, defendant 5.

The plaintiff came to Court with the allegation that though he knew of the sale of the ryoti holding by Kalidas Sil and Hara Sundary Dassi to Rajendra Narayan Choudhury he did not know that Rajendra Narayan Chowdhury was the benamidar of defendants 1 to 4, and that he was kept away from knowing the real nature of the said purchase by the fraud of defendants 1 to 4 and that he came for the first time to know that defendants 1 to 4 were the real purchasers in March 1928. On the said allegations he instituted this suit on 11th

February 1930 and claimed possession on the basis of Cl. 19 of the partition deed. Many defences were put forward in the lower Courts but all were overruled. The Court of first instance declared that defendants 1 to 5 did not acquire any title to the ryoti-holding Mudafat Ram Kanai Sil, and further held that the plaintiff was entitled to recover rent of the said ryoti holding, meaning, obviously, from defendant 6. The defendants filed an appeal before the learned District Judge. At the time of the argument a plea was raised by the appellants that the plaint had been insufficiently stamped. Thereupon the plaintiff put in a petition on 23rd August 1932 stating that he did not want khas possession and would be satisfied if he is allowed to get rent from defendant 6; that is he proceeded upon the footing that by reason of Cl. 19 of the partition deed the 15½ annas of the ryoti holding purchased by defendants 1 to 4 should be wiped away. The said prayer was allowed by Order No. 13 passed by the learned District Judge on the same date. The learned District Judge dismissed the appeal. In his decree he declared that the plaintiff was entitled to get rent from defendant 6, the rent which defendant 6 stipulated to pay by the under ryoti kabuliat which he had executed in favour of Rajendra Narayan Chowdhury on 5th June 1916.

Mr. Roy appearing for the principal defendants-appellants has raised a number of points before me. Two of them require serious consideration, but the rest are of no substance. The two substantial contentions are that (a) the suit is barred by limitation, and (b) Cl. 19 of the partition deed violates the rule against perpetuities and so unenforceable. I will deal with these points last of all.

The other points raised by him are: (i) The purchase being not of the whole of the ryoti holding Mudafat Ram Kanai Sil, Cl. 19 of the partition deed does not apply; (ii) Cl. 19 of the partition deed does not bind heirs and assigns of the executants; (iii) there being no prayer for recovery of rent, and the only prayer being for possession, the decree passed is erroneous, especially when the plaintiff challenged in his plaint the osat ryoti created by Rajendra Narayan Choudhury in favour of defendant 6; (iv) no decree for rent could be passed against defendant 6 in this suit, as a former suit for rent brought by the plaintiff against defendant 6 had been dismissed on the finding that the plaintiff had dispossessed defendant 6 from a portion of the ryoti holding; (v) that the plaintiff has ratified the purchase of defendants 1 to 4 in the course of an adjustment of accounts between him and the said defendants in December 1923; (vi) the plaintiff having himself violated Cl. 19 of the partition deed by purchasing ryoti and osat ryoti holdings in the shaham of Kali Nath Guha is not entitled to any relief.

Some of these contentions are new ones, for the first time raised here, and some proceed upon misconception of facts, but all have the merit of having no substance. The first and the second contentions are against the express provisions of the partition deed, the provisions which I have mentioned above, and points Nos. 4 and 5 are absolutely new points. Apart from the fact that points Nos. 4 and 5 involve investigation of facts, and so cannot be allowed to be urged for the first time in second appeal, there are no merits in the same. The Subordinate Judge has found that at the time of the adjustment, the fact that Rajendra Narayan Chowdhury was the benamidar was not disclosed by defendants 1 and 4, a finding not touched or reversed by the learned District Judge. How on such a finding a case of ratification can arise I fail to see. Nor can I see how point No. 4 arises at all. This suit is not a suit for recovery of rent of the ryoti holding from defendant 6. By the application which the plaintiff made before the District Judge on 23rd August 1932, the substance of which I have stated above, the plaintiff abandoned his prayer for khas possession, but the effect of his petition and the decree which he has obtained from the District Judge is still a decree for possession against defendants 1 to 5. He has obtained a decree for possession through defendant 6 who is to be his direct tenant by reason of the declaration given by the District Judge in his favour. Surely it was open to the plaintiff during the progress of the suit to withdraw his challenge to defendant 6, accept him as a tenant of his and reco-

ver possession from defendants 1 to 5 through the said defendant 6. For these reasons I overrule the first five points raised by Mr. Roy.

Regarding the sixth point Mr. Roy invokes in his aid the maxim that he who seeks equity must come with clean hands. In England the said maxim has been confined strictly to cases where the plaintiff seeks equitable reliefs. If the plaintiff has purchased raiyati or under-raiyati holding in the shaham of Kalinath Guha, the defendants can sue him if in time, but that is in my judgment no defence to this action. I now pass on to the two substantial points involved in the appeal, namely: (a) if the suit is barred by limitation, and (b) is Cl. 19 of the partition deed an illegal clause, by reason of its violating the rule against perpetuities?

Regarding the point of limitation Mr. Roy contends, firstly, that Art. 113 is the article applicable; secondly, Art. 120, and, thirdly, if Art. 143 is applicable, which is the article applied by the Courts below, limitation runs from date of the conveyance by Kalidas Sil and Hara Sundary Dassi in favour of Rajendra Narayan Choudhury, there being no scope on the evidence in the case for the application of S. 18, Lim. Act. In my judgment the suit being not a suit for specific performance of a contract there is no scope for the application of Art. 113. The plaintiff does not require an act of the defendants to perfect his title; all that he asks for is possession through the help of Court. The competition is between Art. 120 and Art. 143, and if Art. 143 is the proper article to apply there can be no scope for the application of Art. 120.

In my judgment Art. 143 applies to this case. Mr. Roy contends that that article is applicable only to suits between landlord and tenant based on forfeiture and in support of his contention relies upon some observations in 18 C L J 553 (1) and 57 Cal 289 (2). Art. 143 is in general terms. By its terms it applies to all suits for possession, when the plaintiff becomes entitled to possession by reason of any forfeiture or breach of condition. A tenancy can be forfeited on the breach of a covenant in a lease providing in such cases for re-entry, or where the title of the landlord is repudiated, but other interest owned by persons other than tenants can be forfeited by rules of law or by reason of breach of express conditions, and a person may also be entitled to possession on certain conditions being not performed. The forfeiture of an estate owned by a Hindu widow on remarriage is an instance. This article has been applied to such a case in other Courts although the point is not settled in this Court: 1928 Cal 714 (3). It has also been applied to cases coming under the provisions of S. 119, T. P. Act, on the footing that by that section a condition is imposed by law to exchanges of property for mutual return if one party is deprived of what he got by exchange: 30 Mad 316 (4) and 42 Mad 690 (5). It has also been applied to a case where a purchaser agreed to put the vendor in possession of a part of the property purchased on his failure to pay the vendor certain annual fees: 4 All 493 (6). In 8 I A 210 (7) as a result of a family settlement a Hindu widow retained half share of certain villages which belonged to her husband, and her cosharer retained the remaining half share. The widow agreed not to alienate the properties which were to go over to her cosharer at her death. The widow alienated four annas share in some of the villages and on her death the suit was brought by her cosharer to recover the said share of the said villages from the transferee. The suit was brought beyond 12 years of the transfer but within 12 years of the widow's death. Sir Arthur Hobhouse on a construction of the covenant held that it did not prevent an alienating by the widow of her life estate, and there were no words of forfeiture there and so there was no forefeiture on the transfer being effected. In this view of the matter Art. 144, Act

1. Bhairab Chandra Naskar v. Kadam Bewa, (1913) 22 I C 28=18 C L J 553.
2. Abinash Chandra Ghosh v. Narahari Mather, 1930 Cal 165=123 I C 444=57 Cal 289=50 C L J 260.
3. Tilottoma Dassi v. Madhu Sudan Giri, 1928 Cal 714=117 I C 703.
4. Raja Gopalam v. Kasivasi Somasundara Thambiran, (1907) 30 Mad 316=17 M L J 149.
5. Sreenivasa Aiyangar v. Johnsa Rowther, 1920 Mad 812=51 I C 939=42 Mad 690.
6. Bhojraj v. Gulshan Ali, (1882) 4 All 493=1882 A W N 125.
7. Mt. Bebea Sahodra v. Roy Jung Bahadur, (1882) 8 Cal 224=8 I A 210 (P C).

9 of 1871, which corresponds to Art. 143 of the present Act, was not applied, but he held that time ran from his widow's death. If Art. 144, Act 9 of 1871, had been applicable only to suits between landlord and tenant Sir Arthur Hobhouse would have said so and there would have been no necessity to construe the covenant in question and to hold that Art. 144 of that Act was inapplicable because of the construction so put upon it. When a particular article is intended to be made applicable to suits between landlord and tenant only it is stated to be so in express terms in the Limitation Act (Art. 139).

The cases cited by Mr. Roy do not support him. In both the cases cited the suit was brought on the footing that there was a tenancy and the same had been forfeited. It was held that Art. 143 was not applicable as there was at no time any relationship of landlord and tenant. If that was so, there was or could be no question of forfeiture. I accordingly hold that Art. 143 applies to this case and time ran from the date of the purchase by Rajendra Narayan Choudhury, which being beyond 12 years of the institution of the suit, it is prima facie barred by limitation, unless the case comes within S. 18, Lim. Act. The finding of the Courts below is that by contrivances adopted by defendants 1 to 4 the plaintiff was kept from knowledge of his right to sue. The methods adopted were so effective that even Kalidas Sil did not even up to the year 1919 know that defendants 1 to 4 were his landlords in respect of his osat raiyati. These findings of the Courts below, in my judgment, are good findings and defendants 1 to 4 cannot in my judgment succeed by simply showing that by diligent inquiries the plaintiff could have known of the real nature of Rajendra Narayan's purchase much earlier. In 49 Cal 886 (8) Sir Ashutosh Mookherjee has pointed out that the terms of S. 18, Lim. Act are materially different from S. 26, Real Property Limitation Act (3 and 4 Will. IV, C. 27) and that when a plaintiff has established that by fraud of the defendant he had been kept from the knowledge of his right to sue the burden is shifted on the defendant to show that the plaintiff had knowledge of the transaction impeached beyond the period of limitation. If the defendant only asserts or proves that the plaintiff had some clues and hints which if vigorously and acutely followed up might have led to a complete knowledge of his fraud, he does not discharge the burden shifted on to him, though under the English Act, he may have done so. For these reasons having regard to the finding of the lower appellate Court that the plaintiff first came to know in the year 1923 that the purchase was really by defendants 1 to 4 and that he was prevented by fraud of defendants 1 to 4 from knowing the same before, I do hold that the suit is in time. Regarding the point that Cl. 19 of the partition deed violates the rule against perpetuities I am of opinion that it is not a good point. That clause did not create any right in property in favour of the co-sharers of any of them. The raiyats and under-raiyats holding under them could transfer their interest to any body, only rights were reserved to a quandum co-sharer to disregard purchase of such rights by his other co-sharers who got allotments elsewhere. The case is in my judgment governed by the principles formulated by Greaves and Mukherji, JJ., in 44 C L J 220 (9). The clause in question cannot be construed as a clause for preemption and so 56 Cal 487 (10) does not apply. I accordingly affirm the judgment and decree of the District Judge and dismiss the appeal with costs. Leave to appeal under the Letters Patent asked for is granted.

B.D. *Appeal dismissed.*

8. Biman Chandra Dutt v. Promotha Nath Ghosh, 1922 Cal 157=68 I C 94=49 Cal 886=36 C L J 295.

9. Jogesh Chandra Roy v. Asaba Khatoon, 1927 Cal 41=98 I C 46=44 C L J 220.

10. Kala Chand Mukherjee v. Jatindra Mohan Banerjee, 1929 Cal 263=117 I C 855=56 Cal 487=33 C W N 150.

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MUKERJI AND S. K. GHOSE, JJ.

Luxman Chandra Mistry and *another* —Defendants—Appellants.

v.

Charu Chandra Mittra and *another*—Respondents.

Appeal No. 109 of 1932, Decided on 13th June 1935, from original decree of Special Land Acquisition Judge, 24-Parganas, D/- 1st February 1932.

(a) Lease—Construction — Tenant unable to acquire any right of transfer or any other legal right under the kabuliyat — Tenancy created was "tenancy-at-will."

Where character of tenancy is to be determined, the terms of the kabuliyat should be looked into. [P 784 C 2]

Under one of the terms of the kabuliyat the tenant was not to acquire any right of transfer or any other legal rights.

Held: that the tenancy created was tenancy-at-will : 1927 *Cal* 179 and 1921 *Cal* 474, *Dist.* [P 786 C 1]

(b) Record of Rights—Value of — Tenancy land used for residential and horticultural purposes.

Where tenancy is not merely used as one for residential purposes but also for horticultural purposes, the Record of Rights will have the same value as it would have in any other case. [P 786 C 1]

Amarendra Nath Bose and *Harideb Chatterjee*—for Appellants.

Hiralal Chakravarty and *Panchanan Ghosal*—for Respondents.

Judgment. — The only question in this appeal is whether the appellants had such rights in certain lands which have been acquired under the provisions of the Land Acquisition Act as would entitle them to a part of the compensation money. The lands were acquired under a declaration dated 31st January 1927 and the appellants were claimants Nos. 4 and 5 in the land acquisition proceedings, the former being the tenants in respect of two land acquisition plots 8 and 9, plot 8 being a piece of land and plot 9 a doba. Claimant No. 5 was the tenant in respect of two other land acquisition plots 13 and 14, the former being a piece of land and the latter a tank. The Collector had divided the compensation money equally between the two claimants on the one side and their landlords, the Lakhrajdars, on the other. On a reference which arose out of an application made by the landlord and also out of an application which the appellants made, the learned Judge has awarded the whole of the compensation money to the Lakhrajdars. From this decision the appellants have preferred this appeal.

It appears that the survey and settlement operations were going on in the locality about the time when the declaration was made and we are told that the actual survey had been made in or about the year 1925-1926. The Record of Rights that was prepared in connexion with these operations, we are told, was finally published sometime after the declaration. In the Record of Rights, the claimants were entered as "rayats sthithiban" that is, settled-rayats ; and one of the raiyats was described as having a korfa tenant under him. Against the name of the said korfa tenant, there was an entry that according to custom he had occupancy right. The land which this korfa tenant was occupying was described as sali land. The judgment of the learned Judge is not very happy and exception may justly be taken to certain remarks which are to be found in his judgment which create an impression that he was labouring under the idea that the claim which the appellant put forward was not a bona fide claim but that the object of their asserting that they had some rights in the land was simply to improve their status, they being by occupation dhobis, an occupation which they were not inclined to own or accept. The learned Judge says :

> The fact is that taking advantage of the settlement proceedings they are ambitious to become agriculturists.

This sort of remark does not appear to us to be just or proper. But the decision that he has arrived at on the question of the rights of the appellants to the land, in our opinion, is a decision which is justified upon the materials that are on the record. The learned Judge is right in saying that there is no evidence showing that as a matter of fact the appellants were on the land before they executed the two kabuliyats by which they purported to obtain for themselves tenancies in respect of the land acquired. These kabuliyats were executed in 1916 and 1918 respectively. The terms of the two kabuliyats are the same and if the character of the tenancy of the appellants has to be determined, the terms of the kabuliyats have got to be primarily looked into. The kabuliyat states that a certain annual rent was fixed in a lump and that rent was to be paid in four equal kists, and the tenant on agreeing to such rent was taking settlement of land as he was prepared to live on the land as a tenant was accepted by the lessor. Then it says :

> Without your permission I shall not be competent to cut down any trees that are or will grow on the land. You may cut down any trees for your requirements.

These two sentences clearly indicate that no right to the trees was to be enjoyed by the lessee. Then there is a clause which, in our opinion, is of considerable importance. It runs in these words : "Nor shall I acquire any right to transfer by way of gift or sale or any other legal right." The plain words of this clause would suggest that the lessee was not to have any right under their respective leases to transfer by gift or sale or any kind of right whatsoever. But Mr. Bose appearing on behalf of the appellants has argued that the expression " or any other legal right " is to be understood as meaning any other right which a tenant might occupy by remaining in the land for sometime, that is to say, some future right which a tenant coming under a lease of this description might acquire by occupation of the land for sometime. His object in putting this interpretation is to make out that the lessees might acquire a right of occupancy. Unless the words of the clause are unduly strained it is not possible to attribute to it the meaning which Mr. Bose wants to attribute to it. There is no clause, it should be noted, suggesting that so long as the tenant goes on paying the rent that is fixed by the lease, he would be allowed to remain in occupation of the land; and in that respect the kabuliyat seems to contain terms which are almost entirely one-sided. Certain cases have been cited before us by Mr. Bose in order to induce us to hold that there being no words expressly limiting the term for which the lessee would be entitled to remain in occupation of the land, it should be held that the lease would enure during the lifetime of the lessee. In one of these cases, namely the case of 31 C W N 46 (1), the head-note says:

> Where a lease was to the effect that the land was settled with the lessee at an annual rent and the lessee was to enjoy and possess the same by constructing a homestead and residing therein, regularly paying the rent,
>
> and
>
> there was no term of inheritance in the lease, the interest created by the lease which was neither for a definite term nor one expressly for perpetuity, was not that of a tenant-at-will or of a yearly tenant, and it would be right to apply to it the general rule of construction which is to the effect thaf if a grant was made to a man for an indefinite period it enures generally speaking at least for the life-time of the grantee unless there were some words showing the intention that a heritable grant was made.

The lease in the present case is, it is true, a lease without any term fixed. But the clause to which we have referred and which provides that the lessee shall acquire no other legal right by which we understand that he shall not acquire any other legal right under the lease, is a clause which, in our opinion, makes a good deal of difference. In any case the decision quoted above turns on its own facts and the head-note is one which is certainly mis-leading. In that case, after referring to the fact that there was no term of inheritance in the lease and that the lease was one, neither for a definite term, nor one expressly for perpetuity, what was said in the judgment was that in those circumstances the terms of the document themselves not being very clear it was competent to look into the surrounding circumstances. And a number of surrounding circumstances were referred to as facts which had been found by the Court below for which there is nothing corresponding in the present case. It was found in that case that the lessee was to build his dwelling house on the land. There is no such provision in the present lease. Of course it cannot be said that it was intended that no house was to be erected although the lease was granted for residential purposes. But there were other facts. In that case another finding was that at the time the lease was granted a substantial sum was paid by the lessee to the lessor as nazarana. Then there was the fact that the lessee erected with the permission of the lessor some substantial structure upon the land and there were two transfers of the lessee's interest and so on. None of these facts appears in the present case and upon the plain words of the kabuliyat to which we have referred it seems to us that nothing more than a tenancy at will was intended to be created by the document. Another case to which our attention has been drawn is 47 Cal 979 (2). In that case, the grant was of an itmam, the word itself suggesting a tenancy which can never be of a precarious nature and with regard to a grant of that description it was said:

1. Ashutosh Lahiri v. Chandi Charan Mitra, 1927 Cal 179=99 I C 200=31 C W N 46.

2. Jogesh Chandra Roy v. Makbul Ali, 1921 Cal 474=60 I C 984=25 C W N 857=47 Cal 979.

If a grant be made to a man for an indefinite period, it enures, generally speaking, for his life-time and passes no interest to his heirs, unless there are some words showing an intention to grant an hereditary interest.

If the other terms of the kabuliyat in the present case indicated that a permanent tenancy was intended to be created then the fact that no definite term was mentioned in the document would perhaps have entitled us to presume that the intention of the parties was to create a tenancy which would enure during the life-time of the lessee.

We are of opinion that the present kabuliyat does not create in favour of the lessee any interest which can be held to be anything more than a tenancy-at-will. So far as the record of rights is concerned, the learned Judge was inclined to think that because the lands were situated within the limits of Joynagore Municipality therefore the record of rights was of no value. With this conclusion of the learned Judge, we cannot agree because it may be that the tenancy, having regard to the use that has been made of it, can be regarded not merely as one for residential purposes but also for horticultural purposes. And if the latter be the fact, the record of rights in this particular case will have the same value as it would have in any other case. But the entries appear to us to be incorrect inasmuch as the evidence that has been adduced in this case clearly shows that what is stated in the entries is not what is the real state of facts. The under-tenancy is said to be a sali land in the record of rights. But the evidence which the defendants have adduced in this case and to which our attention has been drawn shows that the land had never been paddy land, at least not before it was settled with a person who is said to be an under-raiyat. The whole of the evidence is to the effect that the claimant, whose land it is, had grown vegetables, plantain, betel-nut, cocoanut and some other trees. There are no materials on which it can be held that the entry of the name of this claimant as settled raiyat in the record of rights was justified and such materials as there are before us amply prove the contrary. That being the position we do not see how it is possible for the appellants to contend that any rights which they have under the lease entitle them to a share in the compensation money. The decision of the learned Judge seems to us to be correct.

We accordingly dismiss this appeal. Having regard however to the fact that the appellants were on the land for a period of about ten years or so, we think we ought not to make them liable for the costs of this appeal because in our judgment they had enough justification to prefer this appeal, having regard to the extremely unsatisfactory nature of the judgment appealed from, and also in view of the fact that their occupation of the lands for a series of years may have created in their mind a genuine belief that they have some higher rights in the land.

B.D. *Appeal dismissed.*

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NASIM ALI AND HENDERSON, JJ.

Umasundari Dasi—Appellant.

v.

Prafulla Kumar Mondal and *another*—Respondents.

Appeal No. 1938 of 1932, Decided on 6th August 1935, from appellate decree of Addl. Sub-Judge, Burdwan, D/- 11th July 1932.

Landlord and Tenant—Stranger claiming right through tenant by purchase of tenancy—Nature of tenancy should be determined before declaring stranger's rights.

Where a person claims a declaration of tenancy rights against a landlord for lands held by him as purchaser of a tenancy from a tenant, the suit cannot be disposed of before determining the nature of the tenancy of the vendor tenant. [P 787 C 2]

Nagendra Nath Ghose, N. C. Sen Gupta and *Urukramdas Chakravarti*—for Appellant.

Dr. Mukherjee and *Sanat Kumar Chatterjee*—for Respondents.

Nasim Ali, J. — This appeal arises out of a suit for a declaration of the plaintiff's right on certain char lands which are described in schedule of the plaint. The plaintiff's case briefly stated is as follows: Plot 1 of the plaint appertains to Mouza Gohagram of which the defendants are the talukdars. Plot 2 appertains to Mouza Sansar and the defendants are lessees in respect of the said plot under the proprietors of Mouza Sansar. One Dhan Krishna Jas was in possession of these two plots of lands as a permanent raiyat at a yearly rental of Rs. 20 and that while he was in possession of these lands he used to grow

paddy on portions of them and take the reeds kasia grass and other self-sown plants and trees on these lands. Dhan Krishna died leaving his son Hanseswer as his sole heir. After Hanseswer's death his widow Aghore Kumari inherited this jama and after her death Bhutnath and Provakar, the reversionary heirs of Hanseswer, inherited this property and sold them to the plaintiff on 16th Kartik 1330 B. S. The plaintiff is in possession of the lands but the defendants are trying to take kabuliyats from the tenants who have been inducted into the lands by the plaintiff. The plaintiff is therefore entitled to have his kayami mokrari rayati right declared to this property.

Defendant 1 only contested the suit. Her defence in substance is that plot 2 is in khas possession of the proprietor of Mouza Sansar and that she was only a lessee in respect of the said plot having a forest right only on the basis of a lease dated 1253 B. S. She further states that she as well as her cosharer, husband of defendant 2, are in khas possession of plot 1, and that the plaintiff's predecessor Dhan Krishna had only Bankar right in plot 2. She denies the right of Dhan Krishna, or his successor in interest or of plaintiff to the soil of the lands. Objections were also taken by her to the maintainability of the suit under S. 111, Ben. Ten. Act, and S. 42, Specific Relief Act. Issues were settled in the suit on 19th December 1929. On 18th November 1930, the plaintiff put in an application for amending the plaint by striking out his prayer for declaration of his mokrari kayami rayati right to the lands and by inserting a prayer for declaring his tenancy right in the lands in order to meet the objection of the defendants that the suit was not maintainable in view of the provisions of S. 111, Ben. Ten. Act. This prayer was allowed by the learned Munsif and the only point for determination before the trial Court was whether the plaintiff's vendor was a tenant or had only bankar right in the disputed lands. The learned Munsif on a consideration of the entire evidence gave judgment in favour of the defendant and dismissed the plaintiff's suit. An appeal was thereafter taken by the plaintiff to the lower appellate Court and the learned Judge has reversed the decision of the trial Court and has decreed the plaintiff's suit. Hence the present second appeal by defendant 1.

The first point urged by the learned advocate for the appellant is that the judgment of the lower appellate Court is not a proper judgment of reversal. This contention must prevail. It appears that as regards plot 2, there was a definite finding by the trial Court that the Meas of Sansar are in possession of jack-fruit garden and cultivable lands in plot 2, and that the plaintiff made no attempt to show that his predecessors in-interest were ever in possession of the lands in the said plot. The learned Judge further does not appear to have considered properly the finding of the trial Court as regards the nature of possession exercised by the plaintiff, the defendant and the superior Malik. Again it appears that the plaintiff relied upon a decree in a rent suit which was obtained at a time when plaintiff was the gomastha of defendant 1. The trial Court found this decree to be a fraudulent decree and one of the reasons given by the trial Court is that in that suit part of the rent which was previously paid was also claimed. In reversing the finding of the trial Court on this point the learned Judge has not taken into consideration this fact at all. I am clearly therefore of opinion that there had not been a proper hearing of the appeal by the lower appellate Court.

The next point urged by the learned advocate for the appellant is that the findings of the lower appellate Court are not sufficient to give the plaintiff a decree. It is urged by the learned advocate that even if the plaintiff's vendor had a tenancy right, unless the plaintiff succeeds in showing that such a tenancy was transferable without the consent of the landlord, the plaintiff is not entitled to get a declaration of his right to the property as against the defendant who is admittedly the landlord under whom the plaintiff claims the tenancy right. I have already stated that in the plaint originally there was a prayer for a declaration that the plaintiff has got kayami mokarari rayati right. In order to avoid the objection under S. 111, Ben. Ten. Act, this prayer was expunged. In view of the fact that the plaintiff's case is that he is a purchaser of some tenancy right, this suit cannot be dis-

posed of unless the nature of that tenancy is determined. This aspect of the matter was overlooked by the trial Court and was also overlooked by the learned Judge. In order to dispose of this suit finally it is necessary that the question of the nature of the tenancy of Dhan Krishna Jas must be decided in this suit.

The result therefore is that this appeal is allowed, the judgment and decree of the lower appellate Court are set aside and the case is sent back to the lower appellate Court for re-hearing of the appeal. The learned Judge is directed (1) to decide the question whether the plaintiff's predecessor-in-interest Dhan Krishna Jas was a tenant or he had merely Bankar right to the disputed lands on the evidence which is already on the record, (2) to decide the question whether Dhan Krishna had a transferable right in the disputed lands, that is, a right which was transferable without the consent of the landlords, after admitting in evidence the Record-of-Rights which has been published, and after taking such evidence as the parties may desire to adduce on the point; (3) to come to a finding on the question of maintainability of the suit under S. 42, Specific Relief Act. As the plaintiff amended the plaint by striking out the prayer for declaration of his alleged kayami mokrari right to the disputed lands, he must pay costs to defendant 1 incurred by her in the lower appellate Court as well as in this Court within a fortnight from the date of the arrival of the record in the lower appellate Court; in default the plaintiff will not be entitled to adduce any evidence and the defendant will be entitled to realise the same by execution. Further costs will abide the result. The appellant is allowed to take back the copies of the Record-of-Rights which were filed by her in this Court.

Henderson, J.—I agree.

B.D. *Case remanded.*

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* A. I. R. 1935 Calcutta 788

COSTELLO AND LORT-WILLIAMS, JJ.

Satish Chandra Mukherjee — Defendant—Appellant.

v.

Niladri Nath Mukherjee and *others*—Plaintiffs and Defendant—Respondents.

Appeal No. 26 of 1934, Decided on 11th July 1934.

(a) Will—Construction — Misrecital as to law not followed by disposition does not prove intention to supplement what would be got under law.

A misrecital in a will as to the law applicable to the devisee, which is not followed by any disposition will not be sufficient to enable the devisee to contend that the testator was either supplementing what such person would get under the law, or substituting a provision in his will for the ordinary operation of law.

[P 790 C 2]

*** (b) Will — Construction — Gift must be either express or implied — Testator declaring that person has right independent of will—Recital is no evidence of intention to gift nor is there gift by implication.**

The gift by a testator, if there be any, must be found either in express words or by implication. Where a testator, in one part of his will, has recited that he had given a legacy to a certain person, but it does not appear that any such legacy was given, the Court takes the recital as conclusive evidence of an intention to give by the will, and fastening upon it, gives to the erroneous recital the effect of an actual gift. Where however the testator only makes a declaration that he supposes that a party who is referred to has an interest independent of the will, such a recital is no evidence of an intention to give by the will, and cannot be treated as a gift by implication: *Adams* v. *Adams*, 1 *Hare* 537, *Rel. on.*; *Hall* v. *Lietch*, 9 *Eq* 376, *Diss from.*

[P 791 C 1]

Material portion of a will ran as follow: "On my demise my wife shall become full (absolute) owner of my entire moveable properties according to law, consequently there is no necessity for any will in respect of the same also. The copyright to my books is reckoned among moveable properties." The question was whether the testator by those words gave his moveable properties to his wife, and if so to what extent:

Held: that the testator did not make a gift by his will of the moveables including copyright in the books to his wife.

[P 790 C 1; P 792 C 2]

Sarat Chandra Das Choudhury and *S. R. Das Gupta*—for Appellant.

S. B. Sinha, *S. N. Rudra* and *H. N. Bhattacharya*—for Respondents.

Costello, J.—Three persons Niladri Nath Mukherji, Himadri Nath Mukherji and Bindhyadri Nath Mukherji who were the grandsons of Rai Bankim Chandra Chatterjee Bahadur who died on 8th April 1894, brought the suit out of which this appeal arises, against Satish Chandra Mukherji who is described as the proprietor of the 'Basumati' and of the Basumati Press and Basumati Sahitya Mandir, and as carrying on business as book-seller and publisher, and also against Brojendra Sundar Banerji who is the first cousin of the three plaintiffs and so also a grandson of Rai Bahadur Bankim Chandra Chatterjee. The three plaintiffs are the sons

of Sm. Nilabja Kumari Debi, and the defendant Brojendra is the son of Sm. Sarat Kumari Debi. Those two ladies are the daughters of Rai Bahadur Bankim Chandra Chatterjee. The plaintiffs sued for recovery of damages which they assessed at one lac of Rupees for infringement of the copyright in the works of Bankim Chandra who was a well-known Bengalee litterateur, and the author of a large number of books, a list of which was set forth in para. 1 of the plaint.

Brojendra Sunder Banerjee, defendant 2 as the purported owner of the copyright in the works of his grandfather, had granted a licence to defendant 1 for the publication of those works. Brojendra was supposed to have acquired the ownership of the copyright in his grandfather's works in this way: Rai Bahadur Bankim Chandra was married to a lady named Rajlakshmi Debi. It is said that under the will of Bankim Chandra, dated 23rd May 1890, Rajlakshmi became the absolute owner of the copyright, Letters of Administration having been granted to her on 21st July 1894. Rajlakshmi herself made a will on 2nd September 1894 and to that will was added a codicil on 10th March 1907 whereby she bequeathed the copyright in her husband's books to her elder daughter Sm. Sarat Kumari, the mother of defendant 2. In 1908 the licence in respect of the copyright had been granted by Rajlakshmi to the father of defendant 1, and on 20th May 1926, after Sm. Sarat Kumari had acquired the copyright by virtue of the provisions of her mother's will, she in her turn granted a licence to Satish Chandra Mukherjee, defendant 1 in the suit. That licence was for a period of five years. Shortly after that, on 19th September 1926, Sarat Kumari by a registered deed of gift transferred to her son Brojendra all her rights in the copyright in her father's books. On 4th April 1928 there was an agreement between Brojendra and defendant 1 Satish, which conferred upon the latter a right to publish the books of Bankim Chandra Chatterjee. In the plaint, the date from which the alleged infringement is said to have begun, was 23rd December 1927.

The plaintiffs founded their claim on the fact that their aunt Sarat Kumari had died and they said, her right had come to an end, because she only had, according to the plaintiffs' contention, the rights of a Hindu daughter in succession to the rights of her mother, Rajlakshmi, who herself also had only the rights of a Hindu widow. Sm. Nilabja Kumari, the mother of the plaintiffs, had predeceased Rajlakshmi Debi. The case of the plaintiffs so far as their rights are concerned depended on the question, whether or not Bankim Chandra disposed of the copyright in his works by the will to which I have already referred and which is dated 23rd May 1890. The case was tried by Roy, J., and the learned Judge came to the conclusion that the plaintiffs had established their case, because the copyright had not passed under the will of Bankim Chandra at all. The learned Judge put the matter thus :

> The plaintiffs claim title to the copyright in the books by inheritance and it is conceded that if by his will, dated 23rd May 1890, the late Rai Bahadur Bankim Chandra Chatterjee had made no testamentary disposition of the copyright in his books in favour of his widow, Sm. Rajlakshmi Debi, the plaintiffs and defendant 2 jointly became the owners of the copyright on the death of Sm. Sarat Kumari Debi.

The learned Judge pointed out that there was no dispute about the facts of the case. As I have already said Rai Bahadur Bankim Chandra died on 8th April 1894. Roy, J., stated that the question which he had to decide in this form :

> The question for determination therefore is whether or not on a proper construction of the will of Rai Bahadur Bankim Chandra Chatterjee there was a testamentary disposition of the copyright in the books mentioned in the plaint, in favour of his widow Rajlakshmi Debi.

Then he said :

> The learned counsel for the plaintiffs has submitted that there are no words in the will indicating that the testator intended to make a gift of his moveable properties or the copyright in his books by his will, and that on the contrary the terms of Cl. 3 of the will made it clear that the testator did not consider it necessary to make any testamentary disposition in respect of those properties.

Now, the only real question which we have to decide is that which is set out clearly by the learned Judge. Cl. 3 of the will of Rai Bahadur Bankim Chandra, which we have understood to be in these terms, according to the translation used at the trial and placed before us in the paper book :

> On my demise my wife shall become full (absolute) owner of my entire moveable properties according to law, consequently there is no neces-

sity for any will in respect of the same also. The copyright to my books is reckoned among moveable properties.

The question therefore is whether the testator by those words gave his moveable properties to his wife, and if so to what extent. Mr. Roy Chowdhury on behalf of defendant 1, the appellant before us, put forward a slightly different version of Cl. 3 in this form :

On my demise my wife shall become full (absolute) owner of my entire moveable properties according to law, for this reason about her right, or about the character of her right, there is no necessity for making any will. The copyright to my books is reckoned among moveable properties.

We have had a further translation of this Bengali document, that is of Cl. 3, made by an interpreter of this Court for the purpose of this appeal. According to that translation, the clause will read in English as follows :

After my death, to all my moveable properties my wife shall be fully entitled, and that according to law. For this reason in that respect too there is no need for any will. The copyright of my books is considered as one included in the moveable properties.

It is necessary to consider the general scheme of this will. It consists of four clauses. The fourth clause being however merely for the purpose of revoking a former will, needs no further comment. Under Cl. 1, the testator gave certain properties to his wife, and by concluding words of that clause he made it quite clear that he intended to give her those properties in absolute ownership and not merely in the right of a Hindu widow. In Cl. 2 he says :

I see no necessity of making will in respect of my other immoveable properties.

Therefore, I would think it quite certain that as regards the other immoveable properties other than mentioned in Cl. 1, the testator intended to give to his wife no more than the rights which the law would give her as a Hindu widow. Then comes Cl. 3 of which I have given three English versions. Under that clause, it may well be that the intention of the testator, or at any rate the ideas of the testator, was that his wife would get the moveable properties in absolute ownership. It may possibly, on the other hand, be contended that he thought she would get the moveable properties in the rights of a Hindu widow. I am disposed to think that what really was in the mind of the testator as regards the moveables, was that his wife would have the moveables in absolute ownership. That seems to me to put upon the whole document a reasonable interpretation. What is really to be determined however is whether by Cl. 3 the testator conferred any rights at all on his wife. The outstanding fact shown by Cl. 3 is that the testator thought that the law would confer certain rights in the moveable properties on his wife after his death.

Then he seems to say that as the law would operate to confer rights on his wife, there was no need for him to make any disposition by will at all.

Mr. Roy Chowdhury put before us the second and the third translations, which I have already quoted, for the purpose of suggesting that the testator really meant that the law would confer upon the wife an absolute interest in the moveables, or rather that as the testator thought that the law would confer such a right, there was no need to make any special reference or disposition as regards the nature and character of the right which his wife would acquire. He contended therefore that we ought to read the clause as meaning, at any rate by implication, that the testator was giving to his wife by that clause, or intended to give to his wife an absolute ownership in the moveable properties including the copyright. It seems to me to make no difference whatever whether one takes the view that the testator thought that the law would give to his wife an absolute right to the moveables or whether he only thought that the law would give his wife the right of a Hindu widow as regards the moveables, because in either event we have to decide whether there is, by implication, a gift in the will itself. It may be that as regards the testator's statement as to the law it was a misrecital. The law does not give to a Hindu widow an absolute right even in immovables. But a misrecital which is not followed by any disposition, will not, in my opinion, be sufficient to enable the appellant in this case to argue that the joint effect of the two parts of the clause, is that in substance the testator was either supplementing what his wife would get under the law, or substituting a provision in his will for the ordinary operation of law.

A number of cases was cited before the learned Judge, but the law on this matter is, in my opinion, sufficiently and accurately stated in the judgment of Vice-Chancellor Wigram in 1 Hare, 537 (1). In that case a devise and bequest of a certain real and personal estate upon trust for the children of the testator subject however to the dower and thirds at common law of his wife, followed by a direction to apply the rents, issues and profits, after deducting the dower and thirds of his wife, to the maintenance of the children, was held not to be by implication, a gift of any interest in the estate to the wife; although in fact the wife had no dower. The learned Vice-Chancellor put the matter thus (at p. 540):

> I certainly think that this is a hard case upon the widow; but, whatever my opinion in that respect may be, I cannot make a provision for her, which the testator has not directed.

The question in all these cases is, whether the testator has actually made any gift; and the gift, if there be any, must be found either in express words or by implication. Where a testator, in one part of his will, has recited that he had given a legacy to a certain person, but it has not appeared that any such legacy was given, the Court has taken the recital as conclusive evidence of an intention to give by the will, and, fastening upon it, has given to the erroneous recital the effect of an actual gift. Where, however, the testator says that only which amounts to a declaration that he supposes that a party who is referred to has an interest independent of the will, such a recital is no evidence of an intention to give by the will, and cannot be treated as a gift by implication. The distinction between the two cases is marked and obvious. In the former the erroneous recital is evidence of an intention to give by the will inadvertently not expressed. "In the latter", as it is expressed by Mr. Jarman "On Wills" (the author of the well, known treatise on Will),

> such recitals do not in general amount to a devise; for, as the testator evidently conceives that the person referred to possesses a title independently of his own, he does not intend to make an actual disposition in favour of such person.

The learned Judge then said:

> I cannot distinguish the case before me, in principle from those I have referred to.

It seems to me that in the present instance the testator Bankim Chandra Chatterjee supposed that his wife had or would have an interest in the moveable properties entirely independent of the will, her interest either amounting to absolute ownership or to that of a Hindu widow. Which ever it was, however, in my opinion makes no difference. What the testator in effect said was this: because my wife will by reason of her inherent right by operation of law get my moveables it is not necessary for me to say anything about them in the will at all. In these circumstances, it seems to me quite impossible to say that there was any gift by implication by reason of the recital with regard to the wife's position in law. Mr. Rai Chaudhuri cited to us a number of cases none of which, in my opinion, are helpful to him with the exception of the case reported in 9 Eq. 376 (2). There the testator, being entitled to a policy of assurance for £500 on the joint lives of himself and his wife, bequeathed all his personal estate:

> Save and except the sum of £500 payable at my death, under a policy of insurance, to my wife, and to which she is absolutely entitled under the said policy,

to trustees, upon trust for his wife for life, and for his children after her death: and it was held that the £500 payable under the policy was given, by implication, to the widow absolutely by the will. The case was tried by Sir Richard Malins, V. C., who, having stated the facts, said:

> I think that this must be construed as showing the intention of the testator that his wife should take the £500 absolutely; if the policy did not give it her, she was to take it under the will. It is just as if a testator had by a codicil disposed of all his personal estate, except £500, which I have given to *A* by my will, and he had not given £500 to *A* by his will; that would give the £500 to *A* by implication. Then, he said upon the true construction of the will, the £500 is payable to the plaintiff.

It is to be observed that the learned Vice-Chancellor made no reference to any of the authorities nor, indeed, were any authorities cited before him on one side or the other. One can only come to the conclusion, with all possible respect to the learned Vice-Chancellor, that the decision which he gave was in the nature of one of first impression and that he had inadvertently overlooked or

1. Adams v. Adams, (1842) 1 Hare 537=11 L J Ch 305=58 R R 181.

2. Hall v. Lietch, (1870) 9 Eq 376=23 L T 298=18 W R 423.

was, in fact, oblivious of the distinction or, if I may very respectfully say so, ignorant of the principles which had been so clearly laid down by one of his learned predecessors in 1 Hare 537 (1) already referred to. There is a note in the present edition of Mr. Jarman's book which seems to indicate that in the view of the learned editor of it that is the probable explanation of the judgment given by Vice-Chancellor Malins. There is however a further and more potent authority for the explanation I have suggested and that is the case reported in (1895) 1 Ir R 23 (3) where the Master of the Rolls at p. 40 after setting out the facts said:

> That case, 9 Eq 376 (2), does not seem to have been fully argued. No authorities were cited, and the decision seems to me to be more than questionable, and irreconcilable with the decisions in the Court of appeal in this country. The proposition which Malins, V. C. puts as self evident seems to be contrary to many cases, such as 7 T R 492 (4) and 1 Keen 58 (5). I therefore decline to act upon 9 Eq 376 (2) however strongly it commends itself to one's feeling of what is in a certain sense fair and reasonable.

In my judgment the present case falls exactly within second part of the proposition laid down by Sir James Wigram in 1 Hare 537 (1). But, in any event, I think the present case ought to be treated entirely upon its own peculiar facts and upon its own merits and it seems to me that the testator said in an unequivocal and unambiguous words that he was not by his will making a gift of the moveables. I think he states quite categorically that he did not intend by his will to touch the moveables or to effect their normal destination after his death. Mr. Rai Chaudhuri referred us to a number of sections of the Succession Act, notably Ss. 74, 77 and 84, which embody the English Common Law Rules of interpretation and Canons of Construction which should ordinarily be employed for the purpose of ascertaining a testator's intentions or the meaning of expressions sued in a will. If in the present instance there had been words which, on some view or other, might be construed as making any gift of the moveables, then we should have had to take upon ourselves the task of deciding what the testator's real intention was. Here however the testator stated that there was no necessity for any will in respect of parts of his estate. As I read the clause I think it can only be taken to mean that the testator did not think it necessary for him to make any disposition of the moveables. He uses similar words also in Cl. (2) where he says :

> I see no necessity of making will in respect of any other immovable properties.

Upon that view of the meaning of the clause, whether one looks at it in the light of one version of the Bengali writing or the other, it follows that the learned Judge was quite right in saying that the copyright did not pass under the will to his widow and therefore she had in the copyright no more than a Hindu widow's interest which upon her death passed to her daughters and then, after the deaths of the daughters to the reversionary heirs of the testator jointly that is to say, to the three plaintiffs and defendant 2. Roy, J., states his conclusion in this form:

> After carefully considering the matter, I have come to the conclusion that the testator did not, expressly or by implication, make a gift by his will of the copyright in the books to his widow Rajlakshmi Debi. That being my view, it follows that the copyright in the books formed part of the undisposed of residue and that the plaintiffs on the death of Sreemati Sarat Kumari Debi on 17th December 1927 became entitled to the copyright in the books along with defendant 2 Brojendra Sundar Banerjee.

There is no substance whatever in any of the other points touched upon by Mr. Rai Chaudhuri and the appeal must therefore be dismissed with costs to the plaintiffs-respondents.

Lort Williams, J.—I agree.

K.S. *Appeal dismissed.*

3. Haverty v. Curtis, (1895) 1 Ir R 23.
4. Skerratt v. Oakley, (1798) 7 T R 492.
5. Vaughan v. Foakes, (1836) 1 Keen 58.

** A. I. R. 1935 Calcutta 792

MUKERJI AND S. K. GHOSE, JJ.

Sekendar Ali Mridha—Appellants.

v.

Sadaruddin Bhuniya—Respondent.

Appeals Nos. 158 and 159 of 1931, Decided on 15th August 1935, from original decrees of Sub-Judge, 4th Court, Dacca, D/- 28th January 1931.

*** (a) Res judicata — Decision on particular point obtained in trial Court in previous suit — Decision appealed against and upheld in appeal — Copy of judgment of appellate Court not filed in subsequent suit for same point — Decision held not res judicata for inability to ascertain grounds of decision in appeal.**

In a previous suit a decision on a particular

point was obtained in the trial Court and on appeal the appellate Court upheld the decision arrived at by the trial Court. The same point arose for decision in a subsequent suit and it was contended that the decision in the previous suit operated as res judicata. The copy of the judgment of the appellate Court was not however filed in the subsequent suit :

Held : that it was not possible to ascertain the grounds on which the appellate Court had upheld the decision of the trial Court in the previous suit and hence the decision could not be taken as operating as res judicata. [P 796 C 1]

(b) Res judicata—Issue decided in previous suit—Same issue in subsequent suit — Later suit not within jurisdiction of previous Court— Previous decision is not res judicata.

Where the previous suit had been decided by a Court which had no jurisdiction to entertain a subsequent suit, the decision of any issue in the previous suit can never be regarded as operating as res judicata when the same issue arises in such subsequent suit : 9 *Cal* 439 (*PC*), *Rel on.* [P 797 C 1, 2]

**** (c) Res judicata — Losing party cannot add causes of action in another suit for swelling valuation and claim former decision as not res judicata—Cause of action in subsequent suit not existing at time of previous suit or could not be availed of — Subsequent suit for entire cause of action — Previous decision would not be res judicata — Entire cause of action in subsequent suit divisible — Part of cause of action relied on in previous suit—Previous decision bars only that part.**

A party who has lost in one Court cannot be permitted to add causes of action or prayers for reliefs in another suit for the purpose of swelling the valuation of his suit and claim that the decision in the former suit does not operate as res judicata. But if it appears that his subsequent suit proceeded upon a cause of action which did not exist at the date of the previous suit, or if that cause of action existed it was one which he could not have availed of at that time, having regard to the nature of the suit as it then was, the fact that he had now instituted a suit embracing entire cause of action with the result that his suit was of a higher value, would justify him in claiming that the decision in the earlier suit was not operative as res judicata. If it is possible to treat the entire cause of action upon which the latter suit is founded as divisible and if in the earlier suit one of the component parts of the cause of action was relied upon, then the previous decision will stand as a bar to the extent of the matter involved in the earlier suit : 1926 *Cal* 1053 ; 1922 *Cal* 162 and 35 *Cal* 353, *Discussed.* [P 797 C 2 ; P 798 C 1]

(d) Res judicata—Previous suit—Decision on validity of wakf — Decision based on admission of parties and other matters raising question only incidentally—Subsequent suit raising question of validity of wakf — Previous decision held not res judicata.

In a previous suit the question of validity of wakf was raised and decided on the admission of parties to the suit and on other matters into which the question of the validity of wakf did not directly, but incidentally enter. In a subsequent suit the validity of wakf was in issue and it was contended that the decision in the previous suit operated as res judicata to the decision of the issue :

Held : that the decision in the previous suit did not bar its decision in the subsequent suit on ground of res judicata. [P 798 C 2]

(e) Wakf — Validity — Wakf created for benefit of poor relations—Creation of wakf stated to be for charity — Endowment to charity not substantial—True nature of deed held family settlement; hence wakf held not valid.

From a deed of wakf it was evident that the wakf was created mainly for the benefit of the poor relations of the wakif. There was however a statement in the deed saying that the wakf was created in the name of God and for purposes of charity, but the endowment made for charitable purposes was found to be illusory and not substantial :

Held : that the document in its true nature represented family settlement in the garb of a wakf. [P 798 C 2 ; P 799 C 1]

*** (f) Costs—Suit for partition — Shares of parties not clear when suit instituted — Grounds of contest, substantial—No demand for partition nor objection to have it by defendants prior to suit—Substantial question of law and fact raised in suit—Order directing each party to bear his own costs held proper.**

People who go in for complicated transactions should be prepared to bear their expenses when they find it necessary to enforce their rights by instituting a suit. Where a suit was filed for partition of certain properties, it was not clear when the plaint was filed what the shares of different parties would be and the grounds upon which the suit was contested were substantial. There was no evidence showing that any demand for partition was made by the plaintiff or that any objection was offered by any of the defendants to have a proper partition made in respect of the properties. The questions raised in the suit were substantial questions either of fact or of law :

Held : that the proper order to make with regard to costs was that each party should bear its own costs. [P 799 C 2]

(g) Res judicata — S. 11, Civil P. C., is exhaustive in respect of cases falling within its terms.

Section 11, Civil P. C., is exhaustive in respect of all cases falling within its terms and with regard to such cases, the Court is not entitled to travel outside the section and apply the general principles. [P 798 C 2]

Manmatha Nath Das Gupta and *Apurba Charan Mukherjee* — for Appellants.

Hemendra Kumar Das and *Charu Chandra Chowdhury*—for Respondents.

Judgment.—These two appeals have arisen out of a preliminary decree in a suit for partition. The facts of these cases are very complicated and the calculation of shares which is involved in the claims put forward by the respective parties is a matter about which no very clear idea can be had unless the various documents upon which

the Court below has relied are brought before us. For the purposes of the appeals however it will not be necessary to go very much into details. The facts, so far as they have got to be recited for the purposes of appreciating the contentions that have been put forward before us, are the following :

One Mariam Bibi was owner of a 4½ annas share in an Estate Touzi No. 9954 of the Dacca Collectorate. She had three nephews, Golam Hossain, Delwar Ali and Enayet Hossain. Enayet died leaving as his heir his daughters' son, one Syed Bakhar. In 1269, Mariam Bibi executed a wakf deed in respect of the said 4½ annas share of Estate Touzi No. 9954 and also of some other properties, appointing her nephew Golam Hossain as Mutwalli. The Mutwalli came into possession and got his name registered in the Collectorate as such and thereupon the said 4½ annas share was carved out and formed into a new estate, No. 13173, named Khalil Rahaman. In 1312, Golam Hossain gave a patni settlement to one Raj Chandra Karmakar of the said estate and also of some other properties. Settlement was taken by the latter for himself and on behalf of his brothers and nephews. In 1271, Mariam died. Delwar Ali admitted the patni, but Syed Bakhar did not do so. In Sraban 1313, Golam Hossain and Delwar Ali sold 2/3rds of the Estate to one Moulvi Alimuddin, purporting to ignore the wakf and presumably on the footing that they were the heirs of Mariam Bibi to the extent of 2/3rds share. In Chaitra 1313, Raj Chandra sold a 1 anna share of the patni to one Kalimuddi alias Kala Meah. This 1 anna share eventually passed to defendants 85 to 105 of the present suit.

In 1315 Raj Chandra and his brothers and nephews sold an 8 annas share of the patni to Moulvi Alimuddin in the benami of one Akshoy Kumar Das. The next year, Syed Bakhar, who claimed to have inherited the 1/3rd share of the estate left by Mariam Bibi, granted a patni of that share to Moulvi Alimuddin. The position therefore at that time was that in Estate No. 13173, 2/3rds share belonged to Alimuddin and 1/3rd to Syed Bakhar ; that in Patni Raj Chandra 1 anna share came to belong to Kalimuddin and 8 annas share to Alimuddin ; and that Raj Chandra and his brothers and nephews were left with the remaining 7 annas share. Then came a fresh chapter of events. Alimuddin sold the 4 annas of the Taluk and of Putni Alimuddin to one Amanulla Bhuiya and 2 annas thereof to one Lalit Mohan Roy. Alimuddin, Amanulla and Lalit on the strength of this purchase applied for registration of names, but their applications were opposed by one Syed Mozuffar Ali who asserted that under the wakf created by Mariam Bibi he was the Mutwalli. Prayer for registration of names was refused. On that Alimuddin, Amanulla and Lalit instituted a Suit No. 27 of 1921 for getting the wakf declared invalid and for declaration of their title by purchase. This suit was decreed, the title of the said plaintiffs was declared and thereafter Estate No. 13173 being partitioned, three separate estates were formed : the original Estate No. 13173 now consisting of 6 annas odd share remained with Alimuddin ; Estate No. 15784 consisting of 2 annas odd share with Amanulla and 1 anna odd share with Lalit Mohan Roy ; and Estate No. 15783 consisted of 1/3rd share of the original Estate of Syed Bakhar. Under the first two named estates remained the Putni Raj Chandra, and under the last one Putni Alimuddin.

We shall now follow the fortunes of the two Putnis, Putni Raj Chandra and Putni Alimuddin. It has been already stated that of Putni Raj Chandra, 7 annas only remained with Raj Chandra and his brothers and nephews. In 1319, Raj Chandra obtained a release from some of his co-sharers and in 1320 he created a Dar Putni of 4 annas share of the putni interest in favour of plaintiffs 1 and 2, defendants 116 to 118, and the predecessors-in-interest of defendants 106 to 115. In 1322, Raj Chandra, although he and his cosharers had no more than 7 annas share in the putni, purported to sell an 8 annas share of the putni to one Nawab Yusuf who in 1323 transferred the interest acquired by him in that sale to one Based, son of Alimuddin. In 1324, Alimuddin and Based sold their entire interest in the taluk and in the putni to one Ram Kumar Nath and in that year the two nephews of Raj Chandra sold the 2 annas odd share of the putni to one Syedulla, plaintiff 3 in this suit.

Litigation followed. Syedulla instituted a suit against Ram Kumar Nath and others and the result of this suit was that the share of 8 annas in Putni Raj Chandra, which Nawab Yusuf had purchased, was reduced by 1 anna namely the share sold by Raj Chandra to Kalimuddin, and also by 2 annas odd share which had been conveyed by Raj Chandra's two nephews to plaintiff 3 ; that is, ultimately a 4 annas odd share was left to Nawab Yusuf ; and Ram Kumar Nath by his purchase from Nawab Yusuf got that share. Ram Kumar Nath however acquired a further share by purchase from Alimuddin and Based. As regards Putni Alimuddin by purchase from Alimuddin and Based, Ram Kumar had acquired a 10 annas share, that is, after deduction of 4 annas sold to Amanulla and 2 annas sold to Lalit Kumar Roy. By subsequent transfers, the details of which it is not possible nor necessary to go into, plaintiffs 1 to 3 on the one hand, and defendants 1 to 84 on the other, acquired different interests in the two putnis and in the Dar Putni which Raj Chandra had created. Defendants 85 to 105 are owners of the 1 anna share of Putni Raj Chandra which Kalimuddin had acquired.

As the result of these transactions, plaintiffs 1 to 3 claimed to have acquired an 11 annas odd share in Putni Raj Chandra, an 8 annas odd share in Putni Alimuddin, and a 1 anna 12 gondas share in the Dar Putni. Their case is that as amongst themselves they are each entitled to a 1/3rd share out of the shares specified above, and the present suit they brought for partition in respect of the properties on the basis of the aforesaid shares. It may be stated here that in the suit, as originally laid, a partition in respect of the estate also was asked for, but this prayer was subsequently given up and the suit as tried was one for partition in respect of the putnis and the Dar Putnis. The Subordinate Judge has made a preliminary decree on the basis of the claim which the plaintiffs put forward and which, in whose opinion succeeded. From this decree, two appeals have been preferred, Appeal No. 158 by defendants 85 to 105 and Appeal No. 159 by defendants 2 to 84. There is one common point urged in both these appeals and that is with regard to the order for costs which has been made by the Court below. With that point we shall deal afterwards.

So far as Appeal No. 158 is concerned, defendants 85 to 105, who are the appellants in this appeal have contended that Putni Raj Chandra was a tenure validly created by Golam Hossain as Mutwalli of the wakf and that therefore it extended to the entire estate in respect of which he was Mutwalli. The Court below has held that this Putni was not under the two estates Nos. 13173 and 15784 but extended also to estate No. 13783. This contention involves the question of the validity of the wakf. The plaintiffs contended and urged that this question is barred by res judicata by reason of the decision in Suit No. 27 of 1911. The learned Judge has held that the decision aforesaid does not operate as res judicata because Kala Meah or his vendors were not parties to the suit in which the decision was passed. The copy of the decision of the Additional Subordinate Judge of Dacca in this suit dated 27th February, 1912 has been proved and marked as Ex. 25 in this case. From the cause title at the top of the judgment it appears that Alimuddin, Lalit and Amanulla Bhuiya were the plaintiffs in the suit and the heirs of Golam Hossain as well as the heirs of Delwar Ali and Syed Bakhar were all made pro forma defendants and in addition to this was impleaded as a principal defendant Syed Mozaffar Ali. From the judgment itself, it appears that Mozaffar Ali was made a party as Mutwalli appointed in the place of Golam Hossain. The appearing defendants alleged that the wakf was legally valid and upon that an issue being issue 6 in the case was framed which raised the question of the validity of the wakf. This issue was specifically dealt with in the judgment and it was eventually found by the learned Judge that the wakf did not represent a substantial endowment for religious and other pious purposes but that the object of the dedicator was only to appropriate a substantial portion of the income of the property for the maintenance of the members of the family. Judging from the array of parties in the suit and the recital of the pleadings as contained in the judgment and the findings that were arrived at upon the issue referred to above, it would seem prima facie that the suit was one in which a decision was

sought to be obtained against the Mutwalli, in his representative capacity, on the question of the validity of the wakf and in that way the decision would operate as res judicata on that question so far as that question has arisen in the present suit.

But the difficulty of treating this decision as a bar is that the decision was appealed from and though it was upheld by this Court on the appeal, no copy of the decision of this Court has been produced and it is not possible to ascertain on what ground the decision was so upheld. In these circumstances, we are unable to accept the contention which the plaintiff-respondents have put forward, namely that the said decision should be taken as operating as res judicata. The appellants on the other hand have relied upon the decision in Title Suit 2285 of 1920 which was decided by a Munsif on 10th December 1921 and from which decision an appeal being taken, the decision was upheld by the Subordinate Judge by a judgment dated 18th June 1923. This suit appears to have been instituted by the predecessors of the appellants, after their purchase from Kala Meah, against Ram Kumar Nath and others and the plaintiffs in the present suit. Plaintiffs 1, 2 and 3 of this suit were defendants 16, 17 and 18 in that suit. The suit was based on the allegation that the one anna share had been purchased by the appellants' predecessors but that the defendants were contesting the plaintiffs' title and therefore a declaration was sought for that the title acquired by the purchase was good. The contesting defendants in that suit alleged that the plaintiffs' vendor Kala Meah had no title or possession in the alleged 1 anna share in the Putni, that the Kabala under which Kala Meah purchased from Raj Chandra was a paper transaction and no consideration had passed at the so-called sale and that the plaintiffs had never been in possession by virtue of their alleged purchase. The contention urged on behalf of the appellants is that the question of the validity of the purchase of Kala Meah and so also the question as to whether Mariam Bibi had made any valid wakf in respect of the properties arose in the suit and that therefore the same question cannot be raised and decided in the present suit as between the parties who were parties to the previous suit and further more that in any event the present suit so far as it relates to the 1 anna share of Putni Raj Chandra which was the subject matter of the previous suit cannot be permitted to go on.

The contention is that inasmuch as in that suit it was decided that Putni Raj Chandra extended not merely to the two Estates Nos. 13173 and 15784, but also to Estate No. 15783, the same question cannot be re-agitated in the present suit. In support of the above contention reliance has been placed on behalf of the appellants upon two decisions of this Court. One is the case reported in 43 C L J 606 (1) and the other, the case reported in 35 C W N 773 (2). On behalf of the plaintiffs-respondents it has been contended that these two decisions upon which the appellants have relied have not correctly laid down the law with regard to a matter of this description but that the principles which should apply to the present case are the principles laid down in 35 Cal 353 (3). We shall presently refer to these three decisions and consider the question as to whether they are really at variance with each other and whether the principle enunciated in these decisions or any of them should be regarded as good law. But before that, it is necessary to consider the terms of S. 11 of the Code itself. The section speaks of the trial of a suit as also the trial of an issue and lays down a rule under which the trial of a suit or the trial of an issue has to be regarded as barred; and the section makes it perfectly clear that the competency of the Court which tried the previous suit or issue in the previous suit depends upon its jurisdiction to try the subsequent suit. There can be no question in the present case, but that the Court of the Munsif had no jurisdiction to deal with the present suit. The question is as to whether the relevant issue having been decided in the previous suit, there is a bar to the trial of that issue in the present suit, or whether the previous suit itself having been decided, the present

1. Drupad Chandra Naskar v. Bindu Moyi Dasi, 1926 Cal 1053=97 I C 209=43 C L J 606.
2. Priya Nath Chakravarty v. Kali Charan Chakravarty, 1932 Cal 162=136 I C 604=35 C W N 773.
3. Shibu Raut v. Baban Raut, (1908) 35 Cal 353 =12 C W N 359=7 C L J 470.

suit or any part of it is barred by the principle of res judicata. So far as the trial of an issue is concerned, it will be well to remember what was said by the Judicial Committee in 9 I A 197 (4). Sir Richard Couch delivering the judgment of the Board observed thus:

As to what is a Court of concurrent jurisdiction, it is material to notice that there are in India a great number of Courts, that one main feature in the Acts constituting them, is that they are of various grades with different pecuniary limits of jurisdiction, and that by the Code of Civil Procedure a suit must be instituted in the Court of the lowest grade competent to try it. For instance, in Bengal, by the Bengal Civil Courts Act, No. 6 of 1871, the jurisdiction of a Munsif extends only to original suits in which the amount or value of the subject-matter in dispute does not exceed Rs. 1,000. The qualifications of a Munsif and the authority of his judgment would not be the same as those of a District or of a Subordinate Judge, who have jurisdiction in civil suits without any limit of amount. In their Lordships' opinion it would not be proper that the decision of a Munsif upon (for instance) the validity of a will or of an adoption in a suit for a small portion of the property affected by it should be conclusive in a suit before a District Judge or in the High Court for property of a large amount, the title to which might depend upon the will or the adoption.

There is a no reason to suppose that the safeguard that was sought to be laid down by the observations just referred to were ignored in the subsequent revision of the Code of Civil Procedure, and having regard to the clear terms of S. 11 itself it would not be right to suppose that it was ever intended that if a question arises upon an issue framed in the suit with regard to a property of inconsiderable value which may be dealt with by the Court in which that question arises, and if a decision is arrived at on that question by that Court, that decision can affect property of a much larger value beyond the jurisdiction of that Court when in respect of such property the same question arises. So far therefore as the trial of an issue is concerned, even though in the previous suit it had been decided but decided only by a Court which had no jurisdiction to entertain a subsequent suit, the decision in our opinion, can never be regarded as operating as res judicata when the same issue arises in such subsequent suit.

As regards the trial of a suit, there have been cases in which the question has arisen. One typical instance may be given. For instance, if a suit is instituted for recovery of possession on declaration of title in respect of a small bit of land upon the allegation that the plaintiff has been dispossessed and a decision is arrived at by the Court on question of the plaintiff's title and that decision is against the plaintiff, it sometimes happens that after that decision has been delivered the plaintiff institutes another suit including therein not only the land from which he had been previously dispossessed and in respect of which he had previously instituted the suit and had failed, but a much larger quantity of land. He gets the suit instituted in a different Court, a Court of a higher grade, and attempts to get a different decision from that Court on the question of title. With regard to cases of this description it has been decided that it is not open to the plaintiff to take such a course but that the subject matter of the previous suit in which an adverse decision had been passed against him should be excluded from the subsequent suit and that the subsequent suit can only go on with regard to a subject matter which did not form the subject matter of the previous suit.

Now reading the above decisions, it seems to us that although no definite principle has been laid down in them, still certain principles may be gathered from what has been said in those cases. A party who has lost in one Court cannot be permitted to add causes of action or prayers for reliefs in another suit for the purpose of swelling the valuation of his suit and claim that the decision in the former suit does not operate as res judicata. But it appears that his subsequent suit proceeded upon a cause of action which did not exist at the date of the previous suit, or if that cause of action existed it was one which he could not have availed of at that time, having regard to the nature of the suit as it then was, the fact that he had now instituted a suit embracing the entire cause of action with the result that his suit was of a higher value would justify him in claiming that the decision in the earlier suit was not operative as res judicata. If it is possible to treat the entire cause of action upon which the latter suit is founded as divisible and if

4. Misser Raghubardial v. Sheo Baksh Singh, (1883) 9 Cal 439=9 I A 197=12 C L R 520=4 Sar 395 (P C).

in the earlier suit one of the component parts of the cause of action was relied upon, then the previous decision will stand as a bar to the extent of the matter involved in the earlier suit. Most of the decisions that are to be found in the reports as bearing upon this question are in our opinion justifiable on this principle, and if this test is applied, a good deal of apparent conflict will be found to be reconcilable. Bearing this in mind, if the three decisions to which our attention has been drawn be looked into it will be found that in 35 Cal 353 (3) the claim in the later suit was one which the plaintiff in the second suit as defendant in the first suit was not competent to advance.

In 43 C L J 606 (1) a previous suit had been instituted for recovery of possession of a portion of the property which was covered by a deed of dedication and subsequently another suit was instituted by the same plaintiff including not merely the properties which formed the subject matter of the previous suit but for profits as well and it was held that the previous suit with regard to the validity of the deed did not operate as res judicata in the subsequent suit, but that so far as the property dealt with in the previous suit was concerned the decision operated as res judicata with regard to that property. Therefore, it was a case in which a claim had been advanced and had failed and thereafter some other properties being included in the suit the earlier decision was challenged. The case illustrates the distinction between the trial of an issue and the trial of a suit, as has been pointed out above. In 35 C W N 773 (2), a suit for possession of certain lands on declaration of plaintiff's title was instituted but previously a similar suit with regard to a portion of the lands had been instituted by the same plaintiff and had failed; and it was held that the suit with regard to that portion could not be tried. Applying the tests laid down above, it would seem that the decisions in all these cases are justifiable. But if the tests are applied to the present cases, the position is this: that here the plaintiffs seek to have their shares enforced by partition with regard to a number of properties. They are claiming 11 annas odd share in the properties which formed the Putni Raj Chandra, and one of the issues which arises in the case is the question of the validity of the wakf. In these circumstances, if these tests are applied, in our judgment, it is not possible to hold either that the trial of the issue is barred under S. 11 of the Code or that the 1 anna share of Putni Raj Chandra with regard to which a previous suit was instituted should have to be kept out of the suit on the ground of res judicata. We have been asked to apply to this case the general principles of res judicata apart from the provisions of the Code. But as has been laid down in authoritative decisions, S. 11 of the Code is exhaustive in respect of all cases falling within its terms and with regard to such cases the Court is not entitled to travel outside the section and apply the general principles. Lastly, we may also state that if the decision in Suit No. 2285 of 1920 be carefully read, it will be found that issue No. 4 which was the issue specifically framed for determining the question of the validity of the Wakf was left undetermined by the Court. The decision seems to have been passed on the admission of the parties and on other matters into which the question of the validity of the Wakf did not directly but only incidentally entered. We are of opinion therefore that the decision cannot operate as res judicata.

Turning now to the terms of the Wakf itself, it seems to us apparent that the provisions contained in it do not disclose a substantial endowment to charity. The recitals in the document are that the Wakf was being created for the benefit of the sons, grand-sons and heirs in successions of the Wakif's deceased cousin Saiyad Warishani and some other relations and kinsmen who are all poor, destitute and without means. It is also stated no doubt that the Wakf was being created in the name of God and for the purposes of charity. But on an examination of the dispositions that are made it is apparent that the property which is stated to be of the value of Rs. 10,000 could not after meeting all provisions that were made leave any appreciable surplus out of which any work of charity could be performed. The learned Judge has said that at the time when the document was executed the people who would be entitled to

allowances under the Wakf would get altogether a sum of Rs. 996 per year, which was to be reduced to Rs. 936 after the death of three persons who were given allowances for their lives. Whatever might be left of the realisations from the Wakf properties, after payment of the said monthly allowances was, it is true, to be spent in pious works at the time of the Muharram; that is to say, the poor and the indigent persons should be fed rice, sinni and sarbat and the repairs of the Imambara, etc., should be done. No details as regards the nature of the wakf nor any specification which would enable the provisions to be enforced are found in the document. Properties of the value stated in the wakf could hardly be expected to produce any amount above the allowances. Our attention has been drawn to a document of 1905 which shows that the rent derivable from the Putni Raj Chandra was Rs. 1,375. This document however came into existence long long after the time when the wakf was created. We are in agreement with the view which the learned Judge has taken as regards the validity of the wakf and we have no hesitation in saying that in our opinion, the gift to charity which is to be found in the wakf is illusory and the document in its true nature represents a family settlement in the garb of a wakf.

So far as Appeal No. 159 is concerned, the contentions raised on behalf of the appellants therein relate to the shares that have been awarded to the parties by the preliminary decree. One such contention relates to the share which purports to have been released in favour of Raj Chandra by his nephews under the Nadabi deed referred to in para. 10 of the plaint. It is not possible to deal with this contention because this document is not before us in print and our attention has been also drawn to the fact that this contention does not form the subject-matter of any of the grounds of appeal taken by the appellants. The next contention relates to the question as to what share passed under the documents Exs. 19 and 21. So far as this matter is concerned, the learned Judge has very carefully considered all that can be said for and against the contentions respectively propounded by the parties. On a careful perusal of the documents, it seems to us clear that 6-annas share of the patni passed under each of these documents. This would be apparent if attention is paid to the fact that Putni Raj Chandra was described in two paragraphs, namely 2 and 3, presumably because a part of the patni was encumbered by a darpatni and the other part was not encumbered. In each of these schedules it was separately mentioned that 3 annas of the patni was sold. These are the considerations to which the learned Judge has referred and we think the view which he has taken is correct. The contention of the appellant therefore must be overruled.

We now turn to the common ground that has been taken by the two sets of appellants. That ground is that the order which the Court below has made with regard to costs is not justifiable. That order is to the effect that the plaintiff would get half of their costs up to the stage of the preliminary decree and that out of this one-half, a half share would be borne by defendants 85 to 105 minus defendant 91 who did not appear, and the other half would be borne by the other contesting defendants, namely defendants 2, 5 to 13 and 15 to 84. This order in our opinion, is not justifiable. People who go in for complicated transactions such as have been disclosed in the present cases should be prepared to bear their expenses when they find it necessary to enforce their rights by instituting a suit. It was not clear when the plaint was filed what the shares of the different parties would be and it is clear to us that the grounds upon which the defendants contested the plaintiffs' claim were quite substantial. There is no evidence showing that any demand for partition was made or that any objection was offered by any of the defendants to have a proper partition made in respect of the properties. The question raised were all substantial questions either of fact or of law.

In these circumstances, the proper order, in our opinion, to make with regard to costs is that each party will bear his or their own costs up to the preliminary stage. Of course, when the time will come to make a final decree, costs of partition subsequently incurred will have to be borne by the parties in proportion to their respective shares. But the present order cannot, in our opinion,

be justified. The result therefore is that subject to the variation as regards the order for costs which we consider it necessary to make as indicated above, the appeals will stand dismissed. In the appeals each party will bear his or their own costs.

S.R. *Appeals dismissed.*

A. I. R. 1935 Calcutta 800

R. C. MITTER, J.

Rajendra Lal Bandopadhyaya and *others*—Defendants—Appellants.

v.

Jogendra Nath Bandopadhaya and *others*—Plaintiffs—Respondents.

Appeal No. 1686 of 1932, Decided on 4th January 1935, from appellate decree of Sub-Judge, Second Court, Faridpur, D/- 29th February 1932.

Bengal Estates Partition Act (5 of 1897), S. 99 — Tenure created by some of joint proprietors is not extinguished on partition under Act.

If a tenure is created by some of the joint proprietors of an estate, the said tenure is not extinguished on a partition under the Estates Partition Act. If the lands compromised in the tenure fall within the Shaham of the grantor of the tenure, there is no disturbance of the tenure-holder. If they are allotted to others, the tenure holder gets compensation lands from the Shaham of his grantor, under S. 99, Estates Partition Act. In any case the tenure is neither destroyed nor split up. [P 801 C 1]

Annada Charan Karkoon and *Iswar Chandra Chakravarty*—for Appellants.

Gunada Charan Sen and *Satindranath Roy Choudhury*—for Respondents.

Judgment.—This appeal is on behalf of pro forma defendants 4, 5, 8 and 10 in a suit for recovery of arrears of rent from 1333 up to the third Kist of 1336. The first Court granted the plaintiff a decree for rent only up to the Pous Kist of 1334, but the lower appellate Court has decreed the suit in full. The lands in suit appertain to parent estate No. 4407 of Faridpur Collectorate. 4as 16½ gds share of the said estate was known as Hissya Durga Ram Roy. The said Hissya was owned by four groups of persons. The owners of the said Hissya created four permanent tenures, three Shikmi Taluks and a Kayemi Mirash.

In this suit we are concerned with one of the Shikmi Taluks, namely Taluk Kashi Chandra Bandopadhyaya. The said Shikmi Taluk was created either in favour of the 3 groups of the owners of Hissya Durga Ram Roy or have been subsequently acquired by the said owners. Proceedings under the Estates Partition Act (5 of 1897 B. C.) were started. The co-proprietors of Touzi No. 4407 who had not granted the Shikmi Taluks or the Kayemi Mirash got their allotments which did not include the lands of the Shikmi Taluks and the Kayemi Mirash. In the valuation of their Shahams, assets were taken, as it must be, on a Ryotwari basis. The allotment made to the proprietors of Hissya Durga Ram Roy was on this basis, namely that besides getting other lands each group of such proprietors was allotted one of the said permanent tenures either a Shikmi taluk or the Kayemi Mirash. The plaintiffs got Shaham No. 14 and the pro forma defendants Shaham No 13. To each of these Shahams was included one of the four permanent tenures, Shikmi Taluk Kashi Chandra Bandopadhyaya being included in Shaham No. 13. The partition was completed in Pous 1334.

Before the partition Shikmi Taluk Kashi Chandra Bandopadhyaya was held in equal shares by the three groups of persons who were also proprietors of Hissya Durga Ram Roy, each of the said three groups having a fourth share of Hissya Durga Ram Roy. Ramani Mohan Roy and others formed one of such groups. Plaintiffs purchased 6 annas 4 gandas 1 kara 21 jabs share out of the share of Ramani Mohan Roy and others both in the said Shikmi Taluk and the touzi and the pro forma defendants the remaining share both in the said Shikmi Taluk and the Touzi. The plaintiffs have sued one set of the raiyats whose lands fall within Shikmi Taluk Kasi Chandra Bandopadhya, claiming 6 annas 4 gandas 1 kara 21 jabs of one third of the rent due from them. They are no doubt entitled to this share of the rent as part owners of the Shikmi taluk up to the date when the partition became final, i.e., up to Pous kist of 1334. The question is whether they are entitled to claim any rent in their character of Shikmi talukdars after the partition.

The defence taken and the case as presented in the lower Courts was that taluk Kashi Chandra Bandopadhyaya has in law ceased to exist as a result of the said partition, being a taluk not created by all the proprietors of touzi No.

4407. That position cannot be maintained in law. If a tenure is created by some of the joint proprietors of an estate, the said tenure is not extinguished on a partition under the Estates Partition Act. If the lands compromised in the tenure fall within the Shaham of the grantor of the tenure, there is no disturbance of the tenure-holder. If they are allotted to others, the tenure-holder gets compensation lands from the Shaham of his grantor under S. 99, Estates Partition Act. In any case the tenure is neither destroyed nor split up.

In the case before me the said Taluk was created by some of the part proprietors of the touzi who did not get one joint allotment. They got four separate allotments and the lands of the tenure have fallen within the geographical limits of one of these four Shahams, namely Shaham No. 13 of the pro forma defendants. Mr. Karkoon contends that in such case the tenure holders of the Taluk Kashi Chandra Bandopadhyaya cannot say that all the lands which originally were comprised in the tenure are still included in the tenure after the partition. To make his position clear he takes a hypothetical case. *A* and *B* are part owners of an estate each having four annas share. They create a tenure which comprises 100 bighas of land comprised in block X; at the partition block X is allotted to *A* alone. Mr. Karkoon says that under S. 99, Estates Partition Act, the allotment of *B* cannot be free of the tenure. The tenure holder would get from the lands of *B's* allotment as within his tenure 50 bighas of land and as the tenure consisted of 100 bighas, only 50 bighas (the balance) in *A's* allotment would be burdened with the tenure and not the whole of 100 bighas. He says that otherwise the result would be unfair and inequitable, for *A* will have to be satisfied only with the rent payable by the tenure holder and would not be able to get any rent from the ryots holding any portion of the said 100 bighas while *B* will be able to realise such rents. I am afraid I cannot give effect to his contention. If by reason of this mode of partition there may be any likelihood of difference in the value of the two allotments, it is for *A* and *B* to have their allotments equalised in value by the partition authorities. That is to say in such a contingency *A* should have claimed more ryoti or khas lands in his allotments to make up for the deficiency of the profits intercepted by the tenure-holder.

His only remedy would be before the partition authorities when the allotments are prepared. To allow him to take up the position now would be to disturb the scheme of partition. The Shikmi Taluk being created by him subsists as against him. It is not destroyed, split up or mutilated in the circumstances of this case. The plaintiffs are part owners of the said Shikmi Taluk and have the same share therein as before. In the circumstances of this case also there is no inequity in the position of the plaintiffs and pro forma defendants regarded as proprietors of the estate, because the plaintiffs have within their allotment one of the Shikmi Taluks. The position is that the plaintiffs and the pro forma defendants would be entitled to realize the rent due respectively from the Shikmi Talukdars whose Taluks have been included in their respective Shahams, and inasmuch the Shikmi Taluks have neither been destroyed nor affected as a result of the partition under the Estates Partition Act; the plaintiffs as part owners of the said taluk are entitled to claim rent from the ryots according to the share claimed by them. The result is that the appeal is dismissed with costs.

K.S. *Appeal dismissed.*

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* A. I. R. 1935 Calcutta 801

DERBYSHIRE, C. J. AND M. N. MUKERJI, J.

Ahmed Hossein Bepari and *others*—Plaintiffs—Appellants.

v.

Digendra Narain Singha Roy and *others*—Defendants—Respondents.

Appeals Nos. 44 and 68 of 1930, Decided on 18th February 1935, against original decrees of Sub-Judge, 2nd Addl. Court, Dacca, D/- 25th November 1929.

*** Record of Rights—Entry in Record of Rights does not create or take away right—It is only piece of evidence with presumption of correctness—Party affected by such entry can come to Court when some injury actually arises to him from such entry—Suit for remedying or averting injury within time from resulting of such injury is proper even though suit for correction of entry might have been barred.**

The entry in the Record of Rights neither creates nor takes away any rights : having been made on the basis of possession, it remains as a piece of evidence with an evidentiary value, namely with a presumption of correctness attaching to it. It is not absolutely incumbent on and indeed it is often unnecessary for a party to avoid the effect of the presumption : a party affected by the presumption can come to Court as and when he finds some injury actually arising from it. And so long as he frames his suit to avert or remedy the injury and is in time for that purpose, the fact that he seeks for a declaration as regards the incorrectness of the entry, but only as ancillary to the relief as to injury that he asks for, it is not possible to see how or why his suit should not be held to be in order : *Case law discussed.*

[P 803 C 1]

Jatish Chandra Guha, *Satindra Nath Roy Choudhury* and *Sachindra Kumar Roy*—for Appellants.

Bhupendra Nath Roy Choudhury for *Satindra Chandra Khasnabis*, *Kiron Mohan Sarcar*, *Apoorba Charan Mukerjee* and *Jatish Chandra Guha*—for Respondents.

Mukerji, J.—These appeals have arisen out of a suit which was commenced on the following allegations :

That the lands of Taluk No. 1116 of the Dacca Collectorate are owned and possessed jointly by the plaintiffs, the principal defendants and the proforma defendants, the plaintiffs and the proforma defendants having an 8 annas share and the principal defendants the remaining 8 annas share ; that a debuttar, a brohoottar and a shikmi have been wrongly recorded as interests held under the 16 annas of the Taluk ; and that in a partition pending before the Collectorate, the said interests were being treated as such. The plaintiffs as owners of a 5 annas 12 gandas share in the taluk alleged that the said interests had no existence in fact, and that at least none of them was held under the 8 annas share belonging to themselves and to the proforma defendants. The reliefs asked for were several, but for the purposes of this appeal they may be taken to have been the following : (a) A declaration that the record, in so far as it mentioned the said interests as under the 8 annas share of the plaintiffs and of the proforma defendants was wrong, and that the said 8 annas share was free from those interests ; and (b) an injunction restraining the principal defendants from claiming such interests.

The defence of the principal defendants was a denial that there was anything wrong in the record that had been made of the said interests, a plea of limitation, and an objection as regards the maintainability of the suit. The last two matters go together. The Subordinate Judge has found :

There is no debuttar, brahmottar or shikmi right under the 8 annas share of the plaintiffs and of the proforma defendants, though there are such rights under the 8 annas share of the principal defendants.

This finding, it should be stated, has not been disputed. The Judge however dismissed the suit on the ground of limitation. The two appeals have been preferred by the plaintiffs in two batches. The Judge has held that the suit is for a declaration that the plaintiff's right has not been correctly recorded and so is a suit within the proviso to S. 111-A, Ben. Ten. Act ; that the other prayers in the plaint did not convert the suit into one of any other nature ; and that as the suit, to which Art. 120, Lim. Act, applied, was not instituted within six years of the final publication of the Record of Rights, it was barred. He overruled the contention that the plaintiffs were entitled to come within six years of the date when their title was in jeopardy. For the view of limitation that he took he relied on 23 C W N 883 (1). In 58 C L J 120 (2) it has been observed that so long as the entry does not injure the plaintiff he need not come to Court at all, and that therefore a plaintiff is not out of time if he institutes the suit within six years of the injury which the entry creates and which is the cause of action. As the law and the authorities bearing on it were not discussed in that case, and as the Subordinate Judge has taken a contrary view it is necessary to consider the matter further.

Under the substantive part of S. 111-A, no suit in respect of the order directing the preparation of Record of Rights or in respect of framing, publication, signing or attestation of such record or any part of it lies in the civil Court; nor does a suit lie in the civil Court in respect of rent settled under Ss. 104-A to 104-F, except a suit provided for

1. Rajani Nath v. Manaram, 1919 Cal 151=53 I C 968=23 C W N 883.
2. Kali Mata Thakurani v. Surendra Nath, 1934 Cal 102=150 I C 617=58 C L J 120.

in S. 104-H. The proviso contained in S. 111-A says that a person dissatisfied with any entry in or omission from a Record of Rights, which concerns a right of which he is in possession may institute a suit for a declaration of his right under Ch. 6, Specific Relief Act, 1877. As explained in 3 C L J 133 (3) the first part of S. 111-A, probibits suits which seek to take undue advantage of more technical defects in the procedure leading up to or involved in settlement proceedings; and it further prohibits the alteration of rent once settled, except to the extent allowed by S. 104-H, the object of which prohibition is to safeguard the Government revenue and to attach reasonable finality to the fixation of assets upon which the Government revenue is based. S. 104-J makes it clear that, subject to the provisions of S. 104-H, the rent settled shall be deemed to have been correctly settled and to be fair and equitable. But the question is, what is the effect of an omission to institute a suit under the proviso of S. 111-A as regards a right which has been entered in or omitted from the Record of Rights. Plainly, the only effect is that the entry in the Record of Rights as finally published remains and "shall be presumed to be correct until it is proved by evidence to be incorrect". [S. 103-B. Sub-S. (5).]

The entry in the Record of Rights neither creates nor takes away any rights: having been made on the basis of possession, it remains as a piece of evidence with an evidentiary value, namely with a presumption of correctness attaching to it. It is not absolutely incumbent on and indeed it is often unnecessary for a party to avoid the effect of the presumption: a party affected by the presumption can come to Court as and when he finds some injury actually arising from it. And so long as he frames his suit to avert or remedy the injury and is in time for that purpose, the fact that he seeks for a declaration as regards the incorrectness of the entry, but only as ancillary to the relief as to injury that he asks for, it is not possible to see how or why his suit should not be held to be in order. On the words of the statute and on principle no other view is indeed possible. Now, let us see what is the state of authorities on the point. In 11 C W N 48 (4), the Judges explained the nature of the suit which the proviso to S. 111-A, contemplates, and observed as follows :

> The proviso to S. 111-A of the Act speaks of the possibility of a suit by a person who is affected by an entry in the Record of Rights, for a declaration under the Specific Relief Act; and a suit for declaration, as is contemplated by S. 42, Specific Relief Act, may be instituted within six years of the date when the cause of action arose. We are of opinion that it was not necessary for the plaintiff to bring a suit to set aside an entry in the Record of Rights.

In this decision as well as in a previous decision, 30 Cal 20 (5), to both of which Mitra, J., was a party, the Judge very clearly pointed out that it was not necessary for a party to bring a suit for avoiding a presumption, but if his cause of action is the entry itself and he wants to have the entry corrected he must come within six years of that cause of action. In 10 A L J R 413 (6) it was held that unless an actual claim was made upon the entry in the record of rights, time did not run against a plaintiff who seeks to have a declaration against the correctness of the entry. In 23 C L J 561 (7), along with a prayer for declaration there was a prayer for confirmation of possession and for an injunction, it was held that the prayer for injunction was a prayer for a consequential relief and so the suit was not a declaratory suit to which Art. 120, Lim. Act, applied. It was further pointed out that entries in a record of rights adverse to the plaintiff do not by themselves affect his possession though they may be used in evidence against him in a suit for declaration of title, and that time does not run against him until an actual claim is made on the strength of the entry in the record of rights. In 25 C W N 1022 (8), it was observed that an entry in the record of rights merely raises a presumption of correctness and is not a starting point for the computation of the period of limitation. In that case a suit for declaration of title and confirmation of possession was brought

3. Nasarulla v. Amiruddi, (1906) 3 C L J 133.
4. Ram Gulam Singh v. Bishnu Pargash Narain Singh, (1907) 11 C W N 48.
5. Agin Bind v. Mohan, (1903) 30 Cal 20=7 C W N 314.
6. Speopher Singh v. Deo Narain, (1912) 10 A L J R 413=17 I C 675.
7. Dina Nath v. Rama Nath, 1916 Cal 392=34 I C 702=23 C L J 561.
8. Saraj Kumar v. Umed Ali, 1922 Cal 251=63 I C 954=25 C W N 1022.

more than six years from the date of final publication of the record of rights but within six years from the date of the attempted dispossession; and it was held that the right to sue accrued on the latter date and the suit was not barred. In 49 C L J 281 (9) the plaintiffs had not asked for correction of record of rights, but had incidentally asked for a declaration that the entry therein was incorrect and had also sought for an injunction restraining the defendant from executing a rent decree which the latter had obtained on the basis of the wrong entry; and it was held that the plaintiff was within time, having come within six years of the institution of the suit for rent.

Let us now turn to some of the decision of this Court in which suits instituted more than six years after the final publication were considered time-barred. The case of 23 C W N 883 (1), upon which the Subordinate Judge has relied, is only an authority for the proposition that if the plaintiff sues for a declaration that the entry is wrong and makes the entry itself his cause of action, he must institute his suit within six years from the final publication and not from the date of the signing of the certificate of such publication. It should be noticed that in that case the plaintiff did not rely on any other cause of action and did not allege that his possession had in any way been disturbed or threatened to be disturbed by the defendant and yet added a prayer for confirmation of possession; and as the learned Judges pointed out:

> The only cause of action alleged in the plaint was the alleged wrong entry in the Record of Rights.

The same was held in 41 C L J 31 (10) the state of facts being similar. So also in other cases where the cause of action was the entry itself and nothing else, it has been consistently held that the plaintiff must come within six years of the entry e. g. 97 I C 635 (11); 56 Cal 407 (12). It should be noted that in the last of these two cases, while it was said that the entry, by reason of the presumption as to its correctness casts a cloud on the title, meaning thereby that it thus affords a cause of action for a declaration, it was not suggested that the plaintiff was bound to come to dispel the cloud, or, in other words, that if he did not then come for that purpose he would be precluded from challenging the entry in future. In the Patna High Court the principle governing suits of this nature was enunciated in 2 Pat L J 124 (13) in these words:

> In 1 Pat L J 73 (14) it was held that if a suit is substantially such a declaratory suit as is contemplated in the proviso to S. 111-A of the Act, then the plaintiff cannot by adding a prayer for confirmation of possession escape the six years' rule. The point from which limitation is to run is the date of the publication of the adverse entry in the Record of Rights: 11 C W N 48 (4); 20 All 35 (15).

And in the said case it was also clearly pointed out that an entry in the Record of Rights neither creates nor extinguishes rights, but that it is merely a rebuttable piece of evidence. In a later case of the same Court, 2 Pat L J 493 (16), the Judges were not prepared to affirm the view propounded in 1 Pat L J 73 (14), that if the declaration sought for substantially challenged the Record of Rights, the suit for such a declaration must be instituted within six years of the final publication of the Record of Rights; and laid down the principle in the followjng terms:

> Where there is a definite challenge to the plaintiff's rights by an entry made in the Record of Rights and where the fact is patent that the plaintiff must have been aware of that challenge to the rights, the suit, if brought upon that challenge, must be brought in accordance with the six years' rule of limitation. If, in spite of the challenge, the plaintiff retains possession of the property, he is not required to institute any suit upon that challenge, but may institute a suit at any time within six years of the new challenge which has the effect of prejudicing his rights.

There are numerous cases, not under the Bengal Tenancy Act, in which entries in settlement papers, having similar probative value, were alleged to be wrong, and reliefs were asked for on that footing; and it has been consis-

9. Profulla Chandra v. Kshetra Lal, 1929 Cal 417=120 I C 104=49 C L J 281.
10. Prodyat Kumar v. Bal Gobinda, 1925 Cal 518=86 I C 6=41 C L J 31.
11. Abdul Gafur v. Abdul Jabbar, 1927 Cal 30=97 I C 635.
12. Ashutosh v. Radhika Lal, 1929 Cal 481=119 I C 121=56 Cal 407.
13. Brij Behari v. Sheo Shankar, 1916 Pat 120=39 I C 85=2 Pat L J 124.
14. Amiruddin v. Saidur Rahaman, 1916 Pat 408=35 I C 433=1 Pat L J 78.
15. Francis Legge v. Ram Baran, (1893) 20 All 35=1897 A W N 193 (FB).
16. Ramji Ram v. Lala Sadhu Saran, 1917 Pat 547=41 I C 11=2 Pat L J 493.

tently held by the Allahabad High Court that independently of the cause of action which arises upon the entry itself, a fresh cause of action justifying a prayer for a declaration and for other appropriate reliefs may arise when on the strength of the entry the plaintiff is put in jeopardy, (41 All 509 (17); 1929 All 529 (18), and the authorities referred to in these cases). The prayer for injunction which was there in the present case was, in fact, a prayer for a consequential relief which arose out of claim in the partition proceedings which the defendant put forward on the basis of the entry. So long as the suit was, as it was, instituted within six years of that cause of action the suit was not barred. The appeal therefore should be allowed; and the decree of the Court below being set aside, a decree should be entered giving the plaintiff the declaration and the injunction set out in the beginning of this judgment. The plaintiffs will also be entitled to their costs of the suit and of the appeal as against the contesting defendants. We assess the hearing fee in this Court at ten gold mohurs in each appeal.

Derbyshire, C. J.—I agree.

K.S. *Appeal allowed.*

17. Kali Prasad v. Harbans, 1919 All 383=50 I C 767=41 All 509.
18. Aftab Ali v. Akbar Ali, 1929 All 529=121 I C 209.

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* A. I. R. 1935 Calcutta 805

D. N. MITTER AND RAU, JJ.

Abdul Majid and *others*—Plaintiffs—Appellants.

v.

Akhtar Nabi and *another* — Defendants—Respondents.

Appeal No. 174 of 1932, Decided on 28th May 1935, from original decree of Dist. Judge, Dacca, D/- 21st April 1932.

*** (a) Civil P. C. (1908), S. 92—Suit under S. 92—Court can decide whether trust is public charitable trust—Separate suit is not necessary.**

In a suit under S. 92 it is competent for the Court to decide the question as to whether the trust in respect of which the suit is brought is a public charitable trust or not so as to attract the application of S. 92 and a separate suit for the declaration that the property is a trust property is not necessary. [P 807 C 2 P 808 C 1]

*** (b) Civil P. C. (1908), S. 92—Stranger is not proper party to suit under S. 92—Stranger receiving property from trustee—Knowledge that property is trust—Stranger is constructive trustee—Hence relief against him can be claimed in suit under S. 92.**

Though a stranger to a trust is not a necessary nor a proper party to a suit under S. 92, where the stranger receives money or property from the trustee which he knows to be part of the trust estate and to be paid and handed to him in breach of the trust he is a constructive trustee of the trust property for the persons equitably entitled and therefore relief against him can be claimed in a suit under S. 92: *Case law discussed.* [P 808 C 2 P 809 C 1]

Phani Bhusan Chakravarty and *Abdul Hossain*—for Appellants.

Narendra Chandra Bose, *Jatish Chandra Banerji* and *Promode Ranjan Guha*—for Respondents.

D. N. Mitter, J.—This is an appeal from the decision of the District Judge of Dacca dated 21st April 1932, by which he dismissed the suit brought by the plaintiffs under S. 92, Civil P. C., in the following circumstances: It appears that the plaintiffs who are the appellants before us brought a suit under S. 92, Civil P. C., with the necessary sanction against the two defendants. The allegation against defendant 1 was that he was the sole mutwalli of the wakf property in question and he began to treat wakf property as his own and he did not properly look to the interest of the wakf. It was further stated that defendant 1 after having assumed the position of the sole mutwalli mortgaged the wakf property and raised money for his own use in contravention of the terms of the wakfnama and against the directions and practices of the former mutwalli. In para. 13 of the plaint it was stated that defendant 1 in collusion with defendant 2 transferred the wakf property to defendant 2 most wrongfully and illegally. In para. 14 an allegation was made to the effect that defendant 2 procured the said defendant 1 to do various wrongful and unconscionable things with reference to the wakf property with full knowledge of the fact that the properties had been permanently dedicated to the mosque referred to in the earlier part of the plaint. In para. 17 of the plaint it is stated that defendant 2 has been in possession of the wakf property and that rent, profits and income of the wakf properties are now being entitled for their own benefit and the mosque has thus been deprived of them. In para. 19 a

very important statement is made to which prominent attention should be drawn for the purpose of determining the controversy raised in the present appeal. That statement is this :

That defendant 2 knowingly and fraudulently took possession of the wakf properties and has been utilising the income thereof in collusion with defendant 1 and hence both of them are liable to accounting as trustees de son tort.

An equally important statement or allegation is made in para. 20 of the plaint which runs to the following effect :

That defendant 2 is not a bona fide purchaser for value without notice and as such is a constructive trustee of the wakf properties in his possession and is therefore legally liable to restore the possession of the said properties to the legally appointed mutwallis.

On these relevant statements in the plaint relief was asked for as against defendant 1 alleging as against him that he had been guilty of several breaches of trust which are enumerated in para. 22 of the plaint, vide pp. 7 and 8 of the paper book. Plaintiffs' prayers are contained in para. 25 of the plaint and it is necessary to refer to prayers (a) and (b). Prayer (a) is to the following effect :

That the defendants may be removed from position of trustees or mutwalliship de jure or de son tort or constructive.

Prayer (b) runs as follows :

That a mutwalli be appointed to take charge of and administer the wakf properties, and the same may be vested in him.

This plaint was filed on 1st December 1931, in the Court of the District Judge of Dacca. Summonses were served on the defendants fixing 7th January 1932 for settlement of issues. Both the defendants entered appearance and asked for time to file written statement. After another adjournment on 10th March 1932 the defendants ultimately filed two written statements. In the written statement of defendant 2 one averment was made in para. 13 which it is necessary to notice now although the question does not depend on what is stated in the defendant's written statement, for the matter in controversy before us has to be decided solely on the allegations in the plaint. But we refer to this paragraph to show how defendant 2 understood the allegations in the plaint made against him. Para. 13 of his written statement is to the following effect :

That defendant 2 not having taken upon himself the character of a trustee, rather having asserted hostile title to the alleged trust, he cannot be treated as trustee de jure or de son tort or constructive, and the suit as such is not maintainable against him.

After the filing of this written statement it appears that on 23rd March 1932 the matter came up before the District Judge who after hearing the pleaders recorded the following order :

Pleaders heard. The defendants deny that the property is a public trust at all and contend that it is their private property. The suit cannot proceed unless the plaintiffs obtain a declaration that the property is trust property. It is perfectly true that such a suit would be instituted in the Court of the Subordinate Judge. But this Court has jurisdiction over the property and no useful purpose would be served by compelling the plaintiffs to institute two suits. The plaintiffs are directed to amend their plaint and pay court-fees within a month, failing which the suit will be dismissed.

This order is numbered 5 and dated 21st March 1932. On 21st April 1932 the plaintiffs applied for time, and as the pleaders were not present the application for time was refused and the suit was dismissed in accordance with O. 5. dated 21st March 1932. It is against this order dated 21st April 1932, which is really a consequential order on the one passed on 21st March 1932, that the present appeal has been brought, and it has been contended before us that the learned Judge has committed an error of law in dismissing the suit on the failure of the plaintiffs in furnishing the necessary court-fees after amending their claim in the manner suggested by the Court. The order of the learned District Judge is a very cryptic order and extremely brief, and we do not actually know under what circumstances the suit was dismissed. All that we can get from the order is that the learned Judge was of opinion that unless the plaintiffs could obtain a declaration that the property was trust property the suit could not proceed. The nature of the trust was disputed by the defendants, and the issue which might have to be determined in the suit was as to whether the trust is a public charitable trust within the meaning of S. 92, Civil P. C.

In support of the appeal it has been contended on behalf of the appellants that in a suit under S. 92 it is competent for the court to decide the question as

to whether the trust in respect of which the suit is brought is a public charitable trust or not so as to attract the application of S. 92, Civil P. C., and that a separate suit for the declaration that the property is a trust property is not necessary. This position has not been disputed on the other side, and authorities were shown that in a suit such as this an issue may be raised as to whether the trust was a trust contemplated by S. 92, Civil P. C. But the argument before us has centred on two questions: (1) it has been said that as defendant 2 is an alienee in respect of the trust property, and the property has been sold to him, the suit is not under S. 92 because where a stranger to a trust has been added as party to a suit which is purported to have been brought under S. 92 the suit loses its character as such. In other words it is said that it falls outside the range of S. 92 as soon as a stranger to the trust has been made a party to the suit. Numerous authorities have been placed before us. There has been some divergence of opinion between different High Courts, more particularly the High Courts of Allahabad and Bombay on this question.

But it has been consistently held throughout in so far as this High Court is concerned that a stranger to a trust is neither a necessary nor a proper party to a suit under S. 92, Civil P. C. We may refer in this connexion to the very early case on this point of 2 C L J 431 (1). At p. 437 of the report Asutosh Mukerji, J., after dealing with the contention whether under S. 539 of the Code of 1882 which corresponds to S. 92 of the present Code a suit for the dismissal of a trustee and for the recovery of trust property from the hands of a third party to whom the same has been improperly alienated is within the scope of that section notices the divergence of opinion on the question. After considering the divergence of opinion the learned Judge found himself wholly unable to accept the view, namely, that decree for the recovery of trust property from the hands of a stranger to whom it has been improperly alienated may be made in a suit instituted under S. 539, Civil P. C. The learned Judge said :

> It is reasonably clear that a decree for the removal of a trespasser does not come within the scope of clauses (a) to (e) S. 539 nor is it comprehended, I think, in the general clause which speaks of a decree granting such further or other relief as the nature of the case may require.

This was undoubtedly a case of ejectment of a trespasser and it was held that if a suit to eject a trespasser does not fall within the purview of S. 539, Civil P. C., the claim for precisely the same purpose cannot be joined with a claim for administration of the trust under that section. Towards the end of the judgment Mookerji, J., observed as follows :

> That an alienee was transferee from the original transferor who was neither a necessary nor a proper party to the suit.

It is contended on behalf of the appellant that these observations are too wide. But these observations were followed in subsequent cases as will presently be shown. Reference may be made to another case of this Court, namely the case of 28 C L J 4 (2), where Sir Lancelot Sanderson, C. J., Woodroffe, J. and Mookerji, J., affirmed the view taken in the case reported in 2 C L J 431 (1) just cited. Mookerji, J., said that he need not repeat the grounds on which he based his view in that case where he held that suits for recovery of possession of trust properties from third parties, for instance, from trespassers and from the transferees from the trustees, were not within the scope of S. 539, Civil P. C. of 1882, which has been subsequently replaced by S. 92 of the Code of 1908. So far as this Court is concerned this is the view which has been consistently taken. In this case there was no prayer for ejectment of defendant 2. But the question surely is to be decided on the pleadings as to whether the trust is a public charitable trust within the meaning of S. 92, Civil P. C., and whether such a declaration can in this case be made when the transferee is a stranger to the trust so as to be binding on the alienee. Opinions of various High Courts are collected together in Sir D. F. Mulla's commentary on the Civil P. C. at p, 307 of the 10th

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1. Budh Singh Dhudhuria v. Niradbaran Roy, (1905) 2 C L J 431.

2. Gholam Mowlah v. Ali Hafiz. 1918 Cal 5=47 I C 111=28 C L J 4 (S B).

edition (1934).* The learned commentator says this :

> All High Courts are agreed that in a suit such as the above (suit under S. 92) a decree cannot be passed against the alienee directing him to deliver possession of the property to the plaintiffs, though he is a party to the suit as such relief is neither specifically mentioned in the section nor implied in clause (h) and that the remedy of the newly appointed trustee is to institute a separate suit for possession against him. The proposition that the Court has no power under this section to pass a decree against an alienee directing him to deliver possession to the plaintiffs is in accordance with a recent ruling of the Privy Council where it was held that a relief or a remedy against third persons, that is strangers to the trust, was not within the scope of this section.

The learned author relies in this connection on the case of 55 I A 96 (3). Then the learned commentator gives his own opinion regarding the power of Court to make a declaration and submits that :

> The Court has also no power under this section to make a declaration that the property in suit is not trust property so as to bind the alienee, such a relief also being outside the scope of the section.

There is a very recent decision of Sir Arthur Page C. J. of Burma, where all the cases on this point are exhaustively reviewed and the learned Chief Justice has held that the plaintiffs in a suit framed under S. 92 are not entitled to claim against strangers to the trust either a declaration of title or possession or any other relief, and a suit under S. 92 in which a claim for relief which the Court is competent to decree in such a suit entails a clear misjoinder both of parties and of causes of action and unless the plaint is amended the suit cannot be sustained. The case referred to is the case 10 Rang 342 (4). This view also seems to be in consonance with what has been maintained by this Court in so far as this point is concerned. But the learned Advocate for the appellant has sought to argue that the present case is distinguishable from the Rangoon case and the cases taking the same or similar view seeing that this is not a case of alienation pure and simple or of bona fide purchase for value without notice of the trust. On the other hand it is argued that this is a case where according to the allegations made in the plaint, the purchase was made by defendant 2 with full knowledge of the trust. The position of defendant 2 is that he is a constructive trustee, and the appellant argues and in our opinion rightly that the case of a constructive trustee, or de jure trustee, or trustee de son tort is covered by the provisions of S. 92, Civil P. C. Mr. Bose for the respondents has however contended in reply that there is no case of constructive trustee here, for since the moment of his purchase the defendant ceased to act as a constructive trustee to act in the interest of the trust. The question really does not depend on that circumstance, for according to the authorities to which we shall presently refer, the allegations made in the plaint do constitute defendant 2 a constructive trustee. We may refer in this connexion to the law with reference to constructive trusts as has been summarized in Under-hill's Law of Trust and Trustee, where the learned author refers to a number of cases which really do support the view stated above, namely where a stranger to a trust receives money or property from the trustee which he knows, (1) to be part of the trust estate, and (2) to be paid or handed to him in breach of the, trust he is a constructive trustee of it for the persons equitably entitled but not otherwise : See p. 182 of the eighth edition of Underhill Law of Trusts (1926). The learned author has referred in support of this proposition to a number of cases to which reference may be made : (1874) 9 Ch. 244 (5); 51 L. J. Ch. 271 (6) ; (1888) 40 Ch. D 370 (7). at p. 381 ; (1893) 2 Q. B. 390 (8) ; (1893) A. C. 282 (9) and (1892) 2 Ch 265 (10). Our attention has also been drawn to a passage in Lewin's well-known treatise on the Law of Trust. We are referred in

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3. Abdul Rahim v. Abu Mahomed, 1928 P C 16= 108 I C 361=55 I A 96=55 Cal 519 (P C).
4. Johnson Po Min v. U Ogh, 1932 Rang 132= 140 I C 317=10 Rang 342.

* See chitaly's Civil P. C. Vol. 1 p. 675 Note No. 28 (2nd edn.)

5. Barnes v. Addy, (1874), 9 Ch 244=43 L J Ch 513=30 L T 4=22 W R 505.
6. Re. Spencer, (1881) 51 L J Ch 271.
7. Re Blundell, Blundell v. Blundell, (1888) 40 Ch D 370=57 L J Ch 730=58 L T 933=36 W R 779.
8. Soar v. Ashwell, (1893) 2 Q B 390=4 R 602= 69 L T 585=42 W R 165.
9. Thomson v. Clydesdale Bank (1893) A C 282=62 L J P C 91=1 R 255=69 L T 156.
10. Re Barney Barney v. Barney, (1892) 2 Ch 265=61 L J Ch 585=67 L T 23=40 W R 637

particular to a passage at p. 205 and to another passage at p. 877, Edn. 11 of the work. At p. 877 where the question has been more elaborately discussed the learned author states the law thus :

But if the alienee be a purchaser of the estate at its full value, then (subject as aforesaid) if he takes with notice of the trust, whether the notice be actual or constructive, he is bound to the same extent and in the same manner as the person of whom he purchased even though the conveyance was made to him .....

The learned author cites cases in support of this proposition. Therefore looking to the averment of the appellants in the pleadings defendant 2 is a constructive trustee of the wakf property. The suit cannot be said on the allegations made in the plaint not to be one falling within the provisions of S. 92, Civil P. C. The suit is maintainable without payment of ad valorem Court-fee for the declaration. In these circumstances the proper order to make is to set aside the orders of the District Judge dated 21st March 1932, as well as 21st April 1932, which last order is really the final order and to direct that the case be sent to the District Judge in order that he may try the suit in accordance with law. We do not and indeed we cannot express any opinion as to truth or otherwise of the allegations made in the plaint on which it is claimed that defendant 2 is a constructive trustee. That is a matter of evidence. All that we can say, is that the allegations if proved are quite sufficient in law to bring the suit under the provisions of S. 92, Civil P. C.

The appellants are entitled to get their costs in this appeal. The hearing fee is assessed at five gold mohurs.

Rau, J. — I agree.

S.R. *Appeal allowed.*

A. I. R. 1935 Calcutta 809

M. C. GHOSE, J.

Madras and Southern Mahratta Railway Co. Ltd.—Defendant—Petitioner.

v.

Haji Latif Abdullah — Plaintiff and another — Opposite Parties.

Civil Rule No. 1645 of 1933, Decided on 6th June 1934, from decree of Sub-Judge, Second Court, Howrah, D/- 14th June 1933.

(a) Railways—Delay — Railway, finding seal broken, suspecting theft, and after checking goods removing them to proper shed and sealing wagon again— Railway is not responsible for such delay.

The detention of the goods by the company was in order to prevent any possible theft and it was done by railway servants in the discharge of their duty to prevent theft. It was found that a wire had been cut and they suspected that a theft had taken place or that theft might take place unless proper steps were taken, and they removed the wagons to the proper shed and properly sealed the wagons again :

Held: that the Railway Company was not responsible for the delay caused by such detention. [P 810 C 1]

(b) Railways — Misconduct — Goods sent under risk note A—Consignor held not entitled to damages.

Certain goods which were packed defectively were sent under risk note A. Some of the goods were damaged by wet and it was not proved that the goods got wet owing to the misconduct of the Railway:

Held: that having regard to the implications of risk note A, the consignor was not entitled to any damage. [P 811 C 1]

Brahmachari and *Sundhir Kumar Kastgir*—for Petitioner.

Mohendra Kumar Ghose and *Bibhuti Bhusan Lahiri*—for Opposite Parties.

Order.—This is a petition by the Madras and South Mahratta Railway against whom the Small Cause Court Judge of Howrah has passed a decree for Rs. 469. The suit was instituted by the plaintiff on account of damage by wet to 22 bags of tobacco out of a consignment of 225 bags sent from a place called Nepani to Calcutta. The goods were made over to a contractor at Nepani. The contractor carried them 29 miles in ox carts to Chakodi Railway Station on the M. S. M. Railway. There an assistant, Rangia Charia, defence witness 2, loaded the bags in two wagons. He deposed that he chose the two wagons and he found no defect in them. He received the consignments at 15 hours on the 22nd July and sent the same at 11 hours on the 23rd July. After the wagons had gone 143 miles to Hubli junction on the M. S. M. Railway it was found that a wire of one of the seals was cut; suspecting theft the two wagons were taken to a covered shed where they were opened in the presence of the watch and ward staff and the numbers of the bags were found to be correct. Thereafter the wagons were again properly sealed and sent on by

rail. The delay by this examination was about 23 hours. The wagons arrived at Hubli station at 4-30 hours on the 24th July and were sent on at 3 hours on the 25th July. They travelled 439 miles and arrived at Tadipolli junction on the 27th July. There the metre gauge ends and the broad gauge begins, and the goods had to be transhipped. The clerk who transhipped them defence witness 3, deposed that he noticed certain of the bags damaged by wet. When the goods arrived at Shalimar it was found that 22 bags were damaged by wet. The remainder of the 225 bags were found in good condition. The plaintiff sued both the M. S. M. Railway and the Bengal Nagpur Railway for damages. The trial Court found that the damage had taken place between Chakodi and Tadipalli on the M. S. M. Railway and that no damage took place on the B. N. Railway and the suit was accordingly dismissed against the Bengal Nagpur Railway.

There is no dispute in this Court that the damage to the 22 bags took place between Chakodi and Tadipolli. The question is whether the damage was caused by the misconduct of the railway administration. The learned trial Judge found that the railway administration was guilty of misconduct inasmuch as the railway servant had without justification detained the consignment for 23 hours at Hubli junction and that there was no evidence that the two wagons in which the goods were carried were waterproof or that they were securely sealed and locked. It has been urged that the detention for 23 hours at Hubli junction was in order to prevent any possible theft and that it was done by railway servants in the discharge of their duty to prevent theft. It was found that a wire had been cut and they suspected that a theft had taken place or that theft might take place unless proper steps were taken and they removed the wagons to the proper shed and properly sealed the wagons again and that for this anxiety on the part of the railway servants to secure the goods against possible theft the learned Judge was in error to convict railway officers of misconduct. The argument appears to me to be well founded. It is not correct in the circumstances to find fault with the railway administration for the delay at Hubli junction.

The trial Court found that there was no evidence that the two wagons were waterproof. Dr. Brahmachari has read the relevant evidence to show that the railway officers who were examined in the trial Court deposed that the wagons were in good condition and that there was no defect in them. In another place .the learned Subordinate Judge stated that there was no reliable evidence that the two wagons were water proof. As to this, it is urged that those railway servants who deposed that the wagons were good and had no defect in them were not cross-examined on the point. The officer at Tadipolli who found the damaged bags wrote a note to the train examiner to examine the two narrow gauge wagons and he examined them and gave a certificate that they were in good condition. In view of this evidence it is urged that the learned trial Judge acted illegally in finding that the two wagons were not sufficiently waterproof. It is urged that having regard to the circumstances the learned trial Judge was wrong to find that the railway administration was guilty of misconduct under risk note B. But the greatest argument on the part of the railway is that in this case the consignor executed risk note form A, but that the trial Court has paid no attention to the implications of this fact. Risk note from A is used when articles are tendered for carriage which are already in bad condition or so defectively packed as are liable to damage or wastage in transit. In the present case the consignment was packed in single gunny bags which was defective packing and made the tobacco liable to dryage and wettage, and on this account the consignor signed risk note A stating that whereas the consignment is liable to dryage, wettage or wastage in transit, I do hereby agree and undertake to hold the said Railway Administration and all other Railway Administrations working in connection therewith over whose railways the said goods may be carried in transit harmless and free from all responsibility for the condition in which the aforesaid goods may be delivered to the consignee at destination and for any loss arising from the same.

In this case the M. S. M. Ry. Co. in their written statement took a ground that they were protected by the risk note form A, inasmuch as the consignment was packed in single gunny bags and was thus rendered liable to dryage or wettage in transit. Assuming that the wagons of the M. S. M. Ry. were not perfectly waterproof—indeed few except the latest and best wagons are absolutely waterproof—and assuming that some water entered the wagons and caused wettage it is argued on behalf of the railway administration that the damaged condition cannot be attributed to the misconduct of the Railway. It is urged that they took all reasonable steps to ensure safe transit of the goods. The damage for wettage was as much due to the bad packing as to any other cause, and for this the plaintiff cannot make the railway company responsible. There is some evidence, though the Court below has not referred to it, that as tobacco is liable to damage both by dry weather as well as by wet weather consignors at the time of sending them by rail sprinkle water over the bags so that the tobacco may not suffer by dry weather and turn into dust and lose colour. It has been urged that it was possible that some inexperienced man prinkled too much water over the bags and that in the rainy season these bags did not dry up and got damaged by the water. However that may be, it was a case of damage by wet and the railway company examined all their servants who could throw any light in the matter. It is a matter of conjecture how the bags were damaged by wet. Having regard to the implications of risk note A, I am of opinion that the plaintiff is not entitled to any damages. The rule is made absolute and the plaintiff's suit is dismissed. The parties will bear their own costs in this Court.

K.S. *Rule made absolute.*

A. I. R. 1935 Calcutta 811

LODGE, J.

Madras and Southern Mahratta Ry. Co. Ltd.—Defendants—Petitioners.

v.

Ravi Shing Deepsing & Co.—Plaintiff—Opposite Party.

Civil Rule No. 51 of 1935, Decided on 12th June 1935, from order of Sm. C. C. Judge, Sealdah, D/- 28th September 1934.

(a) Railways—Damages—Risk-note A executed by consignor—Railway Company is not liable except upon proof that loss arose from misconduct of railway—Onus lies on plaintiff—Delay not unreasonable is not misconduct.

Where the consignor has executed Risk-note A, the liability of the Railway Company is limited by the terms of the contract which provide that the railway administration shall not be liable for any loss except upon proof that the loss arose from misconduct on the part of the Railway Administration servants. The burden of proving such misconduct is admittedly upon the plaintiff. Delay on part of Railway to carry consignment which is not unreasonable is no indication of misconduct. [P 812 C 1]

(b) Railway—Misconduct is not accidental or negligent act—It is intentional doing of something known to be wrong or recklessly doing something not caring about result.

Misconduct is not necessarily established by proving even culpable negligence. It is something opposed to accident or negligence and is the intentional doing of something which the doer knows to be wrong or which he does recklessly not caring what the result may be : 1933 *Cal* 742; *Foll.* [P 813 C 1]

S. C. Brahmachari, Bhabesh Narain Bose and *Bibhuti Bhusan Lahiri*—for Petitioners.

Hem Chandra Dhur — for Opposite Party.

Order.—This Rule arises out of a suit instituted in the Court of Small Causes at Sealdah. The plaintiff's case was that 214 bags of tobacco were booked from Nepani, an out-station of the Madras and Southern Mahratta Railway, to Shalimar on the Bengal-Nagpur Railway, and that owing to the misconduct and gross negligence of the railway officers 37 of the bags of tobacco were damaged by water. He accordingly claimed damage with interest. The learned Judge of the Court of Small Causes held that the servants of the Railway Company were guilty of gross

negligence and that the plaintiff was entitled to the value of the tobacco damaged but not to interest and his claim was decreed in part. Hence this Rule. It is urged that the learned Judge, Small Cause Court, was wrong in applying the law; that he assumed that the responsibility of the Railway Company was the responsibility of a carrier under the Carriers Act; that he wrongly found that the parties were not bound by the Risk-notes executed, and that he had no material whatever on which he came to the conclusion that there had been misconduct on the part of the Railway Administration. When the goods were booked, Risk-notes A, B and C were executed. Risk-note A is executed when articles are tendered for carriage in bad condition or so defectively packed as to be liable to damage, leakage or wasteage in transit. In the Risk-note A executed by the parties 214 bags of tobacco were described as 162 new and 52 old, and again in these words 'packing single, 52 bags old, contents damp, liable for wasteage, dryage and damage,' in other words they were accepted as already in bad condition and as so defectively packed as to be liable to damage in transit. The learned Small Cause Court Judge refers to Ex. E, a document written when the goods were made over to the Station Master of Chikadi. This document shows that at Chikadi station the goods were received in sound condition.

It is argued that this shows that the Risk-note A ought not to have been executed and the consignor was consequently not bound by the agreement in Risk-note A. In my opinion Ex. E merely shows that between Nepani and Chikadi no damage had been caused to the consignment. It does not affect the entry in the risk note that the consignment was liable to damage, leakage or wastage, in other words, defectively packed. I am satisfied that the parties are bound by the agreement in risk note A. Such being the case, the liability of the Railway Company is limited by the terms of the contract which provide that the railway administration shall not be liable for any loss except upon proof that the loss arose from misconduct on the part of the railway administration servants. The burden of proving such misconduct is admittedly upon the plaintiff. The following instances of misconduct were alleged by the plaintiff: (1) that it took six days to carry the consignment to a distance of 600 miles and in so doing the particular wagon had to be attached to 4 different trains. It is suggested that such dealay in transit is itself misconduct and it is further suggested that the Railway Company ought to have provided a through train for the purpose. To my mind the delay in question is not unreasonable and is certainly no indication of misconduct. It is pointed out that at Tadapali 23 bags of the consignment were found wet. Yet thereafter all the bags of the consignment were packed together, and when the consignment reached Shalimar 37 bags were found to be wet. It is said that the failure of the Railway Company's servants to separate the wet bags from the dry bags was itself misconduct. Another instance of misconduct is the failure of the Railway Company's servants to place a tarpalin over the flaps of the door of the wagon to prevent water entering and it is suggested that owing to this omission rain entered the wagon and the consignment became damaged.

Again it is pointed out that the goods were unloaded in the broad gauge train at 5 p. m. on the same day; that between 1-30 p. m. and 4 p. m. on that day there was rain and the Court is asked to draw the inference that during that period the consignment must have been exposed to rain and the railway servants must have been negligent. There is no evidence as to how the goods were exposed during that period or whether they were exposed. There is no evidence except the fact that 23 bags were found to be wet at Tadapali and 37 bags wet at Shalimar, to show when and how or under what circumstances the bags became damaged. The fact that the bags were damaged may indicate some negligence on the part of the Railway Company's servants, and I have been asked to hold on the authority of the case of 33 C W N 133 (1) that misconduct in this connexion is synonymous with mere negligence. The question has been considered again in the case of 60 Cal

1. B. N. Ry. Co. v. Moolji Sicka & Co., 1930 Cal 815=129 I C 769=35 C W N 133=52 C L J 235.

996 (2), in which the learned Judge who decided the case held that:

Misconduct is not necessarily established by proving even culpable negligence. It is something opposed to accident or negligence and is the intentional doing of something which the doer knows to be wrong or which he does recklessly not caring what the result may be.

Accepting the definition laid down in the latter ruling I am of opinion that there was no material whatever before the Court to show that the damage was caused by the misconduct of the Railway Company's servants. Such being the case I order that this rule be made absolute, the decree of the Small Cause Court Judge be set aside and the plaintiff's suit dismissed with costs hearing fee of this Rule being assessed at two gold mohurs to be divided between two Railway Companies.

K.S. *Rule made absolute.*

2. M. & S. M. Ry. Co. Ltd. v. Sundarjee Kalidas, 1933 Cal 742=147 I C 752=60 Cal 996=57 C L J 281.

A. I. R. 1935 Calcutta 813

R. C. MITTER, J.

Lalit Mohan Mukhopadhya—Plaintiff—Appellant.

v.

Hara Mohan Banikya Chowdhury and *others*—Respondents.

Appeal No. 1460 of 1932, Decided on 21st January 1935, from appellate decree of Sub-Judge, Second Court, Faridpur, D/- 5th February 1932.

(a) Bengal Landlord and Tenant Procedure Act (8 of 1869), S. 38—If proprietor is unable to measure lands of his estate, he can set in motion Civil Court.

The proprietor of an estate or tenure has the right to make a general survey and measurement of the lands comprised in his estate or tenure unless restrained by express engagements with the occupants of the lands. If he is opposed he has the right to apply to the Civil Court having jurisdiction under S. 37, which has to adjudicate on his right to make measurements, and if his right is established, the Court is to enjoin or excuse the attendance of the "under tenant or raiyat" at the measurement.

If a proprietor of an estate or tenure, however, is unable to measure the lands of his estate or tenure and so fails to ascertain who are the persons liable to pay him rent he has the remedy prescribed in S. 38. He can set in motion the Civil Court by an application and if the civil Court is satisfied that he was unable to measure by his own agency, the civil Court has to grant the application and the further proceedings are continued by the Collector. [P 814 C 2 P 815 C 1]

(b) Bengal Landlord and Tenant Procedure Act (8 of 1869), S. 38—Application to Collector under S. 38—Collector has no right to determine what rent ought to be—He can simply find out what existing rent is—Special application will not generally be made by old proprietor.

Proceedings on an application under S. 38 will ordinarily be beneficial to the proprietor when his case is that either his tenants have encroached upon his khas or unsettled lands or have taken possession of alludial formations or when he wants to ascertain the names of persons in occupation and the quantity and particulars thereof with a view to assess rent. Where his object is to ascertain the names of persons who are his tenants, the particulars of the land in their occupation, the amount of rent payable by them with a view to realise rent already assessed, the special application provided for in the section is the appropriate remedy. The scope of the Collector's investigation is then enlarged. He has then not only to do what he is required when a general application is made, but has to ascertain the persons liable to pay rent and the amount of rent payable by them. The Collector has no right to determine what the rent ought to be but simply to find out what the existing rent is. A special application under the section would not ordinarily be made by an old proprietor of an estate, becasue his records would be sufficient to enable him to realise rent and a proceeding under this part of the section would ordinarily be to him a costly luxury. But such a proceeding would be very useful to a purchaser at a revenue sale, who has no collection papers to go upon: 22 *W R* 480, *Ref.* [P 815 C 1,2]

S. C. Basak and *Hemendra Kumar Das*—for Appellant.

Amarendranath Bose and *Bhagirath Chandra Das*—for Respondents.

Judgment.—This appeal is on behalf of the plaintiff whose suit for khas possession has been dismissed by the lower appellate Court. The plaintiff claims the suit land, which is in village Kurasi, as appertaining to his estate No. 5642 of the Faridpore Collectorate (formerly numbered as No. 631 of the Dacca Collectorate). There is no dispute now that the plaintiff is the proprietor of the said estate, although it was at one stage of the suit contended by defendant 1, that he had no beneficial interest therein. The said estate was sold for arrears of revenue on 29th June 1881 and purchased by Girish Chandra Sen and others, hereinafter called the Sens, from whom the plaintiff has derived his title. Shortly after their purchase the Sens applied for measurement of the lands appertaining to their estate under S. 38, Act 8 of 1869 (B. C.) and proceed-

ings started under the said section were duly completed on 19th March 1885. The application is not on the record, but the Robakari of the Deputy Collector and the Jaripi chita prepared by him are on the record. They are Exs. 5 and 6 respectively. The Jaripi chitta records defendant 8 as tenant under the proprietors of estate No. 5642 holding at a rent which works out at Rs. 3. As the contentions of the parties to this suit depend on the said documents it will be necessary to deal with them in detail hereafter. The plaintiffs case is that defendant 8 and 9 held the lands in suit, which is recorded as Dag No. 241 of the Cadastral survey of the aforesaid village, as ordinary occupancy raiyats at a rental of Rs. 3 with no right of transfer. His further case is that the said plot which corresponds to plots Nos. 32 and 33 of the aforesaid Jaripi chitta, was purchased by one Radhagovinda Manikya, the father of the principal defendants, in execution of a mortgage decree. Hence he sues for khas possession on the basis of abandonment. Of the principal defendants, defendant 1 alone contested the suit. He admitted that defendants 8 and 9 mortgaged the lands in suit to his father and that his father purchased them in execution of his mortgage decree. He sought to defeat the plaintiff's claim on two grounds, namely (1) that the lands in suit do not appertain to the plaintiffs estate and that defendants 8 and 9 were not his tenants. He made a positive statement that they appertain to Estates No. 392 and 393 of the Dacca Collectorate and that defendants 8 and 9 held immediately under the proprietors of the said estates. (2) His further defence was that the tenancy of defendants 8 and 9 was not an occupancy holding but a permanent mirasi tenure held at a rental of Rs. 2. The record-of-rights prepared under Ch. 10, Ben. Ten. Act, regards the lands in suit as permanent mirasi tenure held under the proprietors of Estates Nos. 392 and 393 at a rental of Rs. 2. Both the Courts below have held that they appertain to the plaintiff's estate. The lower appellate Court has further held that the lands are the lands of the tenancy recorded as plots 32 and 33 of the Jaripi Chitta (Ex. 6). The first Court held that defendants 8 and 9 held the lands as ordinary occupancy raiyats and the sale of the entire holding had amounted to an abandonment of the holding on the part of defendants 8 and 9.

The lower appellate Court has held that there is no evidence at all to rebut the entry in the record-of-rights that the lands in suit constitute a permanent mirasi tenure. The suit was accordingly dismissed. Dr. Basak who appears for the plaintiff-appellant contends that the proceedings taken under S. 38 of Act 8 of 1869 are conclusive and preclude the defendants from contending that defendants 8 and 9 were other than ordinary occupancy raiyats. He further contends that in any event Exs. 5 and 6 are cogent evidence to prove his client's assertion that the tenancy is an occupancy holding and that the learned Subordinate Judge has entirely overlooked this evidence in holding otherwise. Mr. Bose for the respondents contends that those documents are not even relevant and that the Subordinate Judge was right in saying that there was no evidence to rebut the particular entry of the record-of-rights. To decide the points raised in the appeal it is necessary to examine the precise scope of Ss. 38 and 39 of Act 8 of 1869 (B. C.) and the contents of the robakary Ex. 5. These sections are reproductions of S. 10 of Act 6 of 1862 (B. C.), which it replaced with a little change which is not material to this case, the difference being that whereas under Act 6 the Collector initiates the proceedings on the application of the owner of the estate or tenure and carries the proceedings to an end, under Act 8, the proceedings begin with an order of a civil Court, the measurement and investigations are made by the Collector on reference from the civil Court, and the proceedings terminate with the records of the Collector being filed in the civil Court. I deal with the relevant provisions of Act 8. Under S. 25 the proprietor of an estate or tenure has the right to make a general survey and measurement of the lands comprised in his estate or tenure unless restrained by express engagements with the occupants of the lands. If he is opposed he has the right to apply to the civil Court having jurisdiction under S. 37, which has to adjudicate on his right to make measurements, and if his right is established the Court is to enjoin or excuse

the attendance of the "under tenant or raiyat" at the measurement.

If a proprietor of an estate or tenure however is unable to measure the lands of his estate or tenure and so fails to ascertain who are the persons liable to pay him rent he has the remedy prescribed in S. 38. He can set in motion the civil Court by an application and if the civil Court is satisfied that he was unable to measure by his own agency the civil Court has to grant the application and the further proceedings are continued by the Collector. That section however contemplates two classes of applications, which for brevity's sake, I will call the general and special application. The scope of the proceedings are determined by the nature of the application. If an order is passed by the civil Court in favour of such a proprietor on a general application the Collector's power is limited to two matters and two matters only. (1) He is to measure the lands and (2) to record the names of the actual occupants of the lands. These occupants may be persons between whom there may have been at the time of the Collector's measurement no relationship of landlord and tenant in respect of the lands occupied by them or not; but the Collector has not to ascertain whether there is such relationship or not. Proceedings on such an application will ordinarily be beneficial to the proprietor when his case is that either his tenants have encroached upon his khas or unsettled lands or have taken possession of alluvial formations or when he wants to ascertain the names of persons in occupation and the quantity and particulars thereof with a view to assess rent. Where his object is to ascertain the names of persons who are his tenants, the particulars of the land in their occupation, the amount of rent payable by them with a view to realise rent already assessed, the special application provided for in the section is the appropriate remedy. The scope of the Collector's investigation is then enlarged. He has then not only to do what he is required when a general application is made, but has to ascertain the persons liable to pay rent and the amount of rent payable by them: 22 W R 480 (1). The Collector has no right to determine what the rent ought to be but simply to find out what the existing rent is. A special application under the section would not ordinarily be made by an old proprietor of an estate, because his record would be sufficient to enable him to realise rent and a proceeding under this part of the section would ordinarily be to him a costly luxury. But such a proceeding would be very useful to a purchaser at a revenue sale, who has no collection papers to go upon. (I exclude those special cases where a purchaser at a revenue sale is able to secure from the defaulting proprietor or his amlas the collection papers). Such a purchaser may for his benefit require the names and particulars of all tenants holding directly under him and who are to pay him rent, whether they be patnidars, tenure holders or raiyats or he may require only the names and particulars of raiyats directly holding under him, trusting for getting information as to the particulars of patnidars and tenureholders who are to pay him rent to other sources.

These principles furnish in my opinion a clue to the interpretation of the robakary (Ex. 5), and the solution of the points in controversy in this appeal. The robokary after reciting the purchase of the Sens at a revenue sale and the details of the mehal proceeds on to say that the applicants not having been able to ascertain the names of all the tenants of the estate, had applied for measurement of the lands of the estate according to the Thak map, and for ascertainment of the names of all cultivating and homestead tenants (chasi and basati praja), the area of lands in the possession of each one of such tenants and the rent payable in respect of the different classes of lands held by them. The robakary then gives the details of measurement and states that in respect of some mauzahs objection had been preferred by proprietors of other estates and by persons claiming lakhiraj rights but simply records their objections with a statement that the applicants had not prayed for recording patnis, shikmi miras or lakhiraj tenures. In respect of mauza Kurasi however no objection was preferred by anyone. The robakary then states that the Deputy Collector on local enquiry had found the

1. W. G. Crowdy v. Poorum Singh, (1874) 22 WR 480.

rates of rent paid in respect of different kinds of land of the several villages of the estate. For mauza Kurasi the rate per Kani is recorded thus:

Rs. 12 for homestead land,
Rs. 10 for abandoned bastu,
Rs. 14 for garden lands,
Rs. 8 for lands adjoining homesteads,
Rs. 5 for paddy lands.

In the chitta Ex. 6 the lands in suit are recorded in Dags Nos. 32 and 33 as "Jote Ambika Charan Dey, the lands as paddy lands and ditch, area 11 1/2 gds odd and rate of rent Rs. 5 per kani." Reading the robakary and having regard to the statements made therein I come to the conclusion that a special application under S. 38 of Act 8 of 1869 (B. C) had been made before the civil Court by Gris Chandra Sen and others, the purchasers at the revenue sale, but they applied to have the particulars as to rent, etc., payable by cultivating and hemstead tenants (chasi and basati praja) and not also of middle men, or tenure-holders. The robakary and the Jaripi Chitta being filed and recorded in the civil Court under the provisions of S. 39 of Act 8 the matter intra vires the Collector have become final and conclusive. These matters are, that in respect of Dags Nos. 32 and 33 of the Jaripi Chitta Ambika Dey was the tenant and that his rent was at the rate of Rs. 5 a kani: 10 Cal 507 (2). The Collector proceeding under S. 38 of Act 8 has no jurisdiction to determine to which class a tenant belongs, or to determine the incidents of a tenancy, or to determine what the fair rent ought to be: 16 W R 50 (3). I am therefore unable to give effect to the first contention of Dr. Basak that the Jaripi Chita and the robakary conclude the matter between the parties and preclude the defendants from asserting that defendants 8 and 9 were permanent tenure-holders and not occupancy raiyats. But in my judgment there is great force in his second contention. As I have stated the Sens made a special application under S. 38 of Act 8 but of a limited character. They only wanted to ascertain the particulars of holdings and not of tenures. In the Jaripi Chita the lands are recorded as being in the possesion of the tenant, defendant 8. This must be on the footing that he was himself in possession by cultivation. No objection was preferred by him that he was not a cultivating tenant and that the Collector could not record the particulars of his land as being beyond the scope of the proprietors' application. I accordingly hold that Exs. 5 and 6 are relevant on the question of the status of defendants 8 and 9 as tenants under the plaintiffs. The learned Subordinate Judge was not therefore right in ignoring Exs. 5 and 6 in arriving at his finding that the subject matter of the suit was a permanent tenure. I accordingly set aside the decree of the learned Subordinate Judge and remand the case to the lower appellate Court so that the question of the status of defendants 8 and 9 under the plaintiffs may be reconsidered. All other findings of the lower appellate Court must stand.

The appeal is a accordingly allowed and the case remanded to the lower appellate Court. Cost to abide the result. There is no substance in the cross-objection which is dismissed but without costs. Leave to appeal under the Letters Patent asked for is refused.

K.S. *Appeal allowed.*

2. Meerjah Janand v. Krishto Chander, (1884) 10 Cal 507.
3. J P Wise v. Lakhoo Khan, (1871) 16 W R 50.

A. I. R. 1935 Calcutta 816

HENDERSON AND KHUNDKAR, JJ.

Fateh Kumar Singh and *another*—Judgment-debtors—Appellants.

v.

Kishen Chand Kachar—Decree-holder—Respondent.

Appeal No. 204 of 1932, Decided on 9th May 1935, against order of Sub-Judge, 2nd Court, 24 Parganas, Alipore, D/- 15th March 1932.

(a) Res judicata — Execution — Decree against firm sought to be executed against persons alleged to be partners—Objection by partners allowed to be dismissed in default—Order not appealed against—Matter cannot be re-agitated in subsequent execution.

Where execution of a decree is taken out against certain persons alleged to be the partners of a firm and they raise an objection but do not proceed with it, letting it to be dismissed for default nor do they prefer an appeal against the order of dismissal, they cannot be allowed to re-agitate the matter all over again in a subsequent execution taken out against them. More so

where the objection is taken at a late stage when the property is put up for sale. [P 817 C 1]

(b) Res judicata—Execution — Judgment-debtors inducing decree-holders to agree to postponement of sale—They cannot subsequently at late stage raise objection to execution.

Where in the execution of a decree, the judgment-debtors induce the decree-holders to agree to postponement of sale, in order that they might have an opportunity of paying the decretal amount, they cannot be allowed to turn round afterwards and put in a delayed application raising an objection against the execution. [P 817 C 2]

Pramatha Nath Mitter and *Bijan Behary Mitter*—for Appellants.

Bejoy Kumar Bhattacharjya, Urukramdas Chakravarti and *Fanindra Kumar Sanyal*—for Respondent.

Henderson, J.—This is an appeal against an order rejecting an application filed by the judgment-debtors appellants under the provisions of S. 47, Civil P. C. The decree for which execution was sought was passed on the Original Side of this Court against a certain firm, and was then transferred to the Subordinate Judge of the 24-Parganas for execution. The contention of the appellants is that they are not partners of the firm, and that the decree cannot be executed against them personally. It is contended that execution can only proceed against them personally under the provisions of O. 21, R. 50, sub-S. (2), of the Code, and that is a matter which can only be allowed by the Court passing the decree and not by the Court to which the decree has been transferred for execution. The contention of the respondent is that sub-S. (1) of the rule applies.

In our opinion it is not possible for the appellants to contend that they are not personally liable. In the first place, there was a previous execution taken out against them and they filed an objection. They did not proceed with it, and in the end it was dismissed for default. No appeal was preferred against that decision, and it has now been binding. They cannot therefore be allowed to re-agitate the matter all over again. In the second place even in the present execution case, the objection was raised at a late stage. The appellants were called upon to show cause why execution should not proceed against them and their property was attached and put up to sale. The sale was to take place on 15th March 1932, and it was only then that they filed this objection. In the third place, on 9th March 1932, so far from raising any objection with regard to their liability, they asked that the sale might be postponed in order that they might have an opportunity of paying the decretal amount. The respondent decree-holder consented and the sale was accordingly adjourned. Having thus induced the decree-holders to agree to a postponement of the sale they cannot possibly be allowed to turn round afterwards and put in a delayed petition of this sort. The result is that the appeal fails, and is dismissed with costs. We assess the hearing fee at one gold mohur.

Khundkar, J.—I agree.

R.M./R.K. *Appeal dismissed.*

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* A. I. R. 1935 Calcutta 817

MUKERJI AND S. K. GHOSE, JJ.

Bikram Kishore Manikya Bahadur—Plaintiff—Appellant.

v.

Jadab Chandra Choudhury and *others*—Respondents.

Appeal No. 302 of 1932, Decided on 27th August 1935, against decree of Sub-Judge, First Court, Comilla, D/- 22nd August 1932.

(a) Principal and Agent—Claim for accounts—Suit is governed by Art. 89 and not Art 90, Lim. Act—Plaintiff cannot alter frame of suit in appellate stage.

Where in a suit for accounts between principal and agent, the foundation of the entire claim is one for accounts, the suit is governed by Art. 89 and not Art. 90 : 1924 *All* 467, *Dist.* [P 820 C 1]

Plaintiff cannot alter frame of suit in appellate stage to establish that Art. 90 and not Art. 89 applies. [P 820 C 1]

*** (b) Principal and Agent—Agency between two persons—Death of principal—Agent continuing in service under sons of principal—Suit for accounts — Periods of agency before and after death of principal should be separately considered—Former agency terminates on death of principal and suit for accounts with regard to that period is three years from date of termination.**

Where an agency is created between two persons and the principal dies but the agent continues in the service of his sons and they file a suit for accounts for period both before and after the death of their father, as the former agency terminates with the death of the father, the two periods should be separately considered and if a suit for accounts in respect of the anterior period is instituted more than three years after the date on which that agency terminated, the suit for accounts must be regarded as barred : 1922 *Cal* 53 ; 1916 *P C* 148 ; 9 *C L J* 107, *Rel on* and 17 *C W N* 5, *not Foll.* [P 820 C 2]

(c) Limitation Act (1908), Art. 89—Art. 89 applies even to suits against legal representative.

The omission of any mention of legal representatives in the words under "discription of suit" in Art. 89 does not mean that the article is not intended to apply to a suit against the legal representatives : 1927 *Mad* 157, *Foll.*

[P 821 C 1]

(d) Deed—Construction — Surety bond—Operative part of guarantee is liable to be controlled by recitals where latter are inconsistent therewith—But not covenant of indemnity.

The principles of construction, so far as surety bonds are concerned, are somewhat different from the principles which should be adopted for construing any other documents. The operative part of a guarantee is liable to be controlled by the recitals, at least where the latter are plainly inconsistent therewith, but not otherwise, as a covenant of indemnity, unlike a release or guarantee, is not to be restricted by its recitals.

[P 823 C 1, 2]

Where the recitals plainly indicated that the sureties had come to execute the bonds on the requisition which the principal had made, calling upon the agent to furnish the sureties who would remain liable to the extent of Rs. 1,000 and no other amount being mentioned in the bonds but only a general statement about liability for the entire amount for which defendant would be found liable :

Held : that the intention of the parties was that the executants would remain liable up to the extent of Rs. 1,000 and no more.

[P 823 C 2 ; P 824 C 1]

Jogesh Chandra Roy, *Santimoy Mazumdar* and *Amarendra Mohan Mitra* for *Birendra Chandra Das*—for Appellant.

Priya Nath Dutt, *Ajit Kumar Dutt* and *Amiya Kumar Som*—for Respondents.

Judgment.—This appeal has been preferred by the plaintiff from a preliminary decree in a suit for accounts. During the pendency of the appeal a final decree in the suit has been passed. The facts necessary to be stated are the following: Defendant 1 was a mukhtear in the service of the plaintiff's father Maharaja Birendra Kishore Manikya Bahadur, the Ruling Chief of Tippera. He was appointed as such mukhtear on 22nd December 1914 and for this service he executed a kabuliat on 24th December 1916. In accordance with an order made on 22nd December 1914, about the time when he was appointed, he furnished two sureties defendants 4 and 5, who executed a surety-bond on 18th April 1919. The Maharaja died on 13th August 1923. Thereafter the plaintiff, Maharaja Bir Bikram Kishore Manikya Bahadur succeeded to the Raj and on 31st March 1926 executed an Am-mukteamama in favour of defendant 1 authorising him to withdraw money and file petitions of satisfaction and also giving him certain other powers. On 23rd May 1926 a fresh kabuliat was executed by defendant 1 in favour of the plaintiff in respect of his services, and as on the previous occasion when he had executed a similar kabuliat, this time he furnished two other sureties, namely defendants 2 and 3, who on the same date executed a fresh surety-bond. Defendant 1 continued in service till 5th September 1927 when he was suspended and he was eventually dismissed on 23rd April 1928.

On 21st March 1929 a notice of demand appears to have been served on defendant 1 calling upon him to pay up the amounts due from him to the State, and on his failure to comply with the said notice the present suit was instituted on 30th June 1930. The suit was framed as a suit for accounts, and in the schedules to the plaint, seven in number, various items set out, aggregating to a sum of Rs. 10,000 odd in respect of which it was said that defendant 1 had either committed defalcation or was liable to make good the loss which had been caused to the State. In Sch. Ka were set out a number of items representing dues under decrees which defendant 1 was alleged to have realised out of Court but had not paid to the State. In Sch. Kha items were set out in respect of decretal dues which defendant 1 was alleged to have taken out of Court but had not credited into the accounts. In Sch. Ga a number of items were set out, in respect of which it was said that by reason of the default on the part of defendant 1 execution of decrees obtained with regard to the amounts had become barred by lapse of time. In Sch. Gha a number of items were set out in respect of which execution petitions were dismissed for default or for want of Tadbir by defendant 1. And in Sch. Uma a few rupees were mentioned as having been taken either in cash or in Court-fees and misappropriated by defendant 1. In the plaint it was also stated that after the demand had been made on defendant 1 for putting in the total amount of Rs. 10,000 odd which had been found due from him on

such accounts as were made, defendant 1 did not comply with the demand and on that a fresh loss to the extent of Rs. 1,000 odd was caused to the State. On these and similar other allegations the suit was laid. Written statements were put in by defendants 1, 2, 3, 4 and 5. Having regard to the contentions that have been put forward in the appeal, it is not necessary to refer to the contents of the written statement. It is sufficient to say that on 22nd August 1932, the Subordinate Judge made a preliminary decree in the suit.

The judgment in accordance with which this decree was made is anything but satisfactory. In it various findings of fact which were necessary to be arrived at in connection with the case were made, but they are scattered all over the judgment and it is difficult to form a clear idea as to what exactly the learned Judge intended to find. Indeed, with regard to some of the points, it may be said that the findings are not possible of reconciliation. In the decree that was drawn up, there was no reference whatsoever to the liability of the sureties, namely defendants 2, 3, 4 and 5 although in the final decree that had been made in the suit such adjudication on the one hand and these defendants on the other had to be relied upon. Having regard to these facts, the case had presented some difficulties, but thanks to the arguments that have been addressed to us on behalf of the parties who have appeared before us, the position in the end seemed to us to be perfectly clear. In the appeal only defendants 2 and 3 have appeared as respondents.

The first question that has arisen for consideration in the case is about the period for which defendant 1 is liable for accounts. The Subordinate Judge has held that he is liable for the period commencing from 13th August 1923 (the date of the death of the plaintiff's father) to 23rd April 1928 (the date of the dismissal of defendant 1): in other words that the said defendant is not liable for the period of his service during the lifetime of the plaintiff's father. This finding has been arrived at by the learned Judge under Issue 5 which was framed in this case. For reasons which would be found recorded by the learned Judge under that issue in his judgment he came to hold that defendant 1 was not liable for the period commencing from the date of his first appointment and ending with the point of time at which the plaintiff's father died. This conclusion of the learned Judge has been challenged on behalf of the appellant, the appellant's contention being that defendant 1 is liable for the entire period of his service commencing from 22nd December 1914, the date of his appointment and ending with 23rd April 1928, the date on which he was dismissed. In order to establish this contention two positions have been taken up on behalf of appellant. The first is that Art. 89, Lim. Act, which presumably is the article which the learned Judge has applied to the case, is not really applicable but that the suit should be treated as governed by Art. 90. Art. 90 is worded thus:

"Other suits by principals against agents for neglect or misconduct-three years when the neglect or misconduct becomes known to the plaintiff."

The argument, so far as this contention is concerned, is that the plaintiff did not stand in need of relief in the shape of a decree for accounts for the purpose of recovering the amounts which were due from defendant 1 to him and also that the misconduct or neglect on the part of defendant 1 which formed the allegations on which the suit was based came to light and became known to the plaintiff well within three years from the date on which the suit was instituted. It is upon these arguments that it has been contended that Art. 90 is the correct article to apply to the case, and in support of this contention reliance has been placed upon the decision in 46 All 175 (1). That was a case in which the plaintiff's claim was for damages due to a loss sustained by him as principal, such loss being directly traceable to disregard on the part of the defendant as agent of directions issued to him regarding the conduct of the business which the defendant was carrying on as such agent. We are of opinion that the case aforesaid is easily distinguishable. In that case there was no question of any accounts being rendered. Here, in the present case, even a cursory examination of the plaint would show

1. A. C. Mukherjee v. Municipal Board, Benares, 1924 All 467=80 I C 241=46 All 175=22 A L J 26.

that although different items were mentioned in the different schedules to the plaint as forming items with regard to which the plaintiff asked for relief, the foundation of the entire claim was a claim for accounts. The first and the second prayers of the plaint, which are the only substantial prayers therein, are both based upon the liability of defendant 1 to render accounts and in those prayers the prayer was that the relief asked for should be awarded to the plaintiff on the footing of the accounts that were to be rendered. It is not permissible to the plaintiff to alter the frame of the suit in the way in which he desires to do at the present stage in order to establish that not Art. 89 but Art. 90 is the article applicable.

It has been next argued that an "irrevocable agency"—I am quoting the words of the learned Advocate who has appeared for the appellant—was created by the terms of the demand such as are evidenced by the kabuliat which was executed by defendant 1 in favour of the plaintiff's father, and that, in point of fact, that kabuliat carefully read would show that defendant 1 was holding service really under the State and that the death of the plaintiff's father would not terminate the agency which had been created in favour of defendant 1 by his first appointment. With regard to this matter, it is quite true that some of the terms of the said kabuliat would indicate that the appointment that was being taken by defendant 1 was an appointment under the State of which the plaintiff's father was the proprietor. In so far, therefore, as the appointment was concerned defendant 1 cannot plead that he was not an officer of the State of which the plaintiff's father was the proprietor but that he was merely holding service under the plaintiff's father in his personal capacity. This question however is immaterial for it was an agency that was created, an agency in respect of which plaintiff's father was the principal and defendant 1 was the agent. That being the position, it cannot be disputed that the agency that was created by the contract between the parties was an agency which could last during the lifetime of the plaintiff's father. With regard to this matter the most authoritative decision to which reference may be made is the decision of the Judicial Committee in 21 C W N 97 (2). That was a case in which an agent was appointed by a certain person and thereafter that person died and the agent continued to hold service under the sons of the person who had made the appointment and had died. Their Lordships of the Judicial Committee held that the agency that was created, terminated at the death of the principal and that with regard to that period a suit for accounts would lie until the expiry of a period of three years from that date and that so far as the service of the agent after the death of the said principal was concerned it should be regarded as an agency held under the heirs of the said principal. That being the position, there can be no doubt that the two periods should have to be separately considered, and if a suit for accounts in respect of the anterior period is instituted more than three years after the date on which that agency terminated, that suit for accounts must be regarded as barred. That this view has been taken of a matter like this in this Court in several cases cannot be disputed. As for instance, reference may be made to the case of 9 C L J 107 (3). There the defendant was a gomasta of the plaintiff's father and after his death in 1901, the plaintiff sued the defendant for accounts. It was held that the suit for accounts up to the time of the death of the plaintiff's father was barred by Art. 89 having been instituted more than three years after the said date. The learned Judges observed thus:

> We however entertain no manner of doubt that Art 89 is the appropriate article and that limitation began to run from the date of the plaintiffs' father's death. S. 201, Contract Act, expressly says that an agency is terminated by either the principal or the agent dying, and the facts are that the plaintiffs' father having died in 1908 that particular agency terminated by that event.

This view has also been taken in a more recent case, namely the case of 26 C W N 320 (4), in which reference was made to the decision of the Judicial Committee to which we have already referred. We are aware that in a deci-

2. Nobin Chandra v. Chandra Madhab, 1916 P C 148=36 I C 1=44 Cal 1=21 C W N 97 (P C).
3. Mohendra Nath Ghose v. Jadu Nath Mullik, (1909) 9 C L J 107=3 I C 684.
4. Sarashibala Dasi v. Chuni Lal Ghose, 1922 Cal 58=65 I C 219=26 C W N 320.

sion of this Court in 17 C W N 5 (5), which however was a case in which the agent having died, a suit was instituted by the principal for accounts against the heirs of the agent, one of the propositions that came up for consideration was whether Art. 89 having regard to its scope can be held to apply to a case where there is no relationship of principal and agent as between the parties, but that one of the parties was a representative of such principal or agent. The learned Judges in that case were of opinion that Art. 89 would not apply to such a case but some other article of the Limitation Act would be applicable. The reasons that were given in that case have been considered in a decision of the Madras High Court in 50 Mad. 249 (6), in which a number of decisions bearing upon this point were considered and we are in agreement with what has been observed in that case, namely that the omission of any mention of legal representatives in the words under "Description of suit" in Art. 89 does not mean that the article is not intended to apply to a suit against the legal representatives. We are of opinion that having regard to the decisions to which we have referred, Art. 89 is the proper article to apply to the suit and that the learned Judge in holding that the accounts in respect of the period prior to the death of the plaintiff's father were barred has taken the right view on the question of limitation which arose in this case.

The second question which arose for consideration is about the period for which the defendants 4 and 5 would be liable as sureties. The learned Judge has held that these defendants would be liable for the period commencing with 13th August 1923, the date of the death of the plaintiff's father and up to 31st March 1926, the date on which the Am-muktearnama was executed. In other words, he has held that for the period during the life-time of the plaintiff's father the claim for accounts as against defendant 1 being barred, these sureties, defendants 4 and 5, are not also liable for that period and the learned Judge has also held that because on 31st March 1926 an Am-muktearnama was executed by the plaintiff in favour of defendant 1 and that Am-muktearnama enabled defendant 1 to do such acts as the withdrawal of moneys, the filing of petitions for satisfaction and so on, these defendants are not liable for what defendant 1 may have done in connexion with such works and therefore these two defendants will only be liable for the period aforementioned. We are of opinion that the learned Judge was entirely wrong in the view that he has taken in respect of both these matters. The liability of defendants 4 and 5 has to be ascertained upon the terms that are contained in the surety-bond which they executed. That surety bond states as follows :

"If upon adjustment of accounts any money is found due to the State or if any kind of claim or decretal dues be barred by limitation or if any suit be lost on account of the laches of the Mukhtear, or if any money of any kind be found due to your State on account of any wrongful act such as defalcation, etc., on his part, and if the Muktear does not pay the said sum amicably within three months, you will be entitled to realise your entire dues from us".

The cause of action upon this stipulation would arise when defendant 1 served with a notice of demand in respect of moneys due from him on various accounts would fail to comply with the demand, and not before. It is difficult to see how any other view can be taken in respect of the liability of defendants 4 and 5. That being the position, there can be no question that no part of the claim which the plaintiff may have established as against defendant 1 can be regarded as barred as against defendant 4 and 5. It is quite true that having regard to the provisions of Art. 89, Lim. Act, it will not be possible for the plaintiff to realise a part of his claim, namely, the part which relates to the period antecedent to the date when he came to take the State as heir to his father, but that fact is immaterial, having regard to the terms of the document to which we have just referred. We are therefore of opinion that the plaintiff would be entitled to enforce his rights under the surety bond in respect of the amounts which defendant 1 may be liable for, for the entire period commencing from the date of his appointment and ending with the date of his dismissal.

5. Kumeda Charan Bala v. Asutosh Chattopadhyaya, (1913) 17 C W N 5=16 I C 742.
6. Parthasarathy Appa Rao v. Subba Rao, 1927 Mad 157=99 I C 456=50 Mad 249=51 M L J 804.

The third question which arises for consideration is the question of the liability of defendants 2 and 3. The learned Judge has held that the said defendants are liable for the period commencing from 13th August 1923, that is to say the date of the plaintiff's father's death, up to 23rd April 1928, the date of the dismissal of defendant 1. The contention of the appellant is that this conclusion of the learned Judge is not right and that the said defendants should be held liable for the entire period of the service of defendant 1 just as defendants 4 and are liable. We have read the surety bond which was executed by defendants 2 and 3 and it cannot be denied that it is upon the terms of that bond that the liability of the said defendants will have to be determined. It appears that in that bond reference was first made to the fact that defendant 1 had been serving as a Muktear after being appointed to that post in accordance with an order passed on 22nd December 1914. Now, this reference was to the first appointment of defendant 1, namely the appointment that he came to hold under the father of the plaintiff. Then it was stated in the surety bond that the said sureties would remain liable for the acts done by the said Muktear since his appointment and up-to-date, as well as for his acts which will be done by him in future in accordance with the terms set out in the kabuliat which was executed by defendant 1 on 9th Jaistha 1336, that is to say, 23rd May 1926. It should be remembered that this surety bond was also executed on 9th Jaistha 1336 corresponding to 23rd May 1926. The terms recited above can only mean that not only would the sureties remain liable for the period of service of defendant 1 during his second appointment but also for the period which had preceded. That being the position, the liability of these two defendants also should be held to extend from the date on which defendant 1 was first appointed and right up to the point of time when he was dismissed. The considerations which weigh with us in holding that defendants 4 and 5 were similarly liable do, in our opinion, apply with equal force to the case of defendants 2 and 3. Anything said by the learned Judge to the contrary must be regarded as overruled.

Then comes up for consideration another question, and that really is a question which has got to be very carefully considered. The learned Judge has held that all these four defendants are jointly and severally liable for a sum of Rupees 1,000 and no more. Though there are certain passages, at least one passage in the judgment of the learned Judge which indicates also a contrary view, it seems to us fairly clear that what the learned Judge intended to find was that it was for an aggregate sum of Rs. 1,000 and no more, that all these defendants will be jointly and severally liable. On behalf of the appellant, on the other hand it has been contended that it should be held, that all these defendants should be jointly and severally liable for the entire amount which would be found due from defendant 1 for the entire period of his service in the State. The question is as to whether either of these two views and if so which is correct and if not what is the correct view to take of the situation.

It will appear from the words used in the two surety bonds that so far as the bond executed by defendants 4 and 5 are concerned that bond opens with the words that the sureties who were standing sureties were doing so in accordance with an order dated 22nd December 1914, and in referring to that order it was stated that immovable properties of the value of Rs. 1,000 or personal surety for the said sum had been ordered to be furnished as a guarantee for discharging the duties of the Ammuktear ; and later on in the same document it was stated that if upon adjustment of accounts money is found due from defendant 1 and the latter does not on demand pay it up, the plaintiff's father would be entitled to realise his entire dues from the sureties ; and again in another part of the document it is stated that the sureties would remain responsible for the acts which defendant 1 might do in contravention of the terms of the kabuliat which he had filed and if in consequence thereof any injury or loss is caused to the State. If reference is made to the other surety bond, namely the one which was executed by defendants 2 and 3 in favour of the plaintiff, it will be found that first of all the appointment of defendant 1 as Muktear is referred to and the order of 22nd

December 1914 is also referred to and then it is stated that immovable properties of the value of Rs. 1,000 on personal liability for the said sum had been ordered to be furnished as a guarantee for discharging the duties of the Muktear and so on and thereafter it was said thus : "We of our own accord and in our personal capacity", etc. This latter expression is not a happy translation of the original which really means for themselves stand surety for him (that is to say, defendant 1) for the said sum of Rs. 1,000. Thereafter, follow other terms and conditions which taken together would indicate that the intention of the parties was that the sureties would remain liable for the entire amount that may be found due from defendant 1 just as was provided for by the terms of the other surety bond. The question is what in these circumstances should be held to be the meaning and intention of the parties with regard to the liabilities of the two sets of sureties. We have been referred to a principle of construction which has been followed in authoritative decisions. This principle of construction was laid down by Lord Esher, M. R. in (1886) 17 Q B D 275 (7) in these words:

> If the recitals are clear and the operative part is ambiguous, the recitals govern the construction. If the recitals are ambiguous, and the operative part is clear, the operative part must prevail. If both the recitals and the operative part are clear, but they are inconsistent with each other, the operative part is to be preferred.

It should be remembered, however, that this case was one in which a deed of composition was being construed. It is well known that the principles of construction so far as surety bonds are concerned are somewhat different from the principles which should be adopted for construing any other documents. A surety in the eye of the law is a favoured debtor and we shall presently refer to the well-recognised cannon of construction so far as surety bonds are concerned, but in the meantime we must refer to the other two cases which have been brought to our notice in support of the construction which the appellant has advanced. One of these cases is (1852) 14 Beav 467 (8) in which it was held that the plain effect of the operative part of the deed cannot be cut down by the recitals. The case, however, was one in which a settlement deed had to be construed. The third case is (1833) 10 Bing. 84, (9). That was a case of a bond executed by certain persons. On the facts it was a case converse to the present one. There a bond had been executed by the defendants for a sum of £1000 and in the body of the bond it has been stated that the obligor had been required to furnish two sureties under the penalty of £500, and on the strength of this last mentioned recital it was argued that although the bond was for a sum of £1000 the fact that two sureties with penalties of £500 each had been called for it should be held that the recitals are contrary to the operative part and therefore the bond should be taken as a bond executed for £500 only and not £1000. The learned Judges went into this matter and held that the mere fact that in the recitals the amount for which sureties had been called for had been mentioned would not mean that after such requisition had been made the parties had not changed their minds, or, in other words, that it was not possible for the obligor to execute a bond for £1000. And having regard to the clear terms of the operative portion, the learned Judges were unable to hold that the mere fact that sureties had been asked for £500 would counteract the operative part which was plain and clear and stated that the bond was taken for a debt of £1000. The true principle with regard to construction of surety bonds appears to be this that

> the operative part of a guarantee is liable to be controlled by the recitals at least where the latter are plainly inconsistent therewith. but not otherwise, though it seems a covenant of indemnity unlike a release or guarantee, is not to be restricted by its recitals: see Halsbury's Laws of England Vol. 15, Art. 908.

Having regard to the fact that the recitals plainly indicated that the sureties had come to execute these bonds on the requisition which the principal had made, calling upon the agent to furnish the sureties who would remain liable to the extent of Rs. 1,000 and no other amount being mentioned in the bonds but only a general statement

7. Ex parte Dawes In re Moon, (1886) 17 Q B D 275=55 L T 114=34 W R 752=3 Morrell 105.
8. Halliday v. Overton, (1852) 14 Beav 467 = 21 L J Ch 769=16 Jur 346.
9. Ingleby v. Swift, (1833) 10 Bing 84=3 M and A C 489=2 L J C P 261.

about liability for the entire amount for which defendant 1 would be found liable, and having regard also to the fact that in the latter bond, though not in the former a distinct statement is to be found limiting the liability of the sureties to Rs. 1,000 only and it not being apparent that two different kinds of liability were contemplated and reading the two bonds in their entirety we think it should be held that the intention of the parties was that the executants would remain liable for each bond up to the extent of Rs. 1,000 and no more.

We have been asked on behalf of defendants 2 and 3 to hold that though there were two bonds executed, the learned Judge's view should be supported on the footing that it was only Rs. 1,000 that was sought to be guaranteed by these two bonds. We are unable to accept this contention either and for the simple reason that there is nothing to show that the second bond, the one that was executed by defendants 2 and 3, was being taken in substitution for the bond which defendants 4 and 5 had previously executed and which continued in force and was to continue in force right up to the time when the appellant's service in the State terminated. We are of opinion therefore that neither the view taken by the learned Judge nor the contention urged on behalf of the parties before us can be accepted but that it should be held that the two sets of sureties were liable, each to the extent of Rs. 1,000 and no more. That is all that we have to say in connexion with the contentions that have been advanced in this appeal.

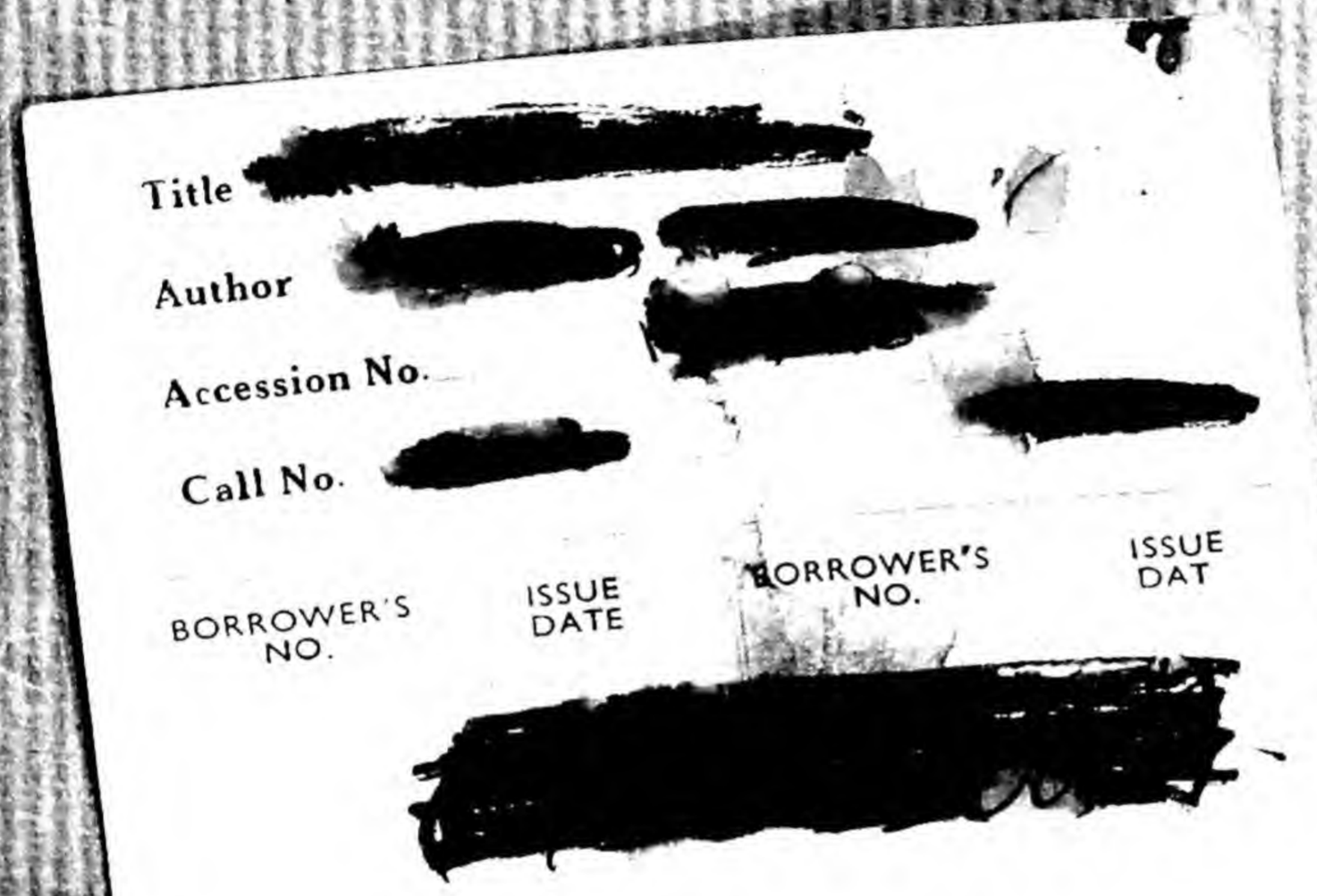
The result, in our opinion, is that the decree from which the appeal has been preferred should be modified and in lieu of that decree it should be ordered that accounts be taken of the work of defendant 1 for the period commencing from 13th August 1923, the date of the plaintiff's father's death, up to 23rd April 1928, the date of the dismissal of defendant 1, the said defendant being held liable to render accounts for the said period; and that defendants 2 and 3 and defendants 4 and 5 be declared liable for the period commencing from 22nd December 1914, the date of defendant 1's appointment as Mukhtear to 23rd April 1928, the date of defendant 1's dismissal but that such liability in respect of each of the two sets of defendants abovenamed would be joint and several liability for Rs. 1,000 and no more. If such accounting as has already been had in respect of the liability of defendant 1 after the preliminary decree passed in this suit by the Court below has disclosed a liability of defendant 1 which would be sufficient to cover the liabilities of these two sets of defendants it will not be necessary to have a fresh accounting or any further accounting in respect of the period antecedent to the date of the death of the plaintiff's father.

But otherwise a further accounting or fresh accounting in respect of that period will also have to be made. The order as to costs made by the Court below in the decree appealed from will stand. On the basis of the conclusions which we have recorded as above a final decree in accordance will have to be made by the Court below. It is superfluous to state that the preliminary decree which the Court below made having been varied by this Court in this way the final decree that has also been made is hereby set aside. As regards the costs and the appeal the appellant will be entitled to his costs from all the respondents, hearing-fee in the appeal being assessed at five gold mohurs.

K.S. ***Decree modified.***

END

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